



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

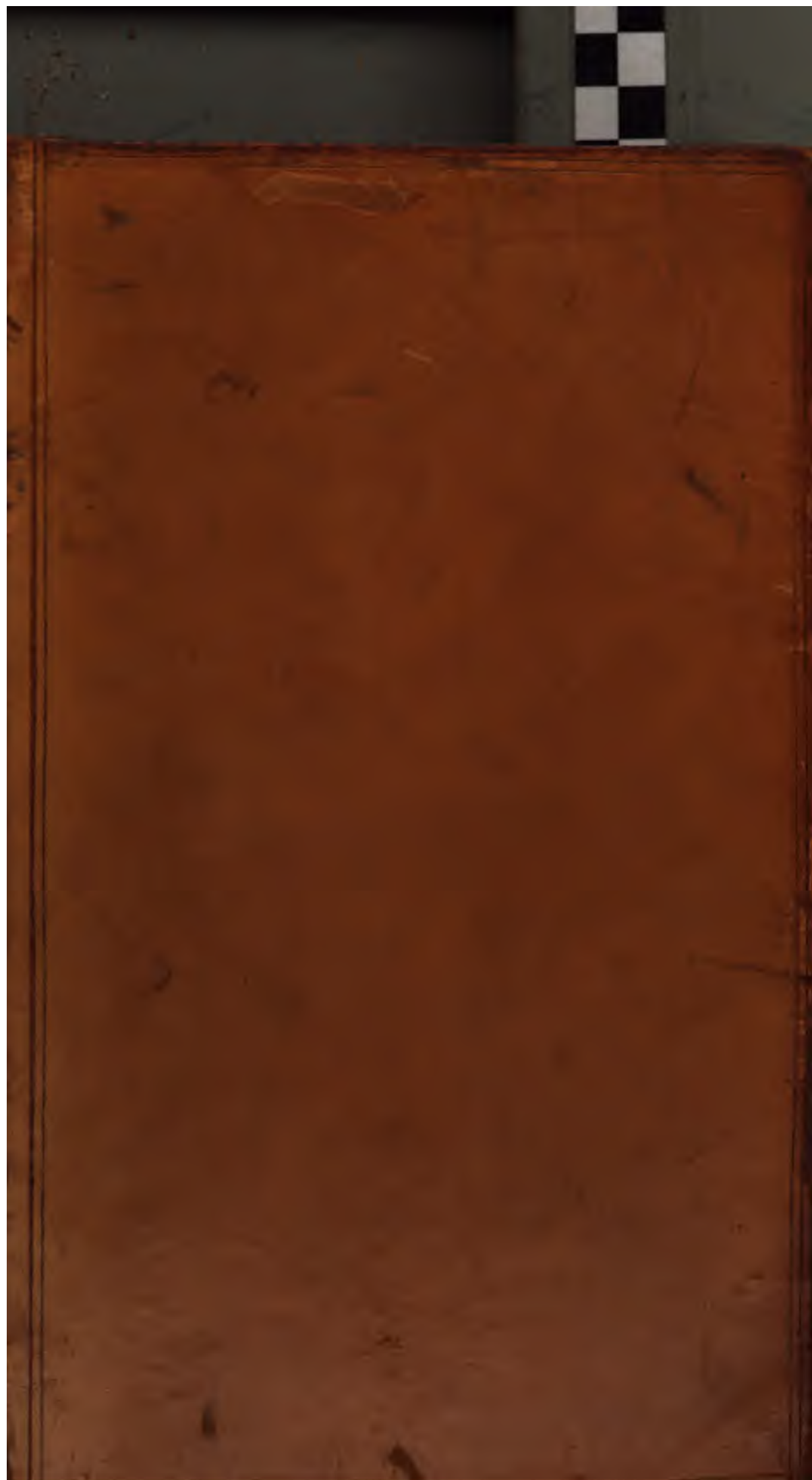
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L. Eng. A30 d. 2.

= E175

CW. U.K.

585

C543.367

CHITTY'S
TREATISE ON PLEADING
AND
PARTIES TO ACTIONS,
WITH
SECOND AND THIRD VOLUMES
CONTAINING
MODERN PRECEDENTS OF PLEADINGS,
AND
Practical Notes.

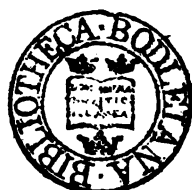
NIHIL SIMUL INVENTUM EST ET PERFECTUM.—*Co. Lit.* 230 a.

IN THREE VOLUMES.
VOL. II.

THE SEVENTH EDITION,
CORRECTED AND ENLARGED,
BY HENRY GREENING, ESQ.,
OF LINCOLN'S INN.

LONDON:
S. SWEET; AND V. & R. STEVENS AND G. S. NORTON;
Law Booksellers and Publishers:
ANDREW MILLIKEN, GRAFTON STREET, DUBLIN.

1844.



LONDON :
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

ADVERTISEMENT

TO THE

SECOND VOLUME OF THE SEVENTH EDITION.

THE principal alterations in this edition of the Second Volume are pointed out in the Preface at the commencement of the First Volume ; and a full account of the manner and care with which the forms inserted in the previous editions of this work, and comprised also in the present, were collected and revised by the learned Author is contained in the Preface to the Second Volume of the sixth edition, to which the reader is referred.

H. G.

9, KING'S BENCH WALK, TEMPLE,
25th November, 1843.

P R E F A C E

TO THE

SECOND VOLUME OF THE SIXTH EDITION.

—◆—

THE previous volume is a digest of the *Principles and Rules* upon which *Pleadings* should be framed, with *Practical Directions*. The present and the Third Volumes contain a collection of *Instances, Examples, or Precedents*, in which those principles and rules have been repeatedly applied in the principal cases that have arisen in practice. The most eminent and experienced lawyers confess that without the assistance of *Precedents* they would constantly find themselves in difficulty, and not unfrequently in error, since approved precedents not only point out the necessary averments, but also the language to be observed. Lord Coke advised every practitioner constantly to consult precedents, "*nam nihil simul inventum est et perfectum*;" i. e. nothing is at the same instant invented or discovered and perfect, but becomes so only by frequent use and occasional correction. (a) For the same reason Lord Eldon said that long adopted precedents ought to have great weight; (b) and still more recently Lord Tenterden observed, that it is very unwise to depart from the common course of precedents: (c) and in a very recent case an affidavit to hold to bail was sustained even against a prior decision unfavourable to its validity, merely because it had been promulgated for upwards of twenty years in Mr. Tidd's *Precedents of Practical Forms*.

But the term *Precedent*, in all these cases, denotes a document that has been long in use, and not a mere novel invention, which, for the above reason, cannot safely be relied upon, as has been unfortunately frequently exemplified by the numerous successful demurrers to new forms of pleas recently invented in consequence of the necessity to plead almost every matter of defence specially. For this reason the following collection, with a few exceptions, and subject to the introduction of alterations required by the new rules, was nearly forty years ago made by the author, not of his own pleadings, or those of any living practitioner, but from higher sources; and for the same reason he begs that every practitioner, when he adopts one of the *new* forms introduced into this edition, will consider the same merely as intended to *assist*, and not to be entirely confided in, unless prescribed by statute or rule of Court, or sanctioned by express decision.

It may here be proper to state the history of the greater part of the precedents collected in this and the next volume. The author

(a) Co. Lit. 230 a.

(b) Per Lord Eldon in *The Attorney General v. Freer*, 11 Price, 193.

(c) Per Abbott, C. J., in *Henniker v. Turner*, 4 Bar. & Cres. 159; 6 Dowl. & R. 94, S. C.

had the good fortune to commence his legal studies under the directions of his relatives, the late Mr. Serjeant George Bond and Mr. Luders, who obtained for him the privilege of access to the best pleadings adopted, prepared, settled, or otherwise sanctioned and constantly used by those eminent pleaders, most of them afterwards judges, viz. Wallace, Warren, Buller, Chambre, Gibbs, Bond, Wood, Holroyd, Law, Abbott, &c. &c. These forms (I might say from time to time immemorially) had been improved with great care, after having been translated from the old entries. The author also selected some excellent original forms from the original demurrer books of Mr. Justice Ashhurst, with his valuable notes and observations. (d) This entire collection was deficient only in the precedents in *assumpsit*. The author was enabled to supply that chasm during his pupillage under Mr. Tidd, who evinced peculiar skill and perspicuity in his pleadings in that form of action, which, of necessity, in its special counts discloses so much of the plaintiff's cause of action.

For the description of *Titles to Real Property*, and the various *modes of acquiring them*, the author is greatly indebted to Sir Edward Sugden, who, although at the time surrounded by pressing engagements, very kindly bestowed great attention to the forms and the notes in *Covenant* relative to those important subjects; and for that part of this Second Volume in particular the author has frequently received the thanks of his professional friends, on account of those pleadings of titles having relieved them from great trouble and anxiety in describing titles to real property, with which pleaders in general are not so conversant as conveyancers.

The *arrangement* of the subject, it is hoped, will be found natural, easy, and perspicuous. As regards the greater part of the precedents, it was not probable, when their origin is remembered, that they would frequently be found defective. During the five preceding editions, and near forty years' circulation, they have been constantly and extensively acted upon, and in most instances supported by decisions of the Courts. In the few instances when supposed to be incorrect, they have of course been corrected in this edition. In many cases, though at first doubted, their sufficiency has been established as well on special demurrer as upon writs of error. If the precedents had originated with the author himself, he would not have said thus much; but as he claims only the merit of selection and arrangement and the notes, it is due to the profession to inform them how far they may confide in the precedents themselves.

—♦—

Soon after the new rules had been promulgated, I ventured to anticipate that they would not be found to *alter any established principle or rule* of pleading, or introduce any *new principle*, and it is clear that such is the result; and it is to be understood by all practitioners that as regards *Declarations*, the principal recent alterations noticed in this edition are mere *consequences* of the excellent enactment in the Uniformity of Process Act, 2 W. 4, c. 39, which abolished all the previous distressing varieties in mesne process, and reduced them principally to *four*; viz. the writ of *Summons*, being mere *serviceable* process, to bring the defendant into Court; the writ of *Dis-*

(d) To that valuable collection in the possession of the author, practitioners and students are welcome to refer.

triagas, having the same object; the writ of *Capias*, to arrest the defendant when at large; and the writ of *Detainer*, to detain him when he is already in custody on prior process. Two subsequent rules of Court prescribed new forms of *Commencements* and *Conclusions* of *Declarations*, to be equally observed in the three superior Courts, and which will be found properly descriptive of the mode in which the defendant has been brought into Court by one of the new processes, and also prescribing that *all* declarations shall be *intituled* at the *head in the proper Court*, and of the *day, month and year when actually delivered* or filed, and that the *venue* shall only be stated in the *margin* and not repeated in the body; whereby the absurd repetition of *place*, although wholly immaterial, is now abolished, except in *trespass quare clausum fregit*, (when local description is frequently material, and in order to avoid the delay and expense of a new assignment, the name of the close or its precise abutments must be stated, or the omission may be corrected by special demurrer.) In no other respect is there any alteration in the *body* or *substance* of a declaration peremptorily enjoined, except indeed as to declarations on *Bills of Exchange*, *Promissory Notes*, and for *common debts* recoverable in *indebitatus assumpsit*, and in *debt*, with respect to which some very concise forms were prescribed by Reg. Gen. Trin. T. 1 W. 4, and which must be strictly observed, and if the declaration be more lengthy than those prescribed, the expense of the extra length cannot be recovered by the plaintiff or his attorney.

The principal alterations only in matters of form.

And in enjoining conciseness.

In practice the forms prescribed by that rule have however been considered by the best pleaders as intended to sanction and encourage a more *succinct mode* of declaring in *all other cases*, and it has become the practice to *omit all words* that are unnecessary; thus a contract or promise is now described by a mere statement "that the defendant *promised to pay*" or "*to deliver*," &c. instead of "that the defendant undertook and then and there faithfully promised the plaintiff to pay, &c." So the word "*said*," before plaintiff or defendant, is now usually omitted, and instead of "special instance and request" the word "*request*" only is used, and instead of the former prolix statement of the breach by the words "Yet the defendant craftily and subtly contriving and intending to deceive and defraud the plaintiff in this behalf, hath not, although he was afterwards, to wit, on &c., at &c., requested by the plaintiff so to do, as yet paid, &c.," the declaration now concludes, "Yet the defendant hath not paid, &c." Although the omission of a word or two might, on first consideration, appear to be of too trifling importance to merit attention, yet it will be found, that in a long record frequent repetition of useless words occasion a considerable increase of expense. And the principle and spirit of conciseness, having been once so laudably introduced, it will, in numerous other even more important respects, be encouraged and extended by those who wish to acquire character and credit for neatness and discrimination in their pleadings, and to avoid useless expense.

But it is principally by the Reg. Gen. Hil. T. 4 W. 4, reg. 5, founded on 3 & 4 W. 4, c. 42, s. 1, 23, that the *greatest ameliorations* in pleading have been introduced and enforced. It had become a condemnable practice to encumber almost every declaration, although only for *one cause of action*, with *numerous counts*, under pretence of avoiding the risk of *variance* on the trial, and the consequent expediency of inserting *several* counts describing the contract or the right or the injury in

And in allowing only one count or plea in respect of the same cause of action or ground of defence.

various ways, so as to meet the evidence whatever it might turn out to be. The above statute, by enabling a judge to *amend* in case of *variance* even *pending* a trial, took from the plaintiff the principal pretence for introducing several varying counts; and that excellent object having been effected, the judges then promulgated the above rule, prohibiting the use of more than *one* count upon each cause of action, or more than one plea on the same ground of defence, and enabling a defendant to apply to a judge to strike out every superfluous count; and made it *imperative* on the judge so to order, and to make the plaintiff pay the costs of the application, and even with certain more serious consequences as regards the costs of the action, if the plaintiff should persist in retaining the superfluous count and not succeed upon the same. Another rule (*viz.* Hil. T. 2 W. 4,) deprives the party of the costs of any pleadings which he has adopted and on which he does not succeed, and entitles the opponent to the costs of all issues found for him. These rules co-operate powerfully to repress any redundancy in pleading, heretofore so disgracefully prevalent for the sole purpose of increasing the profits of the practitioners concerned.

The increased necessity for more care and extended knowledge of pleading.

It will be obvious, however, that as the plaintiff is now confined to *one* statement of his cause of action, it has become much more essential than heretofore that such statement should be *very carefully framed* after a most accurate examination, not only into the *facts* but of the *evidence* that can be *certainly* adduced in support of them; and the judges have declared, that it is the duty of every attorney practising in the Common Law Courts *not to rely merely on his special pleader, but himself to examine and consider the sufficiency and applicability of the declaration*; (e) and it is certainly desirable, as well for his own as his client's interest, that *every attorney* should inform himself upon the principles and practice of pleading, as one of the most important and useful branches of legal knowledge. It would be found salutary, if the plaintiff's attorney would in every case obtain an accurate statement of the facts and evidence, and prepare from a Volume of Precedents a declaration in such form as he may consider most applicable to his client's case, and then have the draft settled by his pleader or counsel. Even as an exercise for the *articled clerks* under the principal attorney's tuition, this practice would inevitably be found of considerable utility, as habituating them to a systematic investigation of a subject highly useful if not indispensable to them in their subsequent practice, and it would save some time and labour to the gentleman who will ultimately settle the draft.

The alterations and improvements relating to *Pleas, Replications* and *subsequent Pleadings*, will be pointed out in the Preface to the *Third Volume*. They have been considerably altered and enlarged, and a great number of new precedents are introduced; and, to secure accuracy, the author has availed himself of the assistance of his son, Mr. Thomas Chitty, but at the same time the author has himself carefully revised every part.

J. C.

Chambers, 6, Chancery Lane,
12th January, 1836.

(e) *Cliffe v. Prosser*, 2 Dowl. 21; *Tomlinson v. Nanney*, 3 Dowl. 17; 3 Chitty's Gen. Prac. 429 to 433.

ANALYTICAL TABLE OF CONTENTS

OF

THIS SECOND VOLUME.

NOTICES OF ACTION AND DEMAND OF COPY OF WARRANT.

notice of action by party injured to a justice for false imprisonment, 1
the like by an attorney for his client, 3
the like to an excise or custom-house officer, for seizing and detaining a
ship and goods, *ib.*
demand of copy of a warrant from constable, 4

PARTICULARS OF PLAINTIFF'S DEMAND.

full particulars, not giving any credit, 5
the like, giving credit, 6
short particulars, not giving credit, *ib.*
the like, giving credit, 7

COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

IN INFERIOR COURTS.

in the Mayor's Court, in London, in assumpsit, 8
do. do. in debt, *ib.*
do. do. by baron and feme, feme being
sole trader, within the city, *ib.*
do. do. against baron and feme, feme
being sole trader, &c. *ib.*
in the Palace Court, 9
in the Court of Record of Kingston-upon-Hull, *ib.*
in the Borough Court of Southwark, *ib.*
in the County Court, *ib.*
præcipe for writ of justices in the County Court, in assumpsit, *ib.*
writ of justices thereon, 10
declaration thereon, *ib.*

ON REMOVALS FROM INFERIOR COURTS.

of declaration in Q. B. in an action removed from an inferior
Court, 10
conclusion of same, *ib.*
do. in C. P., 11
conclusion of same, *ib.*
do. in replevin, *ib.*
conclusion of same, *ib.*
do. in Exchequer, in action removed from Inferior Court, *ib.*
conclusion of same, *ib.*
do. at suit of an executor or administrator, *ib.*
conclusion of same, *ib.*

OBSERVATIONS ON COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS AS NOW REGULATED.

IN THE SUPERIOR COURTS.

1st. How affected by form of writ, 12
2d. How affected by the character in which plaintiff sues or de-
fendant is sued, 13
conclusions of declarations, *ib.*
omission of pledges, *ib.*

COMMENCEMENTS, &c. OF DECLARATIONS—(continued.)

I. IN GENERAL.

1. Common commencement of a declaration, 13
conclusion thereof, *ib.*
2. Do. at the suit of an infant, 14
3. Do. against a *peer* who has been served with a common writ of summons, *ib.*
4. The like against an M. P., *ib.*
5. Do. against a corporation aggregate, 15
6. Do. against guardians of the poor, *ib.*
7. Do. against hundredors, *ib.*
8. Do. by an attorney suing in that character, *ib.*
9. Do. at the suit of a side clerk of the Exchequer, *ib.*
10. Do. in a second action after a plea in abatement of the non-joinder of a defendant, 16
11. Do. of occasional commencement in debt. *ib.*
12. Do. in debt and detainue, *ib.*
13. Do. by the assignee of a sheriff on bail bond, *ib.*
14. Do. in debt qui tam, 17
15. Do. by a plaintiff who has been sued by a wrong name, *ib.*
16. Do. by a defendant sued by a wrong name, *ib.*
17. Do. by a surviving plaintiff where his co-plaintiff died between writ and declaration, *ib.*
18. Do. against surviving defendant, where the deceased died between writ and declaration, 18
19. Do. where one of the defendants has been outlawed, *ib.*

RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED.

1st. *Surviving Partners.*

20. Do. by a surviving partner, 18.
21. Do. against a surviving partner, 19

2nd. *Husband and Wife.*

22. Do. by husband and wife, 19
23. Do. against husband and wife, *ib.*

3rd. *By Assignees of a Bankrupt.*

24. Do. by assignees of a bankrupt, 19
conclusion of same, *ib.*
25. Do. by one partner and the assignees of another, *ib.*
26. Do. by assignees of two or more bankrupts under several fiats, to recover a debt due to the joint estate, 20

4th. *By Assignees of an Insolvent Debtor.*

27. Do. by the assignee of an insolvent debtor, 20
28. Do. by the assignee of an insolvent after the removal of the first assignee by the Insolvent Court, *ib.*

5th. *By and against Executors.*

29. Do. by an executor, 20
30. Do. against an executor, *ib.*
31. Do. by an executor against an executor, 21
32. Do. by the executor of an executor, *ib.*
33. Do. by a surviving executor, *ib.*
34. Do. against a surviving executor, *ib.*
35. Do. by husband and wife, the wife being executrix, *ib.*
36. Do. against husband and wife, the wife being executrix, *ib.*
37. Conclusion and profert by an executor, 22
38. The like by an executor of an executor, *ib.*
39. Profert by a surviving executor, *ib.*

6th. *By and against Administrators.*

40. Commencement of declaration by an administrator, 22.
41. Do. against an administrator, *ib.*

COMMENCEMENTS, &c. OF DECLARATIONS—(*continued.*)

42. Commencement of declaration by an administrator against an administrator, 22
43. Do. by a surviving administrator, 23
44. Do. against a surviving administrator, *ib.*
45. Do. by husband and wife, the wife being administratrix, *ib.*
46. Do. against husband and wife, the wife being administratrix, *ib.*
47. Do. by an administrator de bonis non, with the will annexed, *ib.*
48. Do. against an administrator de bonis non with the will annexed, *ib.*
49. Do. by an administrator durante minoritate, 24
50. Do. by an administrator limited until the original will or a copy thereof be brought into the Archbishop's Court, *ib.*
51. Conclusion and profert by an administrator, 25
52. The like in another form, *ib.*
53. Statement of grant by vicar-general of the bishop of Chester, *ib.*
54. Profert by a surviving administrator, *ib.*
55. Profert by an administrator de bonis non of an administrator, 26
56. Profert by an administrator de bonis non, with the will annexed, *ib.*
57. Profert by an administrator with the will annexed, *ib.*
- 7th. *By and against Clerks, Treasurers, Trustees, and Public Officers appointed to sue and be sued by Statute.*
58. Commencement of declaration by a clerk or treasurer to trustees, &c. empowered to sue by statute, 26
59. Do. by clerk or treasurer to a company empowered to sue by statute, 27.
60. Do. against such clerk or treasurer, *ib.*
61. Do. by the trustees of a friendly society, *ib.*
62. Do. by one of the public officers of a banking company under 7 Geo. 4, c. 46, *ib.*
63. Do. against one of the public officers of a banking company, 28

MODELS OF CONCISENESS IN DECLARATIONS IN ASSUMPSIT AND DEBT, AS PRESCRIBED BY REG. GEN. T. T. 1 W. 4, AND REG. GEN. H. T. 4 W. 4. observations on these rules in general, 29

Reg. Gen. T. T. 1 W. 4. .30

recital of object of the rule, *ib.*

forms prescribed under that rule, 31

1. Count on a promissory note against the maker by payee or indorsee, as the case may be, *ib.*
indorsee against maker, *ib.*
 2. Do. on a promissory note against payee by an indorsee, *ib.*
several indorsements, 32
 3. Do. on a promissory note against indorser by indorsee, *ib.*
 4. Do. on an inland bill of exchange against the acceptor by the drawer, being also the payee, *ib.*
 5. Do. against the acceptor by the drawer, not being the payee, *ib.*
 6. Do. against the acceptor by indorsee, *ib.*
 7. Do. against the acceptor by the payee, *ib.*
 8. Do. against the drawer by payee on non-acceptance, 33
 9. Do. against the drawer by indorsee on non-acceptance, *ib.*
 10. Do. against indorser, by indorsee on non-acceptance, *ib.*
 11. Do. against payee by indorsee on non-acceptance, *ib.*
 12. Directions for declarations on bills, where action brought *after Time of payment expired, ib.*
 - 1st. On bills payable after date, *ib.*
 - 2d. On bills payable after sight, 34
- directions for declarations on bills or notes payable at sight, *ib.*
directions for declarations on foreign bills, *ib.*

COMMENCEMENTS, &c. OF DECLARATIONS—(*continued.*)

COMMON COUNTS.

1. Goods sold, 34
2. Work and materials, *ib.*
3. Money lent, *ib.*
4. Money paid, *ib.*
5. Money received, *ib.*
6. Account stated, *ib.*
7. General promise applicable to all the counts, *ib.*
8. General breach, *ib.*

Directions how to frame declarations where there is a count on a bill or note besides the common counts, *ib.*

DECLARATIONS IN ASSUMPSIT.

I COMMON COUNTS.

1. Present form of a declaration in assumpsit, containing only indebitatus counts, 36.
conclusion, *ib.*
2. Conclusion where the declaration contains a count on a bill, &c. and no common count, *ib.*
3. Present form of a declaration on a note, bill or check, with a count on the consideration and an account stated, *ib.*
4. Breach admitting part payment, 37
5. Indebitatus assumpsit count on a promise to pay chattels, *ib.*

- I. RESPECTING REAL PROPERTY, FOR
- a freehold estate sold and conveyed, 37
 - a copyhold estate surrendered, *ib.*
 - a leasehold estate sold and assigned, 38
 - the good-will of a business, *ib.*
 - the good-will of a public house and plaintiff's business therein, *ib.*
 - by outgoing against incoming tenant for fixtures, *ib.*
 - the use and occupation of a house and land, *ib.*
 - the use and occupation of a fishery, 39
 - the use of a way, *ib.*
 - use and occupation of a pew, 40
 - use and occupation of a seat in a house to view a public procession, *ib.*
 - the use of a tennis court, balls and rackets, *ib.*
 - the use and profits of an inn, *ib.*
 - on 11 Geo. 2, c. 19, s. 18, for double rent, *ib.*
 - the use of pasture land and eatage of the grass, 41
 - use, occupation and enjoyment of buildings and prædial tithes, *ib.*
 - use and occupation of lands, with the right to take the tithes, *ib.*
 - use and occupation of unfurnished lodgings, *ib.*
 - use and standings in market-places and tolls, *ib.*
 - use and occupation of furnished lodgings, 42
 - board and lodging, *ib.*
 - warehouse room of goods, *ib.*
 - standing of carriages, &c. *ib.*
 - moorage of ships, *ib.*
 - finer on admissions to copyhold property, *ib.*
 - tolls on loaded carriages passing over a bridge, 43
 - tolls on goods brought to market and weighed in plaintiff's beam, *ib.*
 - tolls on cattle sold in a market, *ib.*
 - the like in another form, *ib.*
 - tolls due for passing through a turnpike gate, 44
 - the like more general, *ib.*
 - port dues, *ib.*
 - petty customs, *ib.*
 - calls on shares in a bridge, *ib.*

DECLARATIONS IN ASSUMPSIT.—I. COMMON COUNTS—(*continued.*)

the like in another way, 44
 the like at suit of treasurer to Vauxhall Bridge Company, 45
 calls under a road act, *ib.*
 at suit of treasurer of company for canal calls, *ib.*
 railway calls, *ib.*
 contribution to a party wall, 46
 the use of a patent invention, *ib.*

II. RESPECTING PERSONAL PROPERTY, FOR

goods, &c. sold and delivered to the defeneant, *ib.*
 goods bargained and sold to defendant, and delivered to a third person, 47
 goods bargained and sold to defendant generally, *ib.*
 a crop of grass or turnips, &c. bargained and sold, *ib.*
 tithes bargained and sold, 48
 the like in another form, *ib.*
 small tithes, *ib.*
 necessities found and provided for defendant, *ib.*
 the like for third persons, *ib.*
 horse-meat and stabling, *ib.*
 agistment of cattle, 49
 the hire of goods, horses, &c., ships, furniture, &c. *ib.*
 covering mares, *ib.*
 bulling cows, *ib.*
 freight, primage, average, *ib.*
 the use of an entire vessel, 50
 general average, *ib.*
 another form, *ib.*
 tonnage of goods, 51
 a passage on board a ship, *ib.*
 demurrage, *ib.*
 lighterage, *ib.*
 lighterage, wharfage and warehouse room, *ib.*

III. RESPECTING PERSONAL SERVICES, FOR

First, Wages, &c.

as a hired servant, 52
 as a sailor, against the captain or owner, *ib.*
 short allowance money by seamen, 53
 as a ship steward or mate, against the captain, *ib.*
 as captain, against the owner, *ib.*
 prize money, wages, &c. by a quarter-master against the owner, *ib.*
 salary as a quarter-master of a corps of troops, *ib.*
 pilotage, *ib.*
 crimpage, 54
 salvage, *ib.*

Secondly, Fees, &c.

work and labour as an attorney, 54
 as attorney, for prosecuting fiat, *ib.*
 the like, for procuring a bankrupt's certificate, *ib.*
 the like, for procuring defendant's discharge as an insolvent, 55
 as clerk in court in the Exchequer, *ib.*
 as one of the six clerks in the Court of Chancery, *ib.*
 as proctor, *ib.*
 by an attorney as agent against another attorney, *ib.*
 as a messenger under a fiat of bankruptcy, 56
 as a sheriff's officer, bailiff, &c. *ib.*
 the like in another form, *ib.*
 as a steward, for fees on admission to a copyhold, 57
 as a witness, *ib.*

DECLARATIONS IN ASSUMPSIT.—I. COMMON COUNTS—(*continued.*)*Thirdly, For Services in general.*

work, labour and materials, 57
 work with horses and carriages, or with lighters, 59
 for carriage of goods by land, *ib.*
 work, journies and attendances, *ib.*
 as an agent generally, and for commission, 60
 as a factor or agent in selling goods, *ib.*
 as an insurance broker, *ib.*
 for premiums of insurance, *ib.*
 as a surveyor, 61
 as an auctioneer and appraiser, *ib.*
 as an accountant, *ib.*
 as a schoolmaster, and for books, board and lodging, &c., 62
 the like, and for entrance-money, *ib.*
 as a surgeon and apothecary, *ib.*
 the like, and as man-midwife, 63
 as a nurse, *ib.*
 as an undertaker, *ib.*
 as a curate, 64
 for composing paragraphs for newspapers and inserting the same therein, *ib.*
 for booking, keeping and receiving passengers and parcels for coaches of defendant, and for use of shop, *ib.*

IV. RESPECTING MONIES.

for money lent, 64
 for money paid, *ib.*
 money had and received, 65
 for interest, *ib.*
 on an account stated, *ib.*
 for work, goods sold, and money counts, in one count, *ib.*
 on an award made by an arbitrator, *ib.*
 ditto on umpirage, *ib.*
 for stock sold and transferred, 66

V. RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES, OR THE DEFENDANT IS SUED.

First, By surviving Partners.

by a surviving partner on a promise to both partners, 66
 conclusion where declaration contains a count on a note, &c. *ib.*
 counts on promises to the surviving partner to pay debts due to both before the death, 67
 promise after death, *ib.*
 breach, *ib.*
 counts on promises for work, &c. by the plaintiff only, *ib.*
 against a surviving partner for work done, &c. *ib.*
 conclusion where declaration contains a count on a bill, note, &c. 68
 counts on promises by the defendant after the death of his partner, *ib.*

Secondly, Husband and Wife.

by husband and wife for work, &c. by wife before marriage, 68
 conclusion where declaration contains a count on a bill, note, &c. 69
 against husband and wife for work, &c. done for wife before marriage, *ib.*
 Conclusion where declaration contains a count on a bill, note, &c. *ib.*

Thirdly, By Assignees of Bankrupts or Insolvents.

by assignees of a bankrupt, &c. before the bankruptcy, 70
 conclusion where declaration contains a count on a bill, note, &c. *ib.*

DECLARATIONS IN ASSUMPSIT.—I. COMMON COUNTS—(continued.)

by assignees on promises to them after the bankruptcy, 71
 the like on causes of action arising after the bankruptcy, *ib.*
 by a surviving assignee, *ib.*
 by one partner and the assignee of another being bankrupt, for
 work, &c. before the bankruptcy, *ib.*
 by assignee of an insolvent debtor on promises to insolvent, 72
 conclusion where the declaration contains a count on a bill, note,
 &c. *ib.*
 counts on causes of action arising to the assignee after the making
 of the vesting order, *ib.*

Fourthly, Executors.

by an executor for work, &c. on a promise to testator, 73
 conclusion where the declaration contains a count on a bill, note,
 &c. *ib.*
 count on a promise to the plaintiff as executor, 74
 by a surviving executor, *ib.*
 by husband and wife, executrix before or after marriage, 75
 against an executor for work, &c. on promise by testator, *ib.*
 conclusion where the declaration contains a count on a note, bill,
 or check, *ib.*
 against an executor on promises by him in that character, *ib.*
 on causes of action arising against defendant as executor, 76
 against a surviving executor, *ib.*
 against husband and wife, executrix, who became executrix *before*
 marriage, *ib.*
 against husband and wife, who became executrix *after* marriage, *ib.*

Fifthly, By Administrators.

by an administrator on promises to the intestate, 77
 conclusion where declaration contains a count on a note, &c. *ib.*
 by an administrator *durante minore ætate*, 78
 by a surviving administrator, *ib.*
 by an administrator *de bonis non*, with will annexed, *ib.*
 by husband and wife, administratrix before marriage, *ib.*
 the like after marriage, *ib.*
 against an administrator, 79
 conclusion where declaration contains a count on a note, bill, or
 check, *ib.*
 against an administrator *durante minore ætate*, *ib.*
 against a surviving administrator, *ib.*
 against an administrator *de bonis non*, with will annexed, *ib.*
 against husband and wife, administratrix before marriage, 80
 the like after marriage, *ib.*

II. SPECIAL COUNTS.

*Instructions how to prepare Declarations on Promissory Notes, Checks,
 Inland and Foreign Bills*, 81

I. ON PROMISSORY NOTES.**Against the Maker.**

payee against maker, on a note payable generally, 82
 on a note wrongly dated, 83
 payee against maker, on a note payable at a particular place, *ib.*
 on a note payable on demand, *ib.*
 on a note payable by instalments, where whole due on one
 default, 84
 the like on one instalment, *ib.*
 the like for several instalments due, *ib.*
 on a note for less than £5. . 85
 on a note made abroad for the payment of guilders, *ib.*

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(*continued.*)

- by payee against maker of note payable six months after the death of another, 85
- first indorsee against maker, payable generally, *ib.*
- the like when payable at a particular place, 86
- second or remote indorsee against maker, *ib.*
- short indorsement, *ib.*
- on a note indorsed for residue, after part payment, *ib.*
- by executor or administrator of payee against maker, 87
- the like on promise since the death, *ib.*
- the like in another form, stating the probate, *ib.*
- payee against the executor or administrator of maker, 88
- by indorsee of executor against maker, *ib.*
- by indorsee of an administrator after the death of the payee against maker, *ib.*
- by the bearer of a note payable to E. F. or bearer, against the maker, 89
- the like in another form, *ib.*
- on a country banker's note, payable in town or country, *ib.*
- by a surviving payee against maker, *ib.*
- payee against a surviving maker, *ib.*
- by husband and wife on a note payable to her whilst sole, 90
- by an executor on a note payable to the wife of the testator before marriage, she not having indorsed it, *ib.*
- by husband alone on a note made to wife during coverture, *ib.*
- against husband and wife on her note before marriage, *ib.*
- by assignees of a bankrupt against maker of a note payable to bankrupt, *ib.*
- by assignee of payee, an insolvent debtor, against maker of a note payable to the insolvent, 91
- surviving indorsee against maker of a note payable generally, *ib.*
- indorsee against surviving maker of a note payable generally, *ib.*
- by husband and wife, on note indorsed to wife before marriage against maker, *ib.*
- indorsee against husband and wife, on note made by wife before marriage, 92
- executor or administrator of indorsee against maker of note payable generally, *ib.*
- indorsee against executor or administrator of maker of a note payable generally, *ib.*
- executor or administrator of indorsee against executor or administrator of maker, *ib.*
- assignee of indorsee, a bankrupt, against maker, 93
- assignee of indorsee, an insolvent debtor, against maker, *ib.*
- by trustees of friendly society against maker, *ib.*
- second count for money lent by the society, 94
- by officer of banking company under 7 Geo. 4, c. 46, against maker, *ib.*
- against public officer of banking company, *ib.*

Against Indorser.

- indorsee against indorser of note payable generally, 94
- the like payable at a particular place, 95
- by indorsee against indorser, payable to *bearer* thirty days after sight, delivered over by payee to defendant, who indorsed it to plaintiff, *ib.*
- first indorsee against first indorser, with averment of want of effects, to excuse notice of non-payment, *ib.*
- against indorser, where maker cannot be found, 96
- against indorser, where maker dead at time note became due, and no executor or administrator, *ib.*

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(continued.)

against indorser who dispensed with presentment for payment, 96
 surviving indorsee against indorser, 97
 indorsee against surviving indorser, *ib.*
 husband and wife on note indorsed to wife before marriage against
 indorser, *ib.*
 indorsee against husband and wife on note payable to the wife
 before marriage and indorsed by her, *ib.*
 executor or administrator of indorsee against indorser, 98
 indorsee against executor or administrator of indorser, *ib.*
 executor or administrator of indorsee against executor or adminis-
 trator of indorser, *ib.*
 assignees of indorsee, a bankrupt, against indorser, 99
 assignee of indorsee, an insolvent debtor, against payee of a note
 payable generally, *ib.*

II. ON CHECKS.

by payee of a check against drawer, 99
 by bearer of a check against drawer, 100

III. ON INLAND BILLS OF EXCHANGE.

observations on the structure of counts thereon, 100

First, Drawer and Payee against Acceptor.

drawer against acceptor on general acceptance, 100
 the like on bill with a wrong date, *ib.*
 drawer against acceptor on bill payable at a particular place, 101
 on bill payable to third person and returned to drawer, *ib.*
 on acceptance varying as to time from bill, 102
 on acceptance payable on a contingency, *ib.*
 payee against acceptor on a general acceptance, *ib.*
 by payee on a bill drawn by agent, *ib.*
 payee against acceptor on bill payable at a particular place, *ib.*
 surviving drawee against acceptor, 103
 drawer against surviving acceptor, *ib.*
 husband and wife on bill drawn by wife before marriage, *ib.*
 by husband alone against acceptor where he married before the bill
 became due, 104
 executor or administrator of drawer against acceptor, *ib.*
 drawer against executor or administrator of acceptor, *ib.*
 executor or administrator of drawer against executor or adminis-
 trator of acceptor, *ib.*
 assignee of drawer, a bankrupt, against acceptor, 105
 assignee of drawer, an insolvent, against acceptor, *ib.*

Second, Indorsee against Acceptor.

indorsee against acceptor of a bill payable generally, 105
 the like payable at a particular place, 106
 indorsement by a firm, *ib.*
 the like by an agent, *ib.*
 surviving indorsee against acceptor, *ib.*
 indorsee against surviving acceptor, 107
 husband and wife, on a bill indorsed to wife before marriage against
 acceptor, *ib.*
 indorsee against husband and wife, on a bill accepted by wife before
 marriage, *ib.*
 executor or administrator of indorsee against acceptor, 108
 indorsee against executor or administrator of acceptor, *ib.*
 executor or administrator of indorsee against executor or adminis-
 trator of acceptor, *ib.*
 executor or administrator against acceptor on promise to plaintiff
 to take case out of Statute of Limitations, 109

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(continued.)

assignees of indorsee, a bankrupt, against acceptor, 109
the like by assignee of insolvent debtor, *ib.*

Third, Payee against Drawer.

payee against drawer, 109
the like payable at a particular place, 110
the like on default of payment where defendant had no effects in hands of drawee, *ib.*
payee against drawer or indorser when drawee could not be found to accept or pay, 111
the like where drawee dead and no executor or administrator appointed at the time the bill became due, *ib.*
payee against drawer who has dispensed with presentment for payment, 112
payee against drawer, stating protest, *ib.*
surviving payee against drawer, *ib.*
payee against surviving drawee, *ib.*
the like when bill dishonoured after death, 113
husband and wife on bill payable to wife before marriage against drawer, *ib.*
the like when bill became due after marriage, *ib.*
payee against husband and wife on bill accepted by her when sole, *ib.*
executor or administrator of payee against drawer, 114
payee against executor or administrator of drawer, *ib.*
executor or administrator of payee against executor or administrator of drawer, *ib.*
assignees of payee, a bankrupt, against drawer, *ib.*
the like by assignee of insolvent debtor, 115

Fourth, Indorsee against Drawer.

indorsee against drawer on bill payable generally, 115
the like payable at a particular place, *ib.*
surviving indorsee against drawer, 116
indorsee against surviving drawer, *ib.*
the like where bill became due after the death of the deceased partner, 117
indorsee against drawer where defendant had no effects in hands of drawee, *ib.*
husband and wife on bill indorsed to wife before marriage against drawer, *ib.*
the like where bill became due after marriage, *ib.*
indorsee against husband and wife on bill drawn by wife when sole, *ib.*
executor or administrator of indorsee against drawer, 118
indorsee against executor or administrator of drawer, *ib.*
executor or administrator of indorsee against executor or administrator of drawer, *ib.*
assignee of indorsee, a bankrupt, against drawer, 119
the like where bill dishonoured after bankruptcy, *ib.*
the like by assignee of insolvent debtor, *ib.*
by indorsee of bill payable to order of fictitious payee, against drawer or acceptor privy to the fact, 120

Fifth, Indorsee against Indorser, not being Drawer.

indorsee against indorser, not being drawer, on bill payable generally, 120
the like payable at a particular place, 121
partial indorsement, *ib.*
surviving indorsee against indorser, *ib.*
indorsee against surviving indorser, *ib.*
husband and wife, on bill indorsed to wife before marriage against indorser, not being drawer, 122

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(*continued.*)

indorsee against husband and wife, on bill indorsed by wife before marriage, she not being the drawer, 122
 executor or administrator of indorsee against indorser, *ib.*
 the like where bill became due after death, 123
 indorsee against executor or administrator of indorser, *ib.*
 executor or administrator of indorsee against executor or administrator of indorser, 124
 by indorsee of executor or administrator, *ib.*
 assignees of indorsee, a bankrupt, against indorser, *ib.*
 the like where the bill became due after the bankruptcy, *ib.*
 the like by assignee of an insolvent debtor, 125

Sixth, On Non-acceptance of Bills.

payee against drawer, on default of acceptance, 125
 the like against drawer, with averment that defendant had no effects in drawee's hands, 126
 indorsee against drawer of a bill on non-acceptance, *ib.*
 indorsee against indorser of a bill on non-acceptance, *ib.*
 indorsee against payee for non-acceptance, 127

IV. ON FOREIGN BILLS OF EXCHANGE.

observations, 127
 drawee against acceptor of a bill drawn abroad for foreign coin payable at usances, *ib.*
 the like in another form, stating more fully the duration of the usance, 128
 drawee against acceptor, where bill paid *supra protest* by third person, *ib.*
 by indorsee against acceptor of bill at usance, in two parts, one accepted, the other indorsed, *ib.*
 special indorsement in full of one part of a bill, stating time and place, 129
 payee or indorser against drawer, &c. on refusal to accept, *ib.*
 second indorsee against first indorser of bill protested for non-acceptance, &c. *ib.*
 payee or indorsee against drawer or indorser, on refusal of acceptor to pay and protest for non-payment, 130
 payee against drawer, on a bill protested abroad for non-acceptance as well as non-payment, *ib.*
 by indorsee against an acceptor *supra protest*, *ib.*
 the like by indorsee in another form, 131
 by drawee who accepted *supra protest* for non-acceptance for honour of second indorser against first indorser, *ib.*

V. ON SEA POLICIES OF INSURANCE.

Instructions how to frame Declarations on Policies of Insurance more concisely, 131

on policy on goods lost by capture, by the broker, 132

Property insured and Interest.

on insurance on freight stated, 136
 on insurance on expected profits, *ib.*
 insurance on moiety of ship—interest in several persons, 137
 plaintiff interested in two-thirds, and others in residue, *ib.*
 another form, where plaintiff interested in two-thirds of a ship, *ib.*
 the like where some persons interested in ship, and others in goods, *ib.*
 averment that no British subject was interested, 138
 on an insurance of money lent on *respondentia*, *ib.*
 averment where name of ship mis-stated in policy, 139
 on policy varied after effected, but not as to subject-matter, *ib.*

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(*continued.*)

statement of alteration of terms after commencement of risks, 139
avertment that ship sailed with convoy, &c. 140

Losses by Perils of Sea.

loss of ship and goods by stormy weather, 140
more general statement of loss by perils of sea, *ib.*
loss by shipwreck, *ib.*
the like in another form, 141
loss by sinking of ship, *ib.*
ship leaky, lost while putting into port, *ib.*
loss by sinking among rocks, *ib.*
loss by ship foundering at sea, *ib.*
loss by ship being cast on rock, and tempest, *ib.*
ship lost by storms and ice, and foundered, 142
loss of ship and freight by stranding, *ib.*
goods damaged by leak sprung in storm, *ib.*

Loss by Worms.

ship eaten by worms, lost in a storm, 142

Loss by Ships running foul.

loss by another ship's running down ship insured, 143

Loss by Fire.

ship and goods burnt at sea, 143
the like in another form, *ib.*

Loss by Capture.

loss by capture of ship and goods, 143
for total loss of ship and freight by capture, for expenses incurred
in endeavouring to regain it, 144
total loss of goods by capture and recapture, *ib.*
loss by being fired upon and sunk by enemy, *ib.*
total loss of goods, ship compelled to go into Cadiz, confiscated by
the King of Spain, 145

Loss by Arrest or Detainment.

ship detained on coast of America, 145
loss by ship being seized by savages, 146

Loss by Pirates.

ship taken by rebel Americans, 146
second count as if taken by pirates, *ib.*

Loss by Thieves.

ship damaged on voyage by unknown persons, and robbed, 146

Loss by Barratry.

by barratry of master and mariners, 146
the like in a more general form, 147
loss by putting in smuggled goods, *ib.*
ship confiscated by master's taking her into hostile port, 148

Average Losses.

for average loss of goods damaged by sea water, 148
second count for general average where it was necessary to cut
away masts, &c. in a storm, *ib.*
ship stranded and disabled, and obliged to be unloaded and piloted,
149
for rateable part of expense in endeavouring to recover ship, 150
the ship damaged by bad weather; her cables, masts, &c. cut
away; plaintiff obliged to pay salvage, &c. *ib.*
average loss where ship sprung a leak, and forced to put into
Lisbon, &c. 151

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(*continued.*)

- average loss on sugars wetted by sea, &c. 151
- for average loss, anchor, &c. cut away, 152
- for average loss, by tackle, &c. burnt, *ib.*
- for average loss, goods stolen while ship detained by embargo, *ib.*

Statement of Abandonment.

- where plaintiff abandoned his claim to ship, 153

Statement of Adjustment.

- statement of adjustment of loss in an action on policy, 153

VI. ON LIFE POLICIES, 153 to 159

- on policy against insurer underwriting by agent, 153
- on policy on life of third person, against Atlas Company, 155

VII. FOR GENERAL AVERAGE, 159 to 161

- at suit of owner of ship against owner of goods, loss occasioned by anchor being cut away, 159
- average loss, anchor cut away, and sails blown away, 160
- average loss, where ship bilged in port by weight of cargo, *ib.*
- average loss, for contribution by ship-owner, according to custom of a particular trade for a loss by jettison, 161

VIII. ON CHARTER-PARTIES, 161 to 167

- owner against freighter for not despatching ship, and not loading her, 161
- by owners of ship against assignee of freighter, for damage in detaining ship beyond days of demurrage, and for freight, prime and average, 165

IX. ON WAGERS, 167 to 171

- on horse-race for a hunter's sweepstakes, 167
- on horse-race agreement; sum forfeited for not running, 169
- for money won by betting at horse-race, *ib.*
- on wager concerning weight of hogs, 170
- for recovery of money lost at cribbage, *ib.*

X. ON FEIGNED ISSUES, 171 to 176

- to try existence of modus in lieu of tithe, 171
- plea thereto, 172
- feigned issue, with two counts, at the suit of surviving partners, first count to try petitioning creditor's debt; second, to try bankruptcy, 172, 173
- plea thereto, 173
- the like to try trading of a supposed bankrupt, *ib.*
- the like issue in one count to try several rights of common, *ib.*
- pleas, 174
- feigned issue *devisavit vel non*, *ib.*
- the like to try whether party heir at law or not, 175
- feigned issue under interpleader act, to try property in goods seized, *ib.*
- plea thereto, 176

XI. ON AWARDS, 176

- on parol submission to award, *ib.*

XII. ON FOREIGN JUDGMENTS, 177 to 179

- on Jamaica judgment, 177
- on a Scotch decree at suit of assignees of a bankrupt, 179

XIII. FOR LEGACIES, 179

- against executor on promise to pay legacy in consideration of forbearance, *ib.*

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(*continued.*)

XIV. FOR CONTRIBUTIONS TO PARTY-WALLS, 180 to 185

On 14 Geo. 3, c. 78, s. 41, for moiety of expense of pulling down an old wall and building party-wall, where two buildings were of same rate or class, 180

the like where there was an old party-wall before the new party-wall was erected, 182

the like by lessee for years, in whom the property of party-wall was vested, for defendant's share of expenses of party-wall, which he had cut into, 183

the like by executor to recover moiety of expenses of building party-wall, used by defendant after death of testator, 184

XV. TO PAY MONEY FOR FORBEARANCE TO DEFENDANT, 185

on promise to pay costs of action in a week, in consideration of stay of proceedings, *ib.*

XVI. TO PAY MONEY FOR FORBEARANCE TO THIRD PERSONS, 186

on promise to pay debt of third person in consideration of forbearance, *ib.*

on promise that if plaintiff would withdraw distress for rent on goods of third person, defendant would pay the rent, 187

on an agreement in consideration of forbearance to deliver up body of a person that he might be arrested, 188

XVII. TO PAY MONEY IN CONSIDERATION OF MARRIAGE, 188

on promise to pay £200, if plaintiff would marry C. D. *ib.*

XVIII. TO PAY MONEY, &c. FOR SERVICES AND WORKS, 189 to 192

special count for board wages as hired servant, 189

for a reward offered for a prisoner, who had escaped, *ib.*

for a reward advertised for discovering an offender, 190

for a reward, &c. at the suit of a constable, 191

on promise of reward if plaintiff would arrest a felon, *ib.*

by a schoolmaster, for taking away pupil from school without a quarter's notice, *ib.*

XIX. RELATING TO SALES OF GOODS AND PERSONALTY, 192 to 200

for not delivering bill of exchange for goods sold, 192

on contract of sale and return, for not returning or paying, 193

for not accepting goods sold, 194

for not accepting goods made for defendant, 195

for not accepting and paying for shares in a railroad, *ib.*

for not taking away goods sold at auction, *ib.*

the like where there has been a re-sale, 196

for not delivering goods within a specified time, 197

for not delivering goods at a particular place, 198

special damage by reason of non-delivery of goods, 199

for not providing another horse or returning money, where horse unsound, 200

XX. RELATING TO CONTRACTS OF EXCHANGE, 200

on promise to pay money on exchange of horses, *ib.*

XXI. RELATING TO CONTRACTS OF LOAN, 201 to 203

for not replacing stock, &c. 201

for not discounting bill, 202

XXII. ON WARRANTIES, 204 to 208

on warranty of a horse, &c. to be sound, &c. 204

on warranty on exchange of horses, 206

for not furnishing, &c. good hams, 207

on false warranty of bank note, 208

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(continued.)

XXIII. RELATING TO THE SALE, USE, &c. OF REAL PROPERTY, 208 to 231

- against vendor of estate for not making title, 209
- against vendor for not delivering abstract of title in due time, in breach of the contract implied from selling, 211
- general count for not making a good title to premises for residue of term, within reasonable time, *ib.*
- against publican, for not having title to assign his lease, 212
- by vendor, for not completing purchase, and paying loss on re-sale, 213
- against vendee on public-house agreement, 215
- against vendee for not taking fixtures and stock in trade, 217
- by outgoing against incoming tenant, for price of crops, &c. valued, 218
- the like in other forms, 220, 221
- the like for fixtures, 221, 222
- landlord against tenant, for breach of express agreement to consume straw on premises, &c. 223
- against tenant, who held premises in question after end of lease, on terms of such lease, for not repairing, &c. 224
- another form more general, 225
- against tenant for not using premises in husbandlike manner, and according to custom of country, 226
- breach for ploughing up grass land, and cropping land, without manuring same, 227
- for taking successive crops without manuring land, 228
- against tenant for keeping and leaving premises out of repair, *ib.*
- against tenant for using the premises in an untenantlike manner, 229
- by outgoing tenant against landlord, on implied promise not to interfere with sale by tenant, 230
- the like for allowance for tillage and sowing, *ib.*
- against landlord for not indemnifying tenant from ground-rent, *ib.*

XXIV. ON GUARANTEES, 231

- on guarantee for goods sold to third person, *ib.*
- on guarantee to pay debt of third person in consideration of forbearance, 232
- by a landlord against a third person on promise to pay rent in a month, in consideration of plaintiff's withdrawing a distress for rent, 187
- on promise to indemnify plaintiff for refusing to deliver goods to a third person, 232

XXV. ON PROMISES TO INDEMNIFY, 232 to 236

- against landlord for not indemnifying tenant from ground-rent, 230
- by acceptor of accommodation bill, for not indemnifying, 232
- by maker of promissory note, made for accommodation of defendant, for not indemnifying, 234
- by broker against party who employed him to distrain for rent, for not indemnifying him, *ib.*
- for not indemnifying bail to the sheriff, *ib.*

XXVI. ON PROMISES TO MARRY, 236 to 239

- for not marrying on request, 237
- second breach for marrying another woman, *ib.*
- for not marrying in a reasonable time, 238
- for not marrying generally, *ib.*
- to marry at a particular time, *ib.*

XXVII. ON PROMISES TO SERVE AND EMPLOY, 239 to 243

- for not receiving hired servant into service, 239

DECLARATIONS IN ASSUMPSIT.—II. SPECIAL COUNTS—(continued.)

- by mariner for not suffering to go as boatswain in defendant's ship, 240
 - for turning servant away without notice, *ib.*
 - for preventing plaintiff completing a work, 241
- XXVIII. To PERFORM WORKS, 243 to 246
 - for not performing building agreement, 243
 - for building contrary to plans, &c. *ib.*
 - for not fixing steam engine properly, 244
 - special damages thereto, 245
 - against insurance broker for not properly effecting insurance, 246
 - the like for not giving notice to his employers of his inability to effect an insurance, *ib.*
- XXIX. AGAINST BAILEES IN GENERAL, 246 to 251
 - against a bailee without reward, for not taking care of goods, 247
 - for not returning casks, or paying for them, 248
 - against a pawnbroker for losing a pledge, *ib.*
 - against the hirer of a horse for riding it improperly, &c. 249
 - for not taking care of furniture let to defendant, 250
 - against watchmaker, for losing watch delivered to repair, *ib.*
 - the like for not redelivering the watch, 251
 - general count against bailee for not taking care of books, *ib.*
- XXX. AGAINST AGENTS, FACTORS, &c. 252 to 259
 - against agent employed to sell, for not accounting, 252
 - the like more general on an executed condition, 254
 - against agent for not accounting for goods consigned at different times for sale, *ib.*
 - against party employed to settle debt, for not accounting, *ib.*
 - the like admitting that defendant in part accounted and paid, 255
 - against agent for selling on credit, *ib.*
 - for not selling for ready money, 256
 - for not obtaining good bill, *ib.*
 - for not using due care in sale of goods, *ib.*
 - on promise to be responsible in *del credere* commission, 257
 - against factor for selling on credit to person who became insolvent, *ib.*
 - against shopman for selling on credit against orders, *ib.*
 - for not accounting for produce of bill defendant had to get discounted, 258
- XXXI. AGAINST WHARFINGER, 259 to 262
 - for losing a hamper to be shipped by him, 259
 - several counts thereon, 260 to 262
- XXXII. AGAINST A FARRIER, 262
 - for badly shoeing a horse, *ib.*
- XXXIII. AGAINST CARRIERS BY LAND, 262 to 268
 - for loss of goods, 262
 - for not carrying within reasonable time, 264
 - for not carrying a passenger, *ib.*
 - for taking more passengers than defendant ought, whereby plaintiff prevented from proceeding on journey, &c. 265
 - the like for not providing room for plaintiff, 266
 - for negligence and overturning coach, whereby plaintiff's arm broken, 267
 - the like more general, 268
- XXXIV. AGAINST CARRIERS BY WATER, 269 to 273
 - against captain, on bill of lading for loss of goods, 269
 - the like more general, 270
 - by master against owner of goods, for not unloading, whereby plaintiff lost freight, &c. *ib.*

DECLARATIONS IN ASSUMPSIT—II. SPECIAL COUNTS—(*continued.*)

the like for not unloading within a reasonable time, 271
against owner of goods, on implied undertaking that they might be lawfully carried, 272

XXXV. AGAINST ATTORNIES, 273 to 283

for negligently conducting a cause to trial without evidence, 273
general count against an attorney, for improperly conducting an action, whereby plaintiff did not recover in it, 275
against an attorney for not obtaining judgment as soon as he ought to have done, 276
for not putting in bail, whereby sheriff fixed, *ib.*
for not putting in a sufficient plea, 277
for not appearing and suffering judgment against plaintiff, 278
general count against an attorney for improperly conducting a defence to an action, whereby defendant failed in it, 279
for not giving note to defendant in former action to pay him 3s. 6d. per week, whereby defendant discharged under Insolvent act, *ib.*
for not ascertaining title, whereby plaintiff, having bought estate, could not resell, *ib.*
for not taking sufficient security on purchase of annuity, 280
general count against an attorney, for negligence in investigating security, 283
against attorney employed to settle debt due to plaintiff, for not accounting for monies received, 254, 283

DECLARATIONS IN DEBT.

I. BEGINNINGS IN GENERAL.

common commencement in debt, 284
by surviving partner, *ib.*
against a surviving partner, 285
by husband and wife, *ib.*
against husband and wife, *ib.*
by an executor or administrator, *ib.*
against an executor or administrator, *ib.*
by an assignee of a bankrupt, 286
by the assignee of an insolvent debtor, *ib.*

II. CONCLUSIONS IN GENERAL.

general conclusion in debt, 286
breach, *ib.*
conclusion by surviving partner, or joint contractor, *ib.*
against surviving partner or joint contractor, 287
by husband and wife, *ib.*
against husband and wife, *ib.*
by an executor, *ib.*
by an administrator, *ib.*
against an executor or administrator, 288
by an executor against an executor or administrator, *ib.*
by an administrator against an executor or administrator, *ib.*
by a surviving executor, 289
by a surviving administrator, *ib.*
against a surviving executor or administrator, *ib.*
by husband and wife, the wife being executrix, *ib.*
the like, the wife administratrix, 290
against husband and wife, the wife being executrix or administratrix, *ib.*
by an administrator de bonis non, *ib.*
against an administrator de bonis non, 291.
by assignees of a bankrupt or insolvent, *ib.*

DECLARATIONS IN DEBT—(continued.)

III. COMMON COUNTS.

goods sold, 291
 work and materials, *ib.*
 various descriptions of debt, 37 to 64
 money lent, 291
 money paid, *ib.*
 money received, *ib.*
 interest, *ib.*
 account stated, 292

IV. ON SIMPLE CONTRACTS, 292 to 295.

indebitatus count for use and occupation, 292

On Promissory Notes.

payee against maker, 292

On Bills of Exchange.

debt by drawer of a bill against the acceptor, 292
 payee against drawer, on default of acceptor, *ib.*

For Road and Canal Calls.

against subscriber on statute for making a road, for his subscription, 293
 for road calls on another statute, giving general form of declaring, *ib.*
 for instalment of subscription towards making a canal under private act, *ib.*
 for calls made by Vauxhall Bridge Company, 294
 by commissioners under a navigation act, against proprietor of tolls for salary, 295

V. ON LEGAL LIABILITIES, 295

On Awards.

on award, where submission by bond, 295
 on award under judge's order, 298

On Bye-Laws.

on bye-law for payment of money to College of Surgeons, 300
 for practising as an apothecary without certificate, 305
 by the Chamberlain of the City of London for penalties under a bye-law, *ib.*
 by a Burgess of Swansea against Mayor, &c. for money due under a bye-law, *ib.*

On Judgments of Foreign and Inferior Courts.

on a Jamaica judgment, 305
 on a Scotch decree, 306.
 another form more general, *ib.*
 on a judgment recovered in the Borough Court of Liverpool, 307

VI. ON SPECIALTIES, 307.

On Deeds-Poll.

on deed, where testator appointed money to be paid to plaintiff when testator died, 307

On Charter-Parties.

by owner against freighter, for not loading cargo, or paying freight, 308

On Sea Policy.

against London Assurance Company, 310
 another form on 6 Geo. 1, c. 18, s. 4, *ib.*

On Leases, &c.

for rent on a demise, 310

DECLARATIONS IN DEBT—(continued.)

against assignee for rent and amount of land-tax redeemed by lessor, 311

on land-tax redemption act, 312

On Annuity Deeds.

on annuity deeds for arrears of annuity, 313

On Mortgage Deeds.

on mortgage by lease and release for principal and interest, 313

the like in a shorter form, 314

On Bonds generally.

on a money bond in Q. B., 315

on Jamaica bond, *ib.*

counts on several bonds, 316

excuses for profert, *ib.*

On Bonds stating Condition.

observations in general as to, 317, 318

form of declaration, stating condition, 318

against a surety on a bond conditioned for an agent's faithfully accounting for goods delivered to him to sell, *ib.*

On Annuity Bonds.

on one, 318

On Bonds to replace Stock.

on bond to replace stock, and pay dividends, 319

*On Bond to perform covenant in another Indenture, 320**On Bail Bonds.*

by assignee against principal or bail, first suit in Q. B., C. P., or Exchequer, by capias, 320

On Replevin Bonds.

by assignee of, where proceedings removed by re. fa. lo. into Q. B. and plaintiff gained a verdict, 325

the like where bond forfeited, by replevin suit not being prosecuted in County Court, 329

the like where party replevying levied his plaint, but was afterwards non-prossed for not declaring, *ib.*

On Bonds relating to Character of Party suing or being sued.

by baron and feme, on bond given to feme before coverture, 330

by surviving obligee against obligor in Q. B. *ib.*

by the assignees of a bankrupt obligee against obligor, 331

executor of obligee against obligor, *ib.*

by an administrator in Q. B. *ib.*

against baron and feme, on bond given by feme before coverture, 332

against an executor or administrator, *ib.*

against an heir, on the bond of his ancestor, *ib.*

against an heir, and the devisee of the obligor, 333

against the devisee of the obligor alone, 334

at suit of treasurer of a friendly society, established before the 10 Geo. 4, c. 56, and not conformed according to that act, 334

at the suit of the treasurer of a friendly society, established under the 10 Geo. 4, c. 56. .335

VII. ON RECORDS, 335

Recognizances of Bail.

on recognizance of bail by capias in Q. B., C. P., or Exchequer, 335

On Judgments.

on final judgment in assumpsit in Q. B., C. P., or Exchequer, 337

DECLARATIONS IN DEBT—VII. ON RECORDS—(*continued.*)

the like on judgment in debt, 338
 on a judgment of non-pros for not declaring, 339
 on judgment for defendant on verdict, *ib.*
 the like on other judgments, 340
 on a judgment recovered by bill in Q. B. when defendant was sued
 by a wrong name, *ib.*
 by baron and feme, against baron and feme administratrix, on
 judgment against intestate revived by scire facias, suggesting
 devastavit, *ib.*
 on Irish judgment, 341
 by conusee of Irish judgment, 342
 on a judgment obtained in the County Court, *ib.*

VIII. ON STATUTES.

By Party grieved.

landlord against tenant, on 4 Geo. 2, c. 28. . 342
 on 11 Geo. 2, c. 19, s. 18. . 344
 by landlord against tenant on 11 Geo. 2, c. 19, s. 12, for not giving
 notice of declaration in ejectment, 345
 by assignee against insolvent on 13 Eliz. c. 5, to recover penalties
 for fraudulent conveyances, *ib.*
 on 11 Geo. 2, c. 19, s. 3. *ib.*
 on 2 & 3 Edw. 5, c. 13, s. 1. . 347
 on 2 & 3 Edw. 6, c. 13. . 349
 on 11 Geo. 4, c. 10. . 351
 on 9 Ann, c. 14, s. 2. *ib.*
 on 5 Geo. 3, c. 14. *ib.*
 on 32 Geo. 2, c. 28, s. 1 & 12 . 355
 on 29 Eliz. c. 4, and 43 Geo. 3, c. 46, s. 5. . 352
 another form, 355
 on 13 Eliz. c. 5, by assignees of insolvent debtor, 356, 4 Bar. &
 Adol. 129
 on 28 Hen. 8, c. 11, s. 3. . 356

By Common Informer.

on 13 Geo. 2, c. 19, s. 2. . 357
 on 23 Hen. 6, c. 9. *ib.*
 on 28 Eliz. c. 4. . 358
 on 12 Ann, s. 2, c. 16. . 359 to 362
 on 7 Geo. 2, c. 8. . 362
 on 2 Geo. 2, c. 23, s. 24. . 364
 on 6 Ann, c. 16, against a stockbroker, for acting before ad-
 mitted, 364
 on 55 Geo. 3, 137, s. 6, *ib.*
 on 2 Geo. 2, c. 24, for bribery, 366
 on 5 & 6 Wil. 4, c. 76, s. 48, against overseer, &c. 367
 against a commissioner *for acting* in a matter in which he was per-
 sonally interested, 367

DECLARATIONS IN COVENANT.

On Apprentice Deeds.

against father for apprentice absenting himself, 370
 by apprentice against master, 371
 by apprentice against executor of master, 372

On Articles of Agreement.

between co-partners in trade, 373

On Deeds of separate Maintenance.

by trustee against husband for maintenance, 375

DECLARATIONS IN COVENANT—(continued.)

On Deed of Indemnity.

by administrator for not indemnifying intestate against payment of annuity, 376

On Charter-Parties.

by owner, for freight and demurrage, 376
the like for not loading, and non-payment of pilotage, 378
by freighter against owner, 379
against captain of vessel as to convenience of passengers, 382

On Policies.

against fire, by executors of insurer, against secretary of fire office, on loss after death, 382
on lives, against Royal Exchange Company, 385

On Deeds of Sale of Real Property.

by heir of purchaser against executor of husband, on covenant for further assurance, and for not levying a fine, 387
against vendor for breach of good title, plaintiff ejected, 388

*On Mortgage Deeds, 391**On Leases.*

by lessor against lessee for rent, 391
by lessor against lessee for not repairing, 393
by assignee, executor, or heir, &c. of lessor against lessee, 395
by lessor against assignee of lessee for rent, 395, 397
by lessor against lessee for removing fixtures and improvements, 397
lessor against assignee of lessee for not repairing, with averment of plaintiff's performance of a condition precedent, *ib.*
breach non-payment of galage rent of coal mines, 400
breach for ploughing up, &c. whereby £5 per acre forfeited, 401
breach for not insuring, *ib.*
by lessee for not paying quit rent, 402
by lessee against lessors for quiet enjoyment, *ib.*
breaches in general, 403

Title pleaded.

tenure in free burgage, 403

Estate and Quantity of Interest.

inducement that lessor was seised in fee-simple, 404
seisin in fee, &c. in husband and wife in right of wife, *ib.*
seisin in the king or a corporation, 405
seisin in tail, *ib.*
seisin for life, *ib.*
the like by a rector, in right of his rectory, 406
tenancy by curtesy or by dower, *ib.*
by assignee of lessor being a termor, against lessee, *ib.*
by executor of lessor, being a termor, against lessee for a breach of covenant after testator's death, 407
against executor of lessee for a breach of covenant after his death, 408
by executor of lessor in another case, *ib.*
inducement that premises were copyhold, and lessor seised thereof, 409
the like in a more concise form, *ib.*
customary freehold, 410

Estate and Time of Enjoyment.

seisin in fee in reversion, 410
interest in a term to commence *in futuro*, 411
remainder in fee in a copyhold, *ib.*

DECLARATIONS IN COVENANT—(continued.)

Estate and Number of Owners.

- estate in severalty, 411
- estate in joint tenancy; and death of one and sole seisin of survivor, *ib.*
- estate in coparcenary, 412
- tenancy in common, *ib.*

Mode of acquiring the Title.

- by descent in fee, 413
- by succession of a rector on death, *ib.*
- by marriage, 414
- by feoffment, *ib.*
- by lease, *ib.*
- by assignment of a term to the plaintiff, 415
- by surrender of a leasehold interest, *ib.*
- by covenant to stand seised to uses, *ib.*
- by bargain and sale enrolled, 416
- by lease and release, 417
- by release under 4 Vic. c. 21, 418
- by private act of parliament, *ib.*
- by lease, &c. from the king, *ib.*
- by fine levied by husband and wife of inheritance of wife, 418
- the like with proclamations, 419
- deed to lead the uses of recovery, and recovery accordingly, *ib.*
- the like more fully pleaded, 420
- surrender to the use of will, and death, and presentment thereof, and admission of devisee, 423
- devise of copyhold premises since 1 Vic. c. 26.. 424
- surrender to the use of a purchaser, *ib.*
- presentment of surrender at a subsequent Court to surrender, 425
- enfranchisement of copyhold by lease and release, *ib.*
- title by devise in fee-simple, 426
- title to a chattel real by will, *ib.*
- title by devise since 1st January, 1838.. 427

DECLARATIONS IN DETINUE.

- on a bailment to redeliver on request, 428.
- on a supposed finding, *ib.*
- debt and detinue in the same declaration, 429.

DECLARATIONS IN CASE.

- beginnings and conclusions of declarations in case or trover in Q. B. C. P. or Exchequer, 12, &c.

I. FOR TORTS TO THE PERSON.

For keeping mischievous Animals.

- for keeping a dog used to bite mankind, 430
- for keeping a dog used to bite sheep, &c. 431

For public Nuisances.

- for nuisances in a public street, whereby plaintiff's carriage was overturned, 431
- for keeping a hole (which led to defendant's cellar) so badly covered that plaintiff fell down and broke his leg, 432
- for obstructing a public highway, 433

For malicious Prosecutions.

- for malicious arrest, where former suit ended on payment of money into Court, 434
- the like where first suit discontinued, 437
- the like where first suit non-prossed, 438
- the like where a verdict for the defendant, *ib.*

DECLARATIONS IN CASE.—I. FOR TORTS TO THE PERSON—(continued.)

for causing plaintiff to be arrested by virtue of a *capias* issued under a judge's order which had been rescinded, 438
 case by plaintiff against defendant and his attorney, for not releasing plaintiff out of prison after satisfaction of debt and costs, &c. 439

For malicious Criminal Prosecutions.

for malicious charge of felony before a justice, 441
 for maliciously exhibiting articles of peace at quarter sessions against plaintiff, in consequence of which he was arrested on a warrant of the justices, and obliged to find sureties and enter into recognizance to appear at a future time, that he did appear but was not proceeded against, and discharged, 444
 for maliciously procuring search-warrant, and causing plaintiff's house to be searched for stolen goods, 446
 for malicious prosecution of indictment for perjury, 448
 the like stating the indictment more shortly, 450
 for malicious prosecution of indictment for assault, *ib.*
 the like in another form, 451

For malicious proceedings in Bankruptcy.

for maliciously issuing a commission of bankruptcy, 452

For Libels.

for a libel, *indirectly* accusing plaintiff of perjury or other specific offence, 454
 second count, 457
 third count, *ib.*
 for a libel directly accusing plaintiff of a theft or other specific offence, 458
 for a libel imputing no specific offence, or imputing want of moral conduct, 459
 for a libel of plaintiff in his *profession* as an attorney, for a libel upon himself and another, in his mode of conducting a fiat of bankruptcy, 460.
 for a libel imputing insolvency to plaintiff in the way of his trade, 462
 for a libel on plaintiff in his *employment* as a servant against his master, in a letter to a person, who in consequence refused to take him into his service, 463
 for a libel in a newspaper, 465
 for a libel in a letter, *ib.*
 for a libel containing distinct passages of libellous matter, *ib.*

For Slander.

for slanderous words, *indirectly* accusing the plaintiff of a *specific* offence, 466
 second count, 467
 for charging plaintiff with perjury on the execution of a writ of inquiry, with a *special* inducement to explain the words, 468.
 for slanderous words, directly accusing the plaintiff of perjury or other *specific* offence, 469
 second count, 470
 for words slandering plaintiff in his *office*, as for accusing a justice of peace with having pocketed fines forfeited by persons convicted by him, *ib.*
 for words slandering plaintiff in his profession, as for slandering an attorney, 471.
 for accusing a governess of fornication, 473
 by baron and feme for words spoken of the latter in the way of her trade, 474

DECLARATIONS IN CASE—I. FOR TORTS TO THE PERSON—(*continued.*)

- for words slandering the plaintiff in his trade, as by calling him a rogue, &c. 474
- second count, 475.
- for words imputing insolvency to plaintiff in the way of his trade, 476
- by the keeper of bathing rooms, for words imputing a propensity to commit an unnatural crime, spoken in answer to a question put to defendant by a third person, 477.
- second count, 478
- for slander, actionable only by reason of *special damage*, 478
- special damage* that plaintiff lost acquaintances, &c. 480
- for slander, where the words are spoken *ironically*, *ib.*
- for slander, where it is to be collected from *question* and *answer*, *ib.*
- for slander of title*, in procuring a third person to attend at a public auction room and slander plaintiff's title to the estate he was about to sell there, 481
- second count, 482.
- for saying to a person who was about to hire plaintiff's ship that she was broken and unfit to proceed to sea, whereby he refused to hire ship, *ib.*
- For Criminal Conversation.*
- precedent for, 483
- For debauching Daughter, Servant, &c.*
- precedent for, 484
- For enticing away Apprentices, &c.*
- by master, for, 485
- for harbouring, 486
- For careless driving.*
- against stage-coach owners, for overloading, &c. whereby coach upset, and plaintiff's leg broken, 486
- against proprietor of stage-coach, for negligently driving, whereby coach was overturned, and plaintiff's wife so much hurt that she, after being ill for some time, died, 487
- against owner of coach, for the negligence of his servant in driving same against plaintiff's gig, and upsetting him, &c. 488
- against surgeon for improper treatment, *ib.*
- Against Innkeepers.*
- against innkeeper, for refusing to receive and lodge plaintiff as a guest at an inn, 499

II. FOR TORTS TO PERSONAL PROPERTY.

- For Breach of implied Contract.*
- against bankers for not honoring plaintiff's check, 489, 510
- Against Carriers by Land.*
- for loss of a box, 489
- for not carrying within reasonable time a box, 491
- against coach proprietors, for loss of a parcel which they engaged to carry with a passenger, 492
- second count stating *termini* of journey with less particularity, *ib.*
- third count, merely stating that defendants had plaintiff's parcel to carry to its destination, without describing them as coach owners, or termination of journey, 493
- fourth count, for not taking care of parcel generally, *ib.*
- for not forwarding parcel, *ib.*
- Against Carriers by Water.*
- against captain, under bill of lading, for deviating from voyage, 495

DECLARATIONS IN CASE—(continued.)

II. FOR TORTS TO PERSONAL PROPERTY—(continued.)

against a carrier by water, for the loss of goods, and injuring them in unloading, 496

against owner of a ship for not obtaining cocquet, &c. whereby goods forfeited, 497

Against Innkeepers.

for loss of a box, 498

for refusing to lodge plaintiff, 499

Against Attornies.

against attorney, for negligently conducting a cause to trial without proper evidence, 500

general count against an attorney, for improperly conducting an action, *ib.*

against an attorney, for not causing a sufficient title to an estate bought by plaintiff to be conveyed to him, *per quod* he could not re-sell it, 501

general count against an attorney for negligence in investigating title, 502

Against a Bailiff.

against a broker employed to distrain on plaintiff's tenant, for negligence in conducting the distress, whereby the goods were lost to plaintiff, 503

second count for not duly selling goods, 504

third count for carelessness generally, *ib.*

fourth count for not distraining, 505

Against Bailees in general.

against bailee, for negligence, stating purpose of bailment, 506

against bailee, without reward, for not taking care of, and re-delivering on request, *ib.*

the like on a general bailment, 507

against bailee of lease, for pawning it, *ib.*

against miller, for mixing corn, 508

for selling cow deposited with defendant as security for a debt, *ib.*

against coal-meter, for not properly measuring coals, whereby plaintiff paid for more than he had, 509

for putting plaintiff's mare, taken damage feasant, into defendant's farm-yard, where it was gored, 510

For Tortious Damage to Personal Property.

against an engraver, for using for his own purpose plates engraved by him for the plaintiff, 510. See 1 Bar. & Adol. 804

against bankers, for not honoring draft of customer, 489, 510

against acceptor of bill, for cancelling his acceptance, 510

For Deceit and Misrepresentation, &c.

for a false warranty of a horse, 511

for deceit on exchange of horses, 512

for falsely warranting a cable sound, 513

for deceitfully selling a smaller quantity of coals than pretended, 514

for deceitfully selling land for greater quantity than it was, *ib.*

declaration in case, for misrepresenting the value and quantity of business, &c. done at a public-house, which plaintiff was about to purchase, and which he afterwards purchased of defendant, *ib.*

for misrepresenting value of business, 515

for pretending defendant had given more for lease than he had, 516

for misrepresenting that defendant had authority to accept bills for a third party, 517

DECLARATIONS IN CASE—(continued.)

II. FOR TORTS TO PERSONAL PROPERTY—(continued.)

for misrepresenting that defendant was authorized to receive goods directed to plaintiff's wharf, whereby plaintiff lost wharfage, 517
 for representing plaintiff's wagon set out from defendant's inn, 518
 by one fishmonger against another, for personating him to a customer, 519
 by proprietor of patent snuff, for selling snuff as if plaintiff's, 520.
 another form, 1 Nev. & Man. 353 : 4 Bar. & Adol. 410, S. C.
 for defending ejectment in plaintiff's name, whereby plaintiff imprisoned for costs, 521
 for representing third person fit to be trusted, and law, 522
 for misrepresenting the character of a person, whom plaintiff in consequence employed as his agent, 524
 against a secretary of an insurance company for misrepresentation, 526

For negligently driving Carriages.

against stage-coach owner for his servant's driving against plaintiff's gig, 529

For negligently navigating Ships.

for running ship against plaintiff's barge, 530
 information by Attorney-General, for running foul of king's ship, 531

For illegal Distresses.

as to number of counts in actions relating to, 533
 for double value of goods distrained, no rent due, on 2 W. & M. sess. 1, c. 5, s. 5. .534
 for distraining beasts of plough and sheep, 535
 for distraining tools of trade when sufficient other goods on premises, *ib.*
 for distraining more rent than was due, 536
 for taking excessive distress for rent, on 52 H. 3, c. 4. .537
 for distraining a second time on same goods for same rent, 538
 for driving distress above three miles out of the hundred, 539
 for impounding distress off the premises, and not giving notice, *ib.*
 for refusing to restore distress on tender of rent and costs, 540
 for selling a distress within five days, 541
 for not removing distress within reasonable time after five days, 542
 for selling under a distress, without having goods appraised by two sworn appraisers, 542
 for distraining by other persons than by bailiffs sworn in, 543
 for selling a growing crop (under a distress) before the same had been gathered and appraised, contrary to the 11 Geo. 2, c. 19, s. 8, *ib.*
 for not selling for the best price, *ib.*
 for selling more goods than necessary, 544
 against a broker, on 57 Geo. 3, c. 93, for not giving a copy of the charges of a distress, 545
 for not leaving the overplus of distress with the sheriff, 544
 for several injuries in one count, 545
 against plaintiff's landlord for not indemnifying him against a distress made on his goods by the ground-landlord, 546, 230

For excessive Levies.

for levying too much on judgment on warrant of attorney, 546
 second count for issuing *feri facias*, where nothing due, 548
 for procuring *feri facias* for more than judgment, *ib.*
 against sheriff, for levying too much and selling at undervalue, *ib.*

DECLARATIONS IN CASE—(continued.)

II. FOR TORTS TO PERSONAL PROPERTY—(continued.)

For Rescue and Pound-breach.

- for rescue of distress for rent on a common appurtenant, 549
- for a bound-breach, 550
- for rescuing cattle taken damage-feasant, *ib.*
- for pound-breach, cattle taken damage-feasant, 551
- for rescue of a person arrested on meane process, *ib.*

For Escapes.

- against sheriff for escape on mesne process, 552
- the like for not arresting on opportunity, 554
- the like for false return of *non est inventus*, 555
- the like for escape on final process, 557
- against keeper of Queen's Prison for escape on mesne process, prisoner removed by *habeas corpus*, 555
- a general count against keeper of Queen's Prison for escape, where defendant in custody on a surrender in discharge of bail, 556
- against keeper of Queen's Prison for the escape of a prisoner committed to his custody in execution, 559
- the like more general, 561
- against keeper of Queen's Prison for escape of prisoner charged in execution on judgment in C. P., removed into Q. B. on error, for damages and costs in C. P. and costs in error, *ib.*
- other forms, see 2 Chitty on Pleading, 5th edition, 743 to 748

For false Returns, &c.

- for false return of *nulla bona* to *feri facias*, 562
- for not levying, and for false return, 564
- for false return of *non est inventus*, 555
- other counts for misconduct relating to a *feri facias*, 565
- for not executing a writ of *habere facias possessionem*, *ib.*

*For not taking Replevin Bond, ib.**For taking insufficient Pledges in Replevin, 568**For not arresting within a reasonable Time, &c. ib.**For not assigning Bail Bond, 569**For taking insufficient Bail, 570**For not obeying Subpœna.*

- for not obeying *subpœna duces tecum*, whereby plaintiff nonsuited, 570

For infringing Copyrights.

- on 5 & 6 Vict. c. 45, for infringing copyright of a book, 572
- first count for printing for sale or exportation, *ib.*
- second count for importing for sale or hire a book unlawfully printed, 573
- third count for selling, &c. without consent of proprietor, 574
- on 5 & 6 Vict. c. 45, for infringing copyright of a musical composition, 575
- for infringing copyright of a print, *ib.*

*For representing, &c. Dramatic Pieces, &c. 576**For infringing Patents.*

- by patentee and assignee, 576
- for making imitations, 577
- other counts, 578
- by assignee where there has been a disclaimer of part of the specification, and an alteration in the title of the patent and specification, *ib.*
- second count, for imitating the invention and using and putting it in practice, 579

DECLARATIONS IN CASE—(*continued.*)II. FOR TORTS TO PERSONAL PROPERTY—(*continued.*)*For Injury to Property in Reversion.*

for injury to goods in possession of tenant, 580

III. FOR TORTS TO REAL PROPERTY CORPOREAL.

To Houses, &c. in Possession.

for obstructing ancient windows, 582

second count for continuing nuisance, 584

third count more general, and not stating means of obstruction, *ib.*

for not repairing privy adjoining plaintiff's house, 585

second count, for not emptying cesspool, *ib.*

for manufacturing candles near a dwelling-house, 586

for keeping a slaughter-house near plaintiff's school, 587

for cutting down trees in an avenue, 588

for erecting a building next to plaintiff's, so that the rain-water ran therefrom on plaintiff's house, and injured it, and plaintiff thereby lost lodgers, &c. 589

for a noisy nuisance in manufacturing iron, and annoying plaintiff in occupation of his dwelling-house, *ib.**To Houses, &c. in Reversion.*

by reversioner for damage done to house, &c. in tenant's possession, 589

for stopping up chimnies in house, 590

For not repairing Fences.

for not repairing, whereby plaintiff's cattle escaped, and were hurt, 591

for not repairing sea walls pursuant to charter, 593

For not carrying away Tithes.

for not carrying away great tithes, 593

For Waste.

by reversioner against tenant for voluntary waste, 595

the like in another form, by a reversioner against tenant who had quitted premises, for having cut down timber, and committed waste, 596

second count, for not cutting down timber as defendant ought to have done, *ib.*

landlord against tenant, for not cultivating according to good husbandry, and not repairing, 597

against administratrix of rector for dilapidations, *ib.**For Injuries to Water-courses.*

for diverting water in river from plaintiff's mill, 599

second count, stating a general diversion of the water, without showing the means, 602

for not keeping banks of river in repair, 603

for widening cuts from stream, 604

for suffering ditch to be choked for want of cleansing, 605

for removing a hatch placed to prevent water running to a mill, *per quod* plaintiff could not repair or work mill, 606for interrupting plaintiff in reversionary right to irrigate meadow, *ib.* against owner of wharf, for placing tree in Thames, whereby plaintiff's barge struck, 607

for injury to navigable canal, whereby plaintiff's barges could not proceed, 608

for using more water to mill on canal than necessary, 609

for suffering flood-gates to remain open, &c. 610

for disturbing the privilege of watering cattle at a pond, 611

DECLARATIONS IN CASE—(continued.)

IV. FOR TORTS TO REAL PROPERTY INCORPOREAL.

For Disturbance of Rights of Common.

- of common of pasture, by turning sheep on the common, 611
- second count, for obstructing the common, not stating how, 613
- of common in common fields, cultivated in rotation, &c. *ib.*
- for building, &c. upon the common, 615
- for inclosing part of the common, *ib.*
- for digging turves, *ib.*
- for destroying common with rabbits, *ib.*
- for taking dung off common, 616
- for putting heaps of dung on common, *ib.*
- for trespass on common with horses, &c. *ib.*
- for disturbance of common of turbary, *ib.*
- for disturbance of common of estovers, 617

For Disturbance of Ways.

- for obstructing plaintiff's private way, 617
- second count, without showing the means of obstruction, 619
- third count more general, merely stating the way to be towards, &c. *ib.*
- case by reversioner, for obstructing a way by building thereon, 620
- by rector, for obstructing way to fetch off tithes, 621

*For Disturbance of Ferries, 623.**For Disturbance of a Pen, 625**For Disturbance of a Market.*

- for opening a new market, thereby disturbing plaintiff's ancient market, 626

For Disturbance of Franchises, Tolls, Offices, &c. 628

V. UPON STATUTES.

By Party grieved.

- on 8 Ann. c. 14, against sheriff, for not leaving year's rent, 629
- on 23 Hen. 6, c. 9, for refusing bail, 631
- on 24 Geo. 3, against justice, for refusing bail, 632
- against sheriff for refusing to replevy after tender of replevin bond
- on distress for poor-rate, 633
- against a justice, for refusing to take bail on a conviction, where plaintiff intended to appeal, *ib.*
- on 28 Eliz. c. 4, against sheriff for extortion, 635
- against hundred, on 7 & 8 Geo. 4, c. 31, where a building, machinery, and goods, were destroyed by rioters, *ib.*
- for destroying the goods of the plaintiff in the warehouse of another person, 637
- the like, where the property was in the care of a servant, 638

DECLARATIONS IN TROVER.

- for cattle, deeds, bonds, bills, notes, bank notes, money, or goods, 639
- by assignees of a bankrupt, on bankrupt's possession, and a conversion after the bankruptcy, 641
- second count, on assignee's possession, *ib.*
- by the assignees of an insolvent debtor, on a possession and conversion before insolvent's petition, 642
- second count, on insolvent's possession, with a conversion after plaintiff was assignee, *ib.*
- third count, on the assignee's possession, and a conversion afterwards, *ib.*
- by an executor, for conversion in the life-time of testator, 643
- second count, for conversion after his death, *ib.*
- third count, for trover and conversion after testator's death, *ib.*
- by an administrator on intestate's possession, 644

DECLARATIONS IN TROVER—(*continued*.)

second count, on trover before the death, and conversion after, 464
 third count, on a trover after death, and before administration, 645
 fourth count, on possession of administrator, *ib.*
 against an administrator, &c. for conversion by intestate, &c. within six months of his death, *ib.*

DECLARATIONS IN REPLEVIN.

declaration in replevin in Q. B. or C. P. 646
 the like in a County Court, 647

DECLARATIONS IN TRESPASS.

COMMENCEMENTS AND CONCLUSIONS.

commencements and conclusions in Q. B., C. P., or Ex. 648, 649

I. TO PERSONS.

for an assault, spitting in face, beating, &c. with damage, 649
 second count, for a common assault, 650
 for firing a loaded pistol at plaintiff, and wounding him thereby, *ib.*
 the like for a battery, &c. on board a ship, 651
 for forcibly excluding plaintiff from vestry-room, *ib.*
 for preventing plaintiff entering Quakers' meeting-house, *ib.*
 husband and wife against husband and wife, for a battery, *ib.*
 by husband alone, for the battery of his wife, *per quod*, &c. 652
 for criminal conversation, *ib.*
 for debauching a daughter and servant, in trespass, 653
 by a master, for the battery of his servant *per quod*, &c. *ib.*
 for false imprisonment, and compelling plaintiff to go to a police office, *ib.*
 common count, for false imprisonment generally, 654

II. TO PERSONAL PROPERTY.

for chasing sheep, &c. with special damage, 654
 second count, for chasing sheep or other cattle, *ib.*
 for seizing cattle, or other property, as a distress, 655
 common count *de bonis asportatis*, *ib.*
 for shooting a dog, &c. *ib.*
 trespass for running defendant's cart against plaintiff's horse, and killing it, 656
 for running a carriage against plaintiff's, with special damage, &c. *ib.*
 for seizing plaintiff's cart and horse, &c. *ib.*
 for seizing and detaining plaintiff's barge, 657
 by master, for impressing mate of ship, whereby ship prevented sailing, *ib.*
 for seizing plaintiff's barge, and putting it adrift, *ib.*
 for navigating a vessel against plaintiff's vessel, 658

III. TO REAL PROPERTY.

To Houses.

for trespass in dwelling-house, breaking doors, and seizing goods, 658
 count for a common expulsion, 659
 on stat. 8 Hen. 6, c. 9, for a forcible entry and detainer, *ib.*
 second count, on possession generally, 660
 for building on a plaintiff's wall, and thereby obstructing light, *ib.*

To Land, &c.

name or abutments, or other description, necessity for statement of, 660,
 note (m); 662, note (n).
 breaking close, gates, and locks, with carts, &c., and special damage, 660

DECLARATIONS IN TRESPASS—(continued.)

III. TO REAL PROPERTY, *To Land, &c.*—(continued.)

the like, setting out the name of the close, or its abutments, 662
for cutting down and carrying away trees, *ib.*
for laying wood in close, 663
for digging in coal mine, *ib.*
for digging mines, raising ore, and taking and converting it to his own use, *ib.*
by an executor for an injury to the real estate of the testator, *ib.*

For Mesne Profits.

for mesne profits, after recovery in ejectment, 664

For Hunting, &c.

for breaking close and killing game, at common law, 665
second count, carrying away game, *ib.*
for entering with hounds, and killing deer, *ib.*

For Fishing.

for fishing in plaintiff's close covered with water, 666
second count, for fishing in plaintiff's several fishery, *ib.*
third count, for fishing in plaintiff's free fishery, *ib.*
fourth count, for catching plaintiff's fish generally, 667

DECLARATIONS IN EJECTMENT.

observations on in general, 668
declaration by original in Q. B. or C. P. on a single demise, 669
notice to appear in common cases, 672
notice to appear on proceedings under 1 Geo. 4, c. 87 . . 673
the like in another form, *ib.*
declaration in ejectment, on 1 Will. 4, c. 70, s. 76, *ib.*
declaration by original on two demises with one ouster, *ib.*
the like on two demises with two ousters, 674
the like on demises by tenants in common, &c. 675
by a tenant in common, *ib.*
form of counts when on demises of tenants in common, *ib.*
by a joint tenant or parcener, *ib.*
by a lessor or superior landlord against lessee, 676
when by deed formerly, *ib.*
ejectment for tithes, stating a demise by deed, 631
declaration by bill in Q. B. 677
the like in the Exchequer, *ib.*
on a vacant possession, 678
notice to appear thereto, *ib.*

PRECEDENTS, &c.

VOL. II.

NOTICES OF ACTION AND DEMAND OF COPY OF WARRANT.

To C. D. Esquire, one of her Majesty's justices of the Peace (a) in
and for the county of ———.

NOTICES OF
ACTION, &c.

I, A. B. of ———, in the county of ———, Gentleman, (c) do hereby, according to the form of the statute in such case made and provided, (d) give you notice, that I shall, by my attorney, Mr. E. F. of ———, in the county of ———, at or soon after the expiration of one calendar month from the time

Notice of action
by party injured
to a justice for
false imprisonment. (b)

(a) It is usual, at the head of the *Notice*, to state the character in which the party about to be sued acted; and some forms state the colour or pretence under which he acted, (see Tidd's Forms, 9th edit. 1, 2, 3, &c.; 2 Campb. 196 :) but the latter seems unnecessary, and if mis-stated may be fatal. See 1 Taunt. 383; 1 Moore & P. 346.

(b) The stat. of 5 & 6 Vict. c. 97, s. 4, after reciting that it was expedient that the law should be uniform with respect to notice of action in all cases where such notice of action was required, enacts, "that from and after the passing of that act, (10th Aug. 1842) in all cases where notice of action is required, such notice shall be given *one calendar month* at least before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding." And by the 5th section of the same statute, after reciting that divers acts, commonly called public local and personal or local and personal acts, and divers other acts of a local and personal nature, contained clauses limiting the time within which actions might be brought for anything done in pursuance of the said acts respectively, and that the periods of such limitations varied very much, and it was expedient that there should be one period of limitation only, enacts "that from and after the passing of that act, the period within which any action may be brought for anything done under the authority or in pursuance of any such act or acts shall be *two years*, or in case of continuing damage, then within *one year* after such damage shall have ceased; and that so much of any clause, provision, or enactment, by which any other time or period of limitation is appointed or enacted, shall be and the same is

thereby repealed." This statute has made an important alteration as to giving notices of action, and as to the time within which actions are to be brought; but it in no way affects the forms of the notices, which in all instances must be regulated by the language of the statute applicable to the particular case, and by the decisions of the Courts on the construction of the act. The older cases as to notices are collected in Tidd's Pr. 9th edit. 28 to 33; Chitty's Col. of Stats. vol. i. 645 to 648; the more recent in Chitty's Gen. Pr. vol. ii. 63 to 70; and the following are some of the latest decisions applicable to the subject. Where a clause in a statute required thirty day's notice of action of anything done in pursuance of it, and enabled the party complained of to tender amends for any irregularity, it was held that a letter written to the defendant, who justified under the act, requesting him to communicate the names of certain parties, and stating that unless the request was complied with the plaintiff would "take proceedings against him accordingly," was an insufficient notice; *Norris v. Smith*, 10 A. & E. 188; 2 P. & D. 353, S. C. Where a statutory protection is given to persons acting in pursuance of the statute, to entitle a defendant to protection and notice under the act, he must have acted *bona fide* and have had probable cause for believing that he was acting under the statute. If he acted under a *reasonable* though mistaken persuasion from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such as were not justified by the statute. *Cann v. Clipperton*, 10 A. & E. 582; 2 P. & D. 560, S. C.; *Cook v. Leonard*, 6 B. & C. 351;

B

NOTICES OF
ACTION, &c.

In trespass.

of your being served with this notice, cause a Writ of Summons (e) to be sued out of her Majesty's Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas,"] at Westminster, against you (f) at my suit, and proceed thereupon according to law. [Then follow the subject-matter of the notice, and which it will in general be found preferable to state in the form that will afterwards be adhered to in the declaration. See the forms of declarations in *Case, Trover, and Trespass*, post, in this volume, and which may be readily applied to a notice of action. (g)] For that you, on the — day of —, A.D. —, at the parish of —, in the county of —, (g) with force and arms, caused an assault to be made on me; and then and there caused me to be apprehended, seized, and laid hold of, and to be forced and compelled to go from and out of a certain dwelling-house into divers public streets there, and also to be then and there forced and compelled to go in, through, and along divers public streets and places to a certain police office, situate and

Beechey v. Sides, 9 B. & C. 806; *Reed v. Cowmeadow*, 6 A. & E. 661; *Wedge v. Berkeley*, 6 A. & E. 663; 1 N. & P. 665, S. C.; *Ballinger v. Ferris*, 1 M. & W. 628. A gamekeeper, acting under a deputation created and registered before the 1 & 2 W. 4, c. 32, is not entitled to notice of action under sect. 47 of that act; *Lidstow v. Borrow*, 9 A. & E. 654; 1 P. & D. 447. By an act incorporating a railway company, no action was to be brought against any person for anything done in pursuance of the act without notice, and it was held that the word "person" included the company; *Boyd v. Croydon Railway Company*, 4 Bing. N. C. 669; 6 Dowl. 721, S. C. A party making a wrongful distress for two causes, as to one of which he is entitled to notice of action, is nevertheless liable to trespass as to the other; *Lamont and another v. Southall*, 7 Dowl. P. C. 469. As to the meaning of the words "anything done or omitted to be done by any person in pursuance of an act," see *Palmer v. The Grand Junction Railway Company*, 7 Dowl. 232; *Norris v. Smith*, 10 A. & E. 188; 2 P. & D. 353, S. C.; *Hopkins v. Crow*, 4 A. & E. 774; *Shatwell v. Hall*, 2 Dowl. N. S. 567; and as to the meaning of the words "after the fact committed," see *Collins v. Rose*, 5 M. & W. 194.

(c) A notice describing the intended plaintiff as of "Rotherhithe, in the county of Surrey, merchant," was deemed sufficient; 3 B. & P. 552, n. The statute does not require the notice to state the abode of the intended plaintiff, but only of his attorney.

(d) See the stat. 24 Geo. 2, c. 44, s. 1, which requires a notice to be given to a justice of the peace. See the precedents in *Tidd's Forms*, 9th edit. p. 1 to 7. The above precedent was inserted by the author as more useful in practice than the forms which commence "You having, &c."

(e) The statute 24 Geo. 2, c. 44, s. 6, expressly requires that the intended writ or process shall be named; 7 T. R. 631; 2 Campb. 196; *Holt*, C. N. P. 27.

(f) Need not notice all parties to be included in action, 2 Price, 126; 5 Price, 168; *Chitty's Col. Stat.* 1 vol. 647.

(g) The statute 24 Geo. 2, c. 44, s. 1, enacts "in which notice shall be clearly and

explicitly contained the cause of action which such party hath or claimeth to have against such justice of the peace." If the action be brought against a justice for any thing done under a conviction which has been quashed, the notice must state that it was done maliciously and without any reasonable or probable cause, and the form of action must be *Cass*; see 43 Geo. 3, c. 141; 12 East, 67; 16 East, 13; 1 Marsh. 220. But the form of action need not be stated in the notice of action; 2 Campb. 196. If, however, it be stated, the plaintiff must declare accordingly; 7 T. R. 631, n.; but see *Chit. Col. Stat.* 1 vol. 647; 3 B. & A. 493. If any special damage has resulted from the injury, it should be fully stated as in a declaration; 2 *Chitty's Gen. Prac.* 65; but it is sufficient to show the facts without disclosing the grounds of legal objection to the proceeding of the magistrate; 1 M. & S. 411, 412; 5 B. & A. 837.

The cause of action may be stated precisely as in a declaration; 1 *McCl. & Young*, 469; for which see the precedents in *trespass, post*, and *Tidd's Forms*, 1 to 7. It is usual, as in the above precedent, to frame the notice so that the subsequent declaration may precisely correspond with it. As, in trespass to the Person, stating the assault, battery, and false imprisonment specially, with all the circumstances and special damage; or in trespass to Personal property, the seizure of the ship, cart, &c. and detaining it, with the consequent damage; or in trespass to Real property, the breaking and entering the house, land, &c. and making a disturbance, and seizing and detaining personal property there.

Notice of action against a magistrate under this statute, or against a policeman under 10 Geo. 4, c. 44, s. 41, must state the place where the cause of action occurred; and a defendant is not, by tendering amends after notice of such action, precluded from objecting that the notice does not state where the cause of action occurred, *Martins v. Upcher*, 2 G. & D. 716; *Breese v. Jerdein*, id. 720, note (a).

A notice of motion under the 24 Geo. 2, c. 44, s. 1, is not bad, by reason of its being signed by the plaintiff, or of its being served not by the attorney but by his clerk, *Morgan v. Leach* 2 Dowl. N. S. 522.

being at the parish aforesaid, in the county aforesaid, and to be then and there unlawfully imprisoned and kept and detained in prison, in a certain dark and unwholesome prison or place, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of — hours then next following, contrary to the laws and customs of this realm, and against the will of me the said A. B., whereby I the said A. B. was then not only greatly hurt, bruised, and wounded, but was also thereby greatly exposed and injured in my credit and circumstances, and other wrongs to me then and there did, against the peace of our lady the now queen and to my damage of £ — [stating a sum sufficient to cover the utmost damages that a jury may probably give.] Dated this — day of —, in the year of our Lord —. Yours, &c. A. B. of —, in the parish of —, in the county of —.

NOTICES OF
ACTION, &c.

[N.B. To be indorsed as follows: "E. F. of —, (h) in the county of —, attorney for the within-named A. B."]

[Same Address as in the last Precedent.]

I do hereby, as the attorney of and for A. B. of — in the county of —, duly authorized in that behalf, according to the form of the statute in such case made and provided, give you notice, That the said A. B. will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a Writ of Summons to be sued out of her Majesty's Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas,"] at Westminster, against you, at the suit of the said A. B. and proceed thereupon according to law: For that &c. [state the cause of action as in the last precedent, and conclude as follows:]

The like by an
attorney for his
client. (i)

And other wrongs to the said A. B. then did, to his damage of £ —, and against the peace of our lady the now queen. Dated this — day of —, in the year of our Lord —.

Your's &c. E. F.,
residing at —, in the parish of —, in the
county of —, attorney for the said A. B.

To C. D. and E. F. Officers of her Majesty's Excise, [or "Customs."]

[The commencement and conclusion are the same as in the notices to a Justice of Peace, ante 1 and 2; but as these officers themselves usually do the act complained of, there appears to be a small difference in describing the trespasses. The form is as follows:—]

The like to an
Excise or Custom-house Officer, for seizing and detaining a ship and goods. (k)

For that you, on the — day of —, A. D. —, with force and arms,

(h) The stat. 24 Geo. 2, c. 44, s. 1, enacts, "on the back of which notice shall be indorsed the name of the attorney or agent of the intended plaintiff." "E. F. of Birmingham, generally," was held sufficient, though "at Durham," was deemed insufficient; 3 B. & P. 551. 553 a; 7 T. R. 635; 2 Campb. 199; 3 Taunt. 127; but a notice describing the attorney as of a place in London, which is fact was in Westminster, is insufficient; 6 Esp. 138; the initial of the attorney's christian name suffices; 2 Marsh. 377; 7 Taunt. 63, S. C. The omission of the initial of the second christian name of the attorney is not

material, 4 Bar. & Cress. 681. Though the name be written inside instead of on the back of the notice, it will nevertheless suffice; Cook v. Curry, Chit. Col. Stat. 1 vol. 648.

(i) This must be indorsed with the name and place of abode of the attorney concerned for the plaintiff, as in the above precedent.

(k) See 7 & 8 Geo. 4, c. 53, s. 114, and 3 & 4 W. 4, c. 53, s. 103; by the latter statute it is enacted, "that no writ shall be sued out against, nor a copy of any process served upon, any officer of the army, navy, marines, custom, or excise, or against any person acting under the direction of the com-

NOTICES OF
ACTION, &c.

&c. at the parish of —, in the county of —, (l) unlawfully seized and took possession of a certain brig or vessel called —, together with her tackle, apparel, furniture, stores, and divers, to wit, two boats of and belonging to me A. B., being of great value, to wit, of the value of £—, and also then and there seized, and took possession of, and carried away, a large quantity, to wit, one hundred boxes of tea, and one thousand pounds weight of tea, belonging to me, being of great value, to wit, of the value of £1000, and kept and detained the said brig or vessel, and her tackle, apparel, furniture, stores, and boats, and the said tea, from me the said A. B. for a long time, to wit, for the space of — days then next following, and until I, the said A. B., in order to regain possession thereof, was forced and obliged to and did pay to you a large sum of money, to wit, the sum of £—; and other wrongs, &c. [*Conclude as in the preceding forms.*]

To C. D.

Demand of
copy of warrant
from a constable. (m)

Whereas on or about the — day of —, 1843, you apprehended, assaulted, and imprisoned A. B. of —, labourer, [*or as the case may be,*] under colour and pretence of some warrant or warrants of some justice or justices of the peace, authorizing you so to do; now I do hereby, as the attorney for the said A. B. and on his behalf, demand of you the perusal and copy of all and every warrant and warrants under or by colour of which you apprehended and imprisoned the said A. B. [*or as the cause of action may be, stating it shortly,*] as aforesaid. Dated the — day of —, 1843.

E. F. of, &c. attorney for the said A. B.

misioners of his Majesty's customs, for anything done in the execution of or by reason of his office, until one calendar month next after notice in writing shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party who intends to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring such action, and the name and place of abode of the attorney or agent." Notice of action under this act by an infant may be given by his *prochein amy*, although he may not be the *prochein amy* on the record; *De Gandouin v. Lewis and another*, 10 A. & E. 117; 2 P. & D. 283.

(l) See *ante*, 2, note (g), as to the necessity of stating the place where the cause of action occurred.

(m) As to a demand of perusal and a copy

of a justice's warrant to be made under 24 G. 2, c. 44, see 2 Chit. Gen. Prac. 61 to 64. A demand of a warrant under the 24 G. 2, c. 44, need not specify any time, and if a different time be mentioned than that allowed by the statute, it will not vitiate the demand; *Collins v. Rose*, 7 Dowl. P. C. 796; 5 M. & W. 194, S. C. Where the defendant, a constable, who had taken the plaintiff to gaol under a magistrate's warrant, was called upon, under 24 G. 2, c. 44, s. 6, for a copy of the warrant and perusal of the original, and the defendant gave the plaintiff a copy, but was unable to grant a perusal of the original, because it was retained by the gaoler for his own instruction, and the plaintiff on information of the circumstances made no objection to its production, it was held that he had dispensed with the production of the original; *Adkins v. Kirby and another*, 4 P. & D. 145.

PARTICULARS OF PLAINTIFF'S DEMAND. (a)

PARTICULARS OF DEMAND.

In the Queen's Bench, ["Common Pleas," or "Exchequer of Pleas."]
Between A. B. Plaintiff,
and
C. D. Defendant.

1. Full particulars, not giving any credit.

This action is brought to recover the sum of £——, due as follows :

[Here copy the account.]

Above are the particulars of the plaintiff's demand in this action, and for the recovery thereof the plaintiff will rely on an account stated, as well as the other count [or "counts"] in the declaration. Dated the —— day of ——, 1843.

Yours &c.

E. F. [Residence.]

Plaintiff's attorney [or "agent."]

To Mr. C. D. the above-named defendant,
[or "the defendant's attorney" or "agent."]

(a) By R. T. 1 W. 4, reg. 6, it is ordered "That with every declaration if delivered, or with the notice of declaration if filed, containing counts in *indebitatus assumpsit* or debt on *simple contract*, the plaintiff shall deliver full particulars of his demand under these counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claims, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios." The rule goes on to provide that in case particulars are not delivered in compliance with the above direction, the plaintiff shall not be allowed the costs of the summons to obtain the order, or of the particulars delivered in pursuance thereof.

As the rule only applies to counts in *indebitatus assumpsit* or debt on *simple contract*, counts on bills of exchange or promissory notes are not within the rule, and therefore where the declaration contains only counts on bills or notes, it is unnecessary to deliver any particulars of demand; *Brookes v. Farlar*, 3 Bing. N. C. 291. But if besides a count on a bill or note, the declaration contain a count or counts on the consideration, particulars must be delivered under these counts; and where particulars of demand are delivered under counts on bills or notes, and they appear to be imperfect, the Court or a Judge will in some cases order further and better particulars to be delivered; *Dawes v. Anstruther and another*, 2 M. & W. 817.

As to the Form of the Particulars.

The particulars should be as explicit as it is in the power of the party to furnish and the nature of the case requires, and should in general specify dates, items and amounts.

But mistakes in particulars of demand, if of such a nature as not calculated to deceive or mislead, are not material; *Lambirth v. Roff*, 1 Moo. & Scott, 597; 8 Bing. 411, S. C.; *Millwood v. Walter*, 2 Taunt. 224; *Harrison v. Wood*, 1 Moo. & Scott, 536; 8 Bing. 371, S. C.; *Spencer v. Butas*, 1 Gale, 108; *Green v. Clarke*, 2 Dowl. 18; *Fleming v. Crisp*, 5 Dowl. 454; *Fisher v. Wainwright*, 1 M. & W. 480; *Hay and another v. Fisher*, 2 M. & W. 722; *Parsons v. Wilson*, 1 Dowl. (N. S.) 181; *Hurcum v. Steriker*, 2 Dowl. (N. S.) 524. As to what is a variance calculated to deceive or mislead, see *Holland v. Hopkins*, 2 Bos. & Pul. 243; 2 Esp. 168, S. C.; *Brecon v. Smith*, 1 A. & E. 488; *Moss v. Smith*, 8 Dowl. P. C. 537.

As to giving credit for Payments on Account.

Before the rule T. T. 1 W. 4, it was considered, that where money had been paid on account, such payments should be credited in the particulars. See *Mitchell v. Wright*, 1 Esp. Rep. 280; *Miller v. Johnson*, 2 Esp. Rep. 602; *Adlington v. Appleton*, 2 Camp. 410. But since this rule it has been held in several cases that it is discretionary with the plaintiff to give any part of the credit side of the account or not; *Pemprase v. Crease*, 4 Dowl. 711; 1 M. & W. 36, S. C.; *Randall v. Ikey*, 4 Dowl. 682; *Smith v. Eldridge*, 4 A. & E. 64.

As to the Effect of giving Credit for Payments or cross Demands.

Before the rule of T. T. 1 Vict. it was necessary, in order to have the benefit of payment as a defence to the action, to plead the fact specially, and this though the payments were credited in the particulars of demand, but the defendant might in an action of *assumpsit*, though not in debt, have given payment

PARTICULARS OF PLAINTIFF'S DEMAND.

**PARTICULARS
OF DEMAND.****2. Full particulars, giving credit.**

In the Queen's Bench ["Common Pleas" or "Exchequer of Pleas."]

Between A. B. Plaintiff,

and

C. D. Defendant.

This action is brought to recover the sum of £——, due as follow :

[Copy the account, and then give credit for the payments as follows:]

By cash.....£

Above are the particulars of the plaintiff's demand in this action, and for the recovery thereof the plaintiff will rely on an account stated, as well as the other count [or "counts"] in the declaration. Yours, &c. [as in last. To, &c. [as in last.

3. Short particulars, not giving credit.

In the Queen's Bench ["Common Pleas" or "Exchequer of Pleas."]

Between A. B. Plaintiff,

and

C. D. Defendant.

This action is brought to recover the sum of £——, for butcher's meat

in evidence in mitigation of damages, under a plea of the general issue; *Ernest v. Brown*, 3 Bing. N. C. 674; 4 Scott, 385; *Kenyon v. Wakes*, 2 M. & W. 764; *Nichols v. Williams*, 2 M. & W. 758; *Shirley v. Jacobs*, 2 Bing. N. C. 88; *Belbin v. Butt*, 2 M. & W. 422. But by the above rule it is ordered "That in any case in which the plaintiff, in order to avoid the expense of the plea of payment, shall have given credit in his particulars of demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money," but this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

By a rule of the same term, payment can in no case be given in evidence in reduction of damages or debt, but must be pleaded in bar.

In order to prevent the expense of entering a *nolle prosequi* to a plea of part payment, it is always advisable to credit all payments on account in the particulars of demand.

If the payment credited in the particulars was made after action brought, a plea of payment is unnecessary; thus where the particulars claimed a balance after crediting payments, some made before and some after action brought, a general plea of payment was held to have reference to that balance, and the defendant on the trial, having proved payment to a greater amount than the balance claimed, was held entitled to a verdict; *Eastwick v. Harman*, 6 M. & W. 13. As the rule of T. T. 1 Vict. has no reference to cross demands, a defendant is not deprived of his plea of set-off by any credit of this nature in the particulars of the plaintiff's demand, and therefore to give credit for that which is the subject of a set-off only furnishes evidence in support of a plea of set-off, and does not deprive the defendant of such plea, or render

it unnecessary for the plaintiff to enter a *nolle prosequi* to a part of his demand, if such plea be pleaded; *Rowland v. Blake*, 2 G. & D. 734.

Where the particulars of the plaintiff's demand stated the action to be brought to recover "a sum of 27l. 13s., being the balance due after giving credit for all payments on account, and for such sums as the defendant might have to set off against the plaintiff;" and then stated the items of the plaintiff's demand to the amount of 120l., it was held that these particulars did not, within the meaning of the rule T. T. 1 Vict. give credit for a sum of money admitted to have been paid; *Morris v. Jones*, 1 G. & D. 13.

As to the effect of giving credit for goods returned, see *Lamb v. Micklewaite*, 1 G. & D. 136. And as to the effect of crediting a bill, and afterwards debiting it on account of its being dishonoured, see *Green and others v. Smithies*, 1 G. & D. 395.

Where the particulars of demand refer to other particulars delivered before action brought, the rule does not render it unnecessary to plead payment of sums credited in such particulars; *Boaley v. Moors*, 8 Dowl. P. C. 375. Where the plaintiff in his particulars of demand charged the defendant and also credited him with items which accrued after action brought, and no objection was made thereto until the under-sheriff was on the point of summing up, a verdict for the balance was sustained, it being considered a matter of consent, and that the defendant should have objected in the earlier part of the cause to a balance of accounts being thus stated; *Alexander v. Porter*, 1 Dowl. N. S. 832.

The Court will not order the delivery of particulars in an action of *trespass*, upon the mere statement of the defendant that he does not know the grievances intended to be relied on, but some special grounds for the application must be shown; *Horlock v. Lediard*, 2 Dowl. N. S. 277.

PARTICULARS OF PLAINTIFF'S DEMAND.

7

supplied by the plaintiff to the defendant, between the — day of —, —, and the — day of —, —, the full particulars whereof cannot be comprised within three folios. PARTICULARS
OF DEMAND.

Above is a statement of the nature and amount of the plaintiff's claim in this action, pursuant to the Rule of Court requiring the same, and for the recovery thereof the plaintiff will rely on an account stated, as well as the other count [*or* "counts"] in the declaration. Dated the — day of —, —.

Yours, &c. [*as before*].

To C. D. &c. [*as before*].

In the Queen's Bench ["Common Pleas," *or* "Exchequer of Pleas."]

Between A. B. Plaintiff,

and

C. D. Defendant.

4. Short particulars, giving credit.

This action is brought to recover the sum of £—, being the amount due to the plaintiff on an account for tea and grocery goods supplied by the plaintiff to the defendant between the — day of —, —, and the — day of —, —, the full particulars whereof cannot be comprised within three folios, after giving credit to the defendant for £—, paid at various times.

Above is a statement of the nature of the plaintiff's claim, and of the amount which he claims to be due, pursuant to the Rule of Court requiring the same, and for the recovery thereof the plaintiff will rely on an account stated (*b*), as well as the other count [*or* "counts"] in the declaration. Dated the — day of —, 1843.

Yours, &c. [*as before*].

To C. D. &c. [*as before*].

(*b*) In order to recover under the account stated, where the particulars do not claim a distinct and separate debt under such count, the plaintiff will be bound to connect any admission of a debt by the defendant with the claim particularly specified in the particulars of demand; *Roberts v. Elsworth*, 2 Dowl. N. S. 456. And where the particulars of demand stated that the action was brought to re-

cover the amount due on the promissory note mentioned in the first count, and that the plaintiff would avail herself of the whole or any part of the declaration for the recovery thereof, it was considered (there being a good defence to the first count), that the plaintiff was by her particulars precluded from going into evidence on the count upon the account stated; *Hedley v. Bainbridge*, 2 G. & D. 483.

COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

IN INFERIOR COURTS.

IN INFERIOR COURTS. (a)

In the Mayor's
Court in Lon-
don, in assump-
sit.

Before the Mayor and Aldermen in the Chamber of
the Guildhall of the City of London.

A. B. by — his attorney, complains against C. D. of a plea of trespass on the case upon promises. For that whereas, &c. [*State the cause of action as in the superior Courts, and it seems that the facts should be stated to have occurred within the jurisdiction. See 6 Term Rep. 764, and see note (a), infra. Conclude as follows:*] To the damage of the said plaintiff of £—, and therefore he brings his suit, &c. Pledges, &c.

Do. in debt.

Title of the Court as above.]

A. B., by E. F. his attorney, demands against C. D. £— of lawful money of Great Britain, which he owes to and unjustly detains from him the said A. B. For that whereas, &c. [*State the cause of action to have accrued within the jurisdiction and as directed in 1 Saund. Rep. 68, note 2; Com. Dig. tit. London, note 1; and note (a), supra.*]

Do. by baron
and feme, feme
being a sole
trader within
the city. (b)

Title of the Court as above.]

A. B. and E. F. his wife (which said E. F. doth sole merchandize without her said husband in the art or trade of — within the city of London), by — their attorney, complain against C. D. in a plea of trespass on the case. For that whereas the said C. D., on &c. at the parish of —, in the city of London, and within the jurisdiction of this Court, was indebted to the said E. F., then and now being the wife of the said A. B. and then and now trading and merchandizing within the said city in the art or trade aforesaid alone and without her said husband, according to the custom of the said city, in the sum of £— of lawful &c. For &c. [*here state the cause of action, laying the promises to E. F. and describing her "as such sole trader as aforesaid."*]

Declaration
against baron
and feme, feme
being sole trader
within the
city. (c)

Title of the Court as above.]

A. B., by — his attorney, complains against C. D. and E. F. his wife, which said E. F. doth sole merchandize without her husband in the art or trade of a — within the city of London, in a plea of trespass on the case upon promises. For that whereas the said E. F., so being such sole trader as aforesaid, on &c. in London and within the jurisdiction of this Court,

(a) The uniformity of process act, 2 W. 4, c. 39, and rules thereon, only apply to the three superior Courts at Westminster. But the 3 & 4 Will. 4, c. 42, ss. 1 and 23, and the pleading rules founded thereon, of Hil. Term, 4 W. 4, extend to all Courts of Common Law, and therefore reg. 8, prohibiting a statement or repetition of venue in the body of a declaration, relates to all Courts. But still it must be averred that each material fact occurred within the jurisdiction; *Read v. Pope*, 1 Crom.

M. & Ros. 302; *Salter v. Slade*, 1 Adol. & Ell. 608; 6 Term R. 764; *Williams v. Gibbs*, 5 Adol. & Ell. 208. As to what is a sufficient allegation of that fact, see *Chitty v. Denby*, 3 Adol. & Ell. 319. Take care not to insert a demand in debt, &c. beyond the amount over which the Court has jurisdiction. See *Dempster v. Parnell*, 1 Dowl. N. S. 168.

(b) As to this custom, see 2 B. & P. 93.

(c) *Id.*

then and still being the wife of the said C. D., and then and still trading and merchandizing within the said city in the art or trade aforesaid alone and without her said husband, according to the custom of the said city, as such sole trader as aforesaid was then indebted, &c.

IN INFERIOR
COURTS.

In the Palace Court.

Palace Court, (to wit.) A. B., by — his attorney, complains against C. D. of a plea of trespass on the case upon promises [*or as the plea is*], For that whereas, &c. [*alleging every material fact to have happened within the jurisdiction of the court, and conclude as follows:*] To the damage of the plaintiff of £—, and therefore he brings his suit, &c. “And the said plaintiff avers that he is not, nor is the said defendant, nor were they, nor was either of them, at the time of levying the plaint of him the said plaintiff here in Court, of the queen’s household.”

Commencement
and conclusion
of declaration
in the Palace
Court. (d)

Court of Record of Kingston-upon-Hull.

Kingston-upon-Hull, (to wit.) C. D. was attached to answer A. B. in a plea of trespass on the case upon promises to his damage of £—, and thereupon the said A. B., by — his attorney, complains. For that whereas the said C. D. on &c., at the town of Kingston-upon-Hull, and within the fee and jurisdiction of this Court, was indebted, &c. [*Afterwards stating every fact to have occurred* “within the jurisdiction aforesaid.”

Do. in the Court
of Record of
Kingston-upon
Hull.

Borough of Southwark, (to wit.) A. B., by — his attorney, complains against C. D. in a plea of trespass on the case upon promises. For that whereas the defendant, on, &c. within the jurisdiction of this Court, was indebted, &c. [*stating every material fact to have happened* “within the jurisdiction aforesaid,” and conclude as formerly in the Queen’s Bench by bill, viz. “to the damage of the plaintiff of £—, and therefore he brings his suit,” &c.

Do. in the
Borough Court
of South-
wark. (e)

In the County Court of the County of —.

— (to wit.) A. B., by — his attorney, complains of C. D. of a plea of trespass on the case upon promises. For that whereas the said defendant, on, &c. and within the jurisdiction of this Court, was indebted, &c. [*alleging every material fact, as well the consideration of the promise as the contract itself, to have taken place within the jurisdiction.* (f)

Do. in the
County Court.

— (to wit.) Writ of justices to be directed to the sheriff of the county of —, to hold plea in his County Court for A. B. against C. D. in an action upon promises. For that whereas [*as in a declaration for a debt in general and in the following forms, except that every material fact, as well the subject-matter of the debt as the promise, must be alleged to have happened*, “and within the jurisdiction of the said Court,” (g) then conclude as follows:] To the damage of the said plaintiff of £—, as it is said, &c.

Præcipe for a
writ of justices
in the County
Court in as-
sumpsit.

(d) See a form in the Palace Court, Ro-
chester, Plead. Assist. 133.

(e) See Plead. Assist. 385; Morg. 174.

(f) 1 Saund. 73, 74, n. 2; 1 Term R. 151;
Read v. Pope, 1 Cromp. M. & Ros. 302;
Salter v. Slade, 1 Adol. & Ell. 608. See the

form of declaration in the County Court in
replevin, post.

(g) This is necessary, 1 Saund. 74, n. 1;
1 Lev. 253; Vin. Ab. tit. Courts County, 6,
D. a; 1 T. R. 151; and see last note, and
ante, vol. i.

COMMENCEMENTS AND CONCLUSIONS

IN INFERIOR COURTS. Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland queen, defender of the faith, to the sheriff of the county of — greeting: A. B. hath complained to us against C. D. in an action upon promises [*or as the plea is.*] For that whereas, &c. [*as in the præcipe to the words, "as it is said," &c. stating the material facts to have occurred* "within the jurisdiction of the said Court of the county of —."] And therefore we command you to hear that plaint, and afterwards cause justice to be done therein, that we hear no more complaint thereof for want of justice. Witness ourself at Westminster, the — day of —, in the — year of our reign.

Declaration thereon in County Court on a writ of justices. In the County Court of —.

— (to wit.) C. D., by virtue of her Majesty's writ of justices, was attached to answer A. B. on an action upon promises, to the damage of the said A. B. of £—, and there are pledges to prosecute, to wit, John Doe and Richard Roe; and whereupon the said A. B., by — his attorney, complains. For that, &c. [*as in the writ of justices to the end, and conclude as follows:*] Wherefore the plaintiff saith that he is injured, and hath sustained damage to the amount of £—, and therefore he brings his suit, &c.

ON REMOVALS FROM INFERIOR COURTS.

ON REMOVALS FROM INFERIOR COURTS. THE uniformity of process act, 2 W. 4, c. 39, and the rules thereon, only extend to *personal actions commenced* in one of the three superior Courts, and therefore, notwithstanding that statute and those rules, whenever an action has been *removed from an inferior Court* into the Queen's Bench, Common Pleas, or Exchequer, and, as usual, it therefore becomes necessary to declare *de novo* in such superior Courts, then the declaration should in each case be intituled of *a term* in which the writ removing the proceedings was returnable, or that in which the defendant appeared thereto; and in the Queen's Bench, the defendant should be described as in the supposed *custody of the keeper of the Queen's prison* (the office of *marshal* being abolished by the 5 Vict. c. 22, s. 3); in the Common Pleas, to have been *summoned* or *attached* to answer to the plaintiff, according to the nature of the cause of action; and in the Exchequer, the plaintiff is still described to be in the commencement and conclusion as *debtor* to the queen. (*See Dodd v. Grant, 4 A. & E. 485.*)

1. Declaration in Q. B. in an action removed from an inferior Court.

In the Queen's Bench.

On the — day of — A. D. —.

Easter Term, in the 6th year of the reign of Queen Victoria. (*h*)

Middlesex (*the venue*) to wit. A. B. by E. F. his attorney, complains of C. D. being in the custody of the keeper of the queen's prison. For that &c. [*here set forth the cause of action and conclude as follows:*] To the damage of the said A. B. of £—, and therefore he brings his suit, &c.

(*h*) If the declaration be delivered in vacation, intitle it, "As yet of — Term," &c. instead of the Term.

In the Common Pleas.

On the — day of — A. D. —.

Easter Term, in the 6th year of the reign of Queen Victoria.

Middlesex (to wit.) C. D. was attached to answer A. B. of a plea of trespass on the case *upon promises*; and thereupon the said A. B., by E. F. his attorney, complains. For that whereas, &c. [*here state the cause of action, and conclude as follow:*] Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of £—, and therefore he brings his suit, &c.

ON REMOVALS
FROM INFERIOR
COURTS.

2. Declaration
in C. P. in an
action removed
from an inferior
Court.

Conclusion.

In the Queen's Bench [or "Common Pleas."]

On the — day of — A. D. —.

Easter Term, in the 6th year of the reign of Queen Victoria. (i)

Venue local (to wit.) C. D. was *summoned* to answer A. B. of a plea wherefore he took the cattle, corn, goods, and chattels of the said A. B., and unjustly detained the same against sureties and pledges until, &c.; and thereupon the said A. B., by E. F. his attorney, complains. For that &c. [*The body of the declaration as post, and conclude as follows:*] Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of £—, and therefore he brings his suit, &c.

3. Commence-
ment in Com-
mon Pleas in
replevin, where
proceedings re-
moved from an
inferior
Court.

Conclusion of
same.

In the Exchequer of Pleas.

On the — day of — A. D. —.

Easter Term, in the 6th year of the reign of Queen Victoria.

— (to wit.) A. B., a debtor to our sovereign lady the now queen, cometh before the barons of her Majesty's Exchequer, on the — day of —, in this same term, by E. F. his attorney, and complains by bill against C. D. present here in Court the same day of a plea of trespass on the case on *promises* [*or as the form of action may be.*] For that whereas &c.

4. Commence-
ment and con-
clusion of decla-
ration in Ex-
chequer in an
action removed
from an inferior
Court.

— (to wit.) A. B. executor of the last will and testament of E. F. deceased, [*or "administrator of all and singular the goods and chattels and credits, which were of E. F. deceased, at the time of his death, who died intestate,"*] and a debtor to our lady the now queen for the debts of the said E. F. cometh before the barons, &c. [*the same as above.*]

5. Do. at the
suit of an exe-
cutor or admi-
nistrator.

To the damage of the said plaintiff of £—, whereby he is the less able to satisfy our said lady the queen the debts [*or if at the suit of an executor or administrator, "the debts of the said E. F."*] which he owes her majesty at her said Exchequer; and therefore he brings his suit, &c.

6. Conclusion
of the declara-
tion.

(i) See form, T. Chitty's Forms, 4th edit. 417. After the removal of a replevin cause, the declaration must be intitled of the term in which the writ removing the proceedings from the County Court was returnable, or that of the appearance; 5 Taunt. 771; 1 Marsh. Rep. 341, S. C. Although in an

action in an inferior Court it is necessary to allege in the declaration that the cause of action arose within the jurisdiction, it is not requisite when the cause is removed to the superior Court by *pone* that the same allegation should be repeated; *Pruett v. Ancell*, 9 Dowl. 893.

COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS IN THE SUPERIOR COURTS.

IN THE SUPERIOR COURTS.

Commencements of declarations as now regulated.
First, How affected by form of writ.

The *commencements* of declarations have in general two objects and utilities—*first*, to denote *the Court* in which the plaintiff declares, and *the writ* or process by which the defendant has been brought into Court; and, *secondly*, the *particular character or right* in which the plaintiff sues or defendant is sued when he does not proceed in his own right. Before the uniformity of process act, 2 W. 4, c. 39, the different processes were materially varied in each Court, and necessarily occasioned great variety in the forms of commencing the declaration in the different Courts, depending principally on the particular process that had in each case been issued; as whether by special original, or special *capias*, or by bill of Middlesex, or *latitat*, or attachment of privilege, or bill against a member of parliament, &c. in the Queen's Bench; or whether by common *capias* or summons, or attachment of privilege, &c. in Common Pleas; or whether by *quo minus*, *venire*, *subpoena*, &c. in the Court of Exchequer. The above statute abolished all those *former writs* and proceedings as they applied to *personal* actions when commenced in either of the Courts at Westminster, and substituted a writ of *summons*, when the defendant was only to be served with process, or a writ of *distringas* to take his goods when he had not appeared to such writ of summons; and a writ of *capias* to take the defendant when he was to be *arrested*, and a writ of *detainer* to detain him when *already in custody*, and the act in a schedule prescribes the exact forms of these new writs. But the act expressly declares that such new writ shall not apply to *real* or *mixed actions*, (such as *quare impedit* or *ejectment*), nor to actions removed from an *inferior Court* by writ of *pone*, *certiorari*, *recordari* *facias loquelam*, *habeas corpus*, or otherwise, see *id.* sect. 19. So that although the *ancient forms of commencements* of declarations in *personal* actions commenced in either of the three superior Courts (and which will be found collected in the 5th edition of this work, page 7 to 37,) have been virtually annulled, yet still some of those previous forms of commencements in actions removed from *inferior Courts*, as in *replevin*, &c. and also those in *ejectment*, are still to be framed as heretofore. If removed into Queen's Bench, the commencement of declarations after such removal would still state the defendant to be *in custody of the marshal*; in Common Pleas, to have been *summoned* or *attached* to answer the plaintiff; and in the Exchequer would commence and conclude as by *quo minus*; and commencement of a declaration in *scire facias* is also not affected by the statute; and it has been held that a declaration in *ejectment* in the Court of Exchequer should still commence and conclude as if the plaintiff were a *debtor to the Queen*; see *Hirst v. Pitt*, 3 Tyr. 264; 1 Crom. & Mees. 324; *Doe dem. Gillet v. Roe*, 1 Crompt. Mees. & Ros. 19; 3 M. & Scott, 376.

In order to *assist* practitioners and prevent the difficulties which might have ensued from the want of precedents for the commencement of declarations founded on the new writs, the judges, by Reg. Gen. Mich. Term, 3 W. 4, reg. I. r. 15, ordered "that every declaration shall be *intituled* in the *proper Court* and of the day of the month and year on which it is filed or delivered, and *shall commence as follows*, and then the rule prescribes *four*

forms, only one of which is applicable since the abolishing of imprisonment for debt, since all actions are now commenced by writ of summons. Other forms have also been prescribed by Reg. Gen. Hil. T. 4 W. 4, reg. 20, founded on the important statute, 3 & 4 W. 4, c. 42, and *observations* upon these regulations and forms will be found in the first volume of this edition and in the notes to the following precedents.

IN THE SUPERIOR COURTS.

With respect to the *forms of commencements*, as they are affected by the particular character or right in which the plaintiff sues or the defendant is sued, they have not, since the fifth edition of this work, undergone any material change. But the General Rule of Pleading, promulgated under the 3 & 4 W. 4, c. 42, sect. 1, viz. Reg. Gen. Hil. Term, 4 W. 4, reg. 21, in effect abolishing the general issue, orders that "in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not be considered as in issue, unless specially denied. This rule has greatly relieved plaintiffs from the risk of nonsuit, previously so frequent, by the failure in proof of the averment or statement in the commencement or body of the declaration of the particular character in which they sued, and which now no longer requires any proof, unless expressly traversed or put in issue by the subsequent pleadings.

Secondly, How the commencement is affected by the character in which plaintiff sues or defendant is sued.

The Reg. Gen. Trin. T. 1 W. 4, prescribes as a general form of conclusion now to be observed in all the Courts, "To the damage of the plaintiff of £—, and thereupon he brings suit, &c.," and now it would be untechnical to conclude a declaration in the Exchequer in a personal action *quo minus*, though that conclusion would still be proper in the mixed action of ejectment in that Court; *Hirst v. Pitt*, 3 Tyr. Rep. 264; *Doc dem. Gillett v. Roe*, 1 Crom. M. & Ros. 19; 3 M. & Scott, 376, S. C. A deviation, however, from a prescribed form of commencing or concluding a declaration is not demurrable, but at most is only an irregularity; *Hart v. Dally*, 2 Dowl. 257; *Alderson v. Johnson*, 2 M. & W. 70; *Turner v. Denman*, 4 Tyr. 313.

Conclusion of declarations.

Formerly it was usual to enter pledges to prosecute at the end of the declaration, but the Reg. Gen. Mich. T. 3 W. 4, reg. 1, orders that "the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued."

I. IN GENERAL.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — in the year of our Lord — (h)
— (i) to wit. A. B., by E. F., his attorney, (k) [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the said

1. Common commencement of a declaration. (h)

(h) This form is prescribed by Reg. Gen. Mich. T. 3 W. 4, reg. 15, which orders "That every declaration (i.e. in personal actions, when commenced in one of the superior Courts) shall be intitled in the proper Court and of the day of the month and year on which it is filed or delivered, and shall commence as follows," and then prescribes the above with other forms of commence-

ments now inapplicable. The Reg. Gen. Hil. T. 4 W. 4 (which requires an *issue* to state the date of the writ) does not extend to declarations; *Du Pre v. Langridge*, 2 Dowl. 584; but in the body of the declaration, the time should, in strictness, be always laid before the date of the writ. However, in a case where the time in the body of the declaration was laid after the date of the writ,

IN THE SUPERIOR COURTS.

Conclusion.

A. B. (l) For that, &c. [*here state the subject of the claim as in the forms throughout this volume, describing the parties as "the plaintiff," (m) or "the defendant;" see New Rep. 289; 2 Marsh. 101; 6 Taunt. 406; and conclude as follows:*] To the damage of the plaintiff of £—; and thereupon he brings his suit, &c.

2. Do. at the suit of an infant. (n)

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by E. F. who is admitted by the Court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., complains of C. D., who has been summoned to answer the said A. B. For that, &c.

3. Do. against a peer who has been served with a common writ of summons. (o)

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by E. F. his attorney, [or "in his own proper person,"] complains of the Right Honourable C., Duke of —, [or "Marquis," or "Earl of —," or "Lord —"] having privilege of peerage [or "the Right Reverend Father in God C. Lord Bishop of —"] who has been summoned to answer the said A. B. For that, &c. [*termining the defendant afterwards throughout "the said Duke," or "Marquis," or "Earl," or "Lord," or "Lord Bishop," and avoid in stating the cause of action any allegation of fraud, deceit, or malice, &c., but merely state the breach of contract without epithet; see Impey, Prac. K. B. 7th ed. 579; 8th ed. 568; 2 Rich. C. P. 243; 2 Cromp. 149.*]

4. Do. against a member of parliament served with a common summons. (p)

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by E. F. his attorney, [or "in his own proper person,"] complains of C. D. Esquire, having privilege of parliament, who has been summoned to answer the said A. B. For that, &c.

it was holden no ground for arresting the judgment; *Steward v. Layton*, 3 Dowl. 430.

If the declaration be not intituled of any particular day, or of a day different from that on which it is filed or delivered, it is no ground of demurrer, but may be set aside as irregular; *Neal v. Richardson*, 2 Dowl. P. C. 89; *Hodson Pennell*, 4 M. & W. 473; 7 Dowl. 208, S. C.

(i) This is now to be the only place where the venue is to be stated; for Reg. Gen. Hil. T. 4 W. 4, r. 8, expressly prohibits repetition of venue or place in the body of the declaration. But if the venue be inserted in the body of the declaration contrary to this rule, it is no ground of demurrer; see *Former v. Champneys*, 1 C. M. & R. 369; 2 Dowl. P. C. 680, S. C.; *Fisher v. Snow*, 3 Dowl. 27; *Townsend v. Gurney* 1 C. M. & R. 590; 3 Dowl. 168, S. C.

(k) As to the necessity of stating that the plaintiff sues in person or by attorney, see *Butler v. Mapp*, 10 Bing. 391.

(l) It is not unusual here to insert the form of action precisely the same as in the writ, as

"In an action on promises."
"In an action of debt."

"In an action of covenant."

"In an action of detinue,"

"In an action of debt and detinue."

"In an action on the case."

"In an action of trespass."

But this is unnecessary, and according to the judgment of Parke, B., in *Ball v. Hamlet*, 1 C. M. & R. 575; 3 Dowl. P. C. 188, S. C.; ought to be omitted.

(m) As to a mistake in the word "plaintiff" for "plaintiffs," see *Tyndals and another v. Ullashorne*, 3 Dowl. 2; 4 M. & Scott, 417.

(n) This form is taken from the issue prescribed in Reg. Hil. T. 4 W. 4.

(o) Where the defendant is a peer, or otherwise entitled to a name of dignity, such name of dignity should be inserted, but it is not necessary either in an action against a peer or a member of parliament to describe him as having privilege of peerage or parliament; *Cantwell v. Earl of Stirling*, 8 Bing. 174.

(p) As to the writ of summons and proceedings against a member of parliament, see 3 Chitty's Gen. Prac. by Lush, 250; see last note.

- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] IN THE SUPERIOR COURTS.
On the — day of — A. D. —.
- to wit. A. B., by E. F. his attorney [*or* "in his own proper person,"] complains of "The Mayor, Commonalty, and Citizens of the City of London" [*or whatever the precise corporate name be,*] who have been summoned to answer the said A. B. For that, &c. 5. Do. against a corporation aggregate. (q)
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 6. Do. against guardians of the poor. (r)
On the — day of — A. D. —.
- to wit. A. B. (the plaintiff in this suit) by his attorney, [*or* "in his own proper person,"] complains of "The Guardians of the Poor of the Parish of —, in the County of —," (the defendants in this suit) who have been summoned to answer the plaintiff. For that whereas, &c.
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 7. Do. against hundredors. (s)
On the — day of — A. D. —.
- to wit. A. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of "The inhabitants of the Hundred of — in the County of —," who have been summoned to answer the said A. B. For that, &c.
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 8. Do. by an attorney suing in that character. (t)
On the — day of — A. D. —.
- to wit. A. B., gentleman, one of the attornies of the Court of our Lady the Queen, before the Queen herself, and who prosecutes this action in person as such attorney, and claims to retain all his privileges as such attorney throughout this suit [*or* "of the Court of the Bench at Westminster, in the county of Middlesex," *or* "of the Court of Exchequer of Pleas at Westminster," according to the fact,] complains of C. D. who has been summoned to answer the said A. B. For that, &c.
- In the Exchequer of Pleas. 9. Do. at the suit of a side clerk of the Exchequer. (u)
On the — day of — A. D. —.
- to wit. A. B. gentleman, one of the side clerks of E. F. gentleman,

(q) As to the writ against a corporation, see Chitty's Gen. Prac. by Lush, 210.

When a corporation is created by an act of parliament, the Courts will take judicial notice of it; *Church v. Imperial Gas Light Company*, 6 A. & E. 846; 3 N. & P. 37; as to suing a corporation in debt or assumpsit, see vol. 1.

(r) By the 5 & 6 W. 4, c. 69, s. 7. the guardians of the poor of every union are incorporated, and are empowered by their corporate name "to bring actions, to prefer indictments, and to sue and be sued, and to take or resist all other proceedings for or in relation to property vested in them, or any lands, contracts, or securities, or instruments given or to be given to them in virtue of their office."

As to the liability of the guardians, see *Moore v. The Guardians of the Poor of Witney Union*, 3 Biaz. N. C. 814.

(s) As to the writ and description of the defendants, see 3 Chitty's Gen. Prac. by Lush, 210; see also the statute 7 & 8 G. 4, c. 31;

Chitty's Col. Stat. vol. 1, 659, and the law, 1 Chitty's Gen. Prac. 137, 172, 410; *proceedings*, id. 576 to 581. If the action be against the inhabitants of a wapentake, ward, or other district in the nature of a hundred, the above commencement may be easily altered to meet the case.

(t) An attorney plaintiff, though he does not describe himself as an attorney on the record, and sues as a common person, does not lose his privilege; *Wright v. Skinner*, 4 Dowl. P. C. 745; and there therefore appears to be no advantage in using the above form of commencement in preference to the one first set forth if the plaintiff sue "in person." An attorney is liable to be arrested by order of a judge, under the 1 & 2 Vict. c. 110, s. 3; *Thomson v. Moore*, 1 Dowl. N. S. 283.

(u) As to the side clerk's privilege, see *Stokes v. White*, 1 C. M. & R. 223; 2 Dowl. 703, S. C.

IN THE SUPERIOR COURTS.

one of the sworn clerks of the office of Pleas of her Majesty's Court of Exchequer, in his own proper person, complains of C. D. who has been *summoned* to answer the said A. B. [*or* "who has been arrested at the suit of the said A. B."] For that, &c.

10. Do. in a second action after a plea in abatement of the nonjoinder of a defendant. (x) In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —. — to wit. A. B., by E. F. his attorney [*or* "in his own proper person,"] complains of C. D. and G. H., who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H. For that, &c.

11. Occasional commencement in debt. (y) In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —. — to wit. A. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff in an action of debt, and the plaintiff demands of the said defendant the sum of £ —, which he owes to (z) and unjustly detains from him. For that, &c.

12. Occasional commencement in detinue and debt. In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —. — to wit. A. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff in an action of detinue and debt; and the plaintiff demands of the defendant certain goods and chattels, [*or* "deeds and writings," *according to the subject matter of the claim*] of the value of £ —, which he unjustly detains from him; and also the sum of £ —, which he owes to and unjustly detains from him. For that, &c.

13. Commencement of a declaration by the assignee of a sheriff on bail bond. In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —. — to wit. A. B., assignee of E. F. Esq., sheriff, [*or* "late sheriff"] of the county of —, according to the form of the statute in such case made and provided, by Y. Z. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the said A. B. For that, &c. [*See full form of declaration, post, debt on bail bond, and conclude as*

(x) This form is prescribed by the rules, Hil. Term, 4 W. 4, r. 20, which provides that in all cases under the 3 & 4 Will 4, c. 42, s. 10, which, after a plea in abatement of the nonjoinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the above form. The counts and conclusion of the declaration are the same as if the action had originally been brought against all the parties pleaded to have

been joint contractors.

(y) When the declaration contains several counts for different debts, and the commencement of the declaration states the *aggregate* of all the sums afterwards demanded, a misstatement of the amount is not demurrable or material, for it may be rejected as surplusage. *Lord v. Houstoun*, 11 East, 62, 65; 1 Hen. Bla. 249; *Verney v. Iddings*, 2 Chitty's Rep. 234.

(z) At the suit of an executor or administrator, the words "owes to" should technically be omitted, but if introduced they would not constitute any ground of demurrer or irregularity, as they may be rejected as surplusage. *Collett v. Collett*, 3 Dowl. 211.

follows] To the damage of the plaintiff, as such assignee, of £50, and therefore he brings suit, &c.

IN THE SUPERIOR COURTS.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., who sues as well for our sovereign lady the queen [*or* "for the poor of the parish of — in the county of —"] as for himself in this behalf, by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the said A. B. who sues as aforesaid (*a*). For that, &c.

And thereupon, as well for our said lady the queen [*or* "for the poor of the said parish of —"] as for himself in this behalf, he brings suit, &c. (*b*)

14. Commencement of a declaration in debt *qui tam*.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., at whose suit a writ of summons was issued in this cause by the name of E. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the said A. B. For that, &c.

15. Do. by a plaintiff who has been sued by a wrong name.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of John Atkins, who has been summoned by a writ of summons by the names of James Atkins, to answer the said A. B., but who has thereupon duly appeared in this action at the suit of the said A. B. in the said name of John Atkins, sued by the name of James Atkins. For that, &c.

16. Do. against a defendant sued by a wrong name. (*c*)

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the said A. B. and Y. Z. since deceased; and now on this day, that is to say, on the — day of — A. D. —, the said A. B., by his attorney aforesaid, comes and gives the Court here to understand and be informed, that the said C. D. was so summoned by virtue of a writ of summons issued out of the said Court on the — day of — last against the said C. D. at the suit of the said A. B. and the said Y. Z.; and that since the issuing of the said writ, and before this day, to wit, on the — day of —, A. D. —, the said

17. Do. by a surviving plaintiff where his co-plaintiff died between writ and declaration. (*d*)

(*a*) In an action of debt *qui tam* it is usual, though unnecessary, here to add "in an action of debt," and the plaintiff demands of the defendant the sum of £—, [*the aggregate of the sums afterwards claimed,*] which he owes to and unjustly detains from our said lady the queen [*or* "the poor of the said parish,"] and the plaintiff who sues as aforesaid." For that, &c.

(*b*) In a declaration by a common informer, who is not entitled to damages for the detention of the penalty, the declaration must not conclude *ad damnum*; 4 Burr. 2021, 2496; 1 *Nash*, 180.

(*c*) This form is proper when the defendant

has entered his appearance in his right name, and to save the expense of an application to a judge under 3 & 4 W. 4, c. 42, s. 11. Where a plaintiff has sued a defendant by his wrong christian name, but has declared against him by his right christian name, the proceeding is regular since the 3 & 4 W. 4, c. 42, s. 11; *Hobson v. Wadsworth*, 8 Dowl. P. C. 601. As to the effect of a misnomer, see *Williams v. Bryant*, 7 Dowl. P. C. 502.

(*d*) The 8 & 9 W. 3, c. 11, s. 7, seems to render it proper to state the death at the earliest stage of a cause after it happened. See *Chitty's Col. Stat.* 2; 1 Burr. 362; *Rex v. Cohen*, 1 Stark. Rep. 611.

IN THE SUPERIOR COURTS.

Y. Z. died, and the said A. B. then survived him : (e) and thereupon the said A. B., by his attorney aforesaid, complains. For that, &c. [*laying all the promises to have been made and causes of action to have accrued to the plaintiff and the deceased party, and concluding* "that the defendant still refuses to pay to the plaintiff, to his damage of £—; and thereupon he brings suit, &c."

18. Do. against a surviving defendant, where the deceased died between writ and declaration. (f)

In the Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas."*]

On the — day of — A. D. —.

— to wit. A. B., by E. F. his attorney, [*or "in his own proper person,"*] complains of C. D., who together with G. H. has been summoned to answer the said C. D., and which said G. H., since the issuing of the writ of summons in this suit against the said C. D. and the said G. H., and before this day, to wit, on the — day of —, A. D. —, died, and the said C. D. then survived him ; (g) and thereupon the said A. B., by his attorney aforesaid, complains against the said C. D. For that, &c.

19. Do. where one of the defendants has been outlawed. (h)

In the Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas."*]

On the — day of — A. D. —.

— to wit. A. B., by E. F. his attorney, [*or "in his own proper person,"*] complains of C. D., who has been summoned to answer the said A. B. ; and thereupon the said A. B. by his said attorney complains. For that whereas the said C. D. and one G. H., which said G. H. by due course of law has been outlawed [*or, if a woman, say "waived"*], at the suit of the said A. B. in this action, (i) and still remains so outlawed (k) [*or "waived"*], on, &c. were indebted, &c. [*State the promises and breach by both the defendants, and conclude, stating* "that the said C. D. and G. H. wholly refused, and the said C. D. still doth refuse, to the damage of the said A. B. of £—; and thereupon he brings suit," &c.

II. RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED.

1st. SURVIVING PARTNERS.

20. Do. by a surviving partner. (l)

In the Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas."*]

On the — day of — A. D. —.

— to wit. A. B., who hath survived one E. F. hereinafter mentioned, by G. H. his attorney, [*or "in his own proper person,"*] complains of C. D., who has been summoned to answer the plaintiff. For that whereas, &c.

(e) The forms used here to add, "which the said C. D. doth not deny, but admits the same to be true ;" but such statement in a declaration seems premature and improper.

(f) See *supra*, note (d).

(g) *Id. ibid.*

(h) This precedent was taken from Impey's *Prac. K. B.* 7th ed. 599 ; 8th ed. 588 ; and see *Brownl. Red.* 197 ; *Lil. Ent.* 20 ; 1 *Brownl.* 20 ; and has been applied to proceeding to outlawry since the Uniformity of Process Act, 2 W. 4, c. 39 ; and see the proceedings to outlawry in general, 3 Chitty's *Gen. Prac.* by Lush, 251 to 254.

(i) It has been held that the declaration

must show an outlawry in the present suit, 3 East, 144 ; 15 East, 1 ; but need not refer to the record of outlawry, 7 East, 50. As to a plea denying the outlawry, see 1 East, 634.

(k) In an action against acceptors of a bill, one of whom has been outlawed, introduce this averment of outlawry, after statement of the direction of the bill to the defendants. See a declaration against one executor after outlawry of the others, *Lil. Ent.* 20.

(l) The plaintiff must sue as surviving partner ; 4 B. & A. 374 ; 6 J. B. Moore, 332 ; 2 Stark. 356. See 2 Marsh. 319 ; 6 Taunt. 697, S. C.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

IN THE SUPERIOR COURTS.

On the — day of — A. D. —.

— to wit. A. B., by G. H. his attorney, [*or* "in his own proper person,"] complains of C. D., who hath survived one E. F. hereinafter mentioned, and who has been summoned to answer the plaintiff. For that whereas, &c.

21. Do. against a surviving partner. (m)

2nd. HUSBAND AND WIFE.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B. and C. his wife, by Y. Z. their attorney, [*or* "in their own proper person,"] complain of D. E., who has been summoned to answer the plaintiffs. For that whereas, &c.

22. Do. by husband and wife. (n)

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by Y. Z. his attorney, [*or* "in his own proper person,"] complains of C. D. and E. his wife, who have been summoned to answer the plaintiff. For that, &c.

23. Do. against husband and wife. (o)

3rd. BY ASSIGNEES OF A BANKRUPT. (p)

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B. and C. D., assignees of the estate and effects of E. F. a bankrupt, according to the statutes in force concerning bankrupts, by Y. Z. their attorney, [*or* "in their own proper persons,"] complain of G. H., who has been summoned to answer the plaintiffs. For that, &c.

24. Do. by assignees of a bankrupt.

To the damage of the said plaintiffs, as assignees as aforesaid, of £—; Conclusion, and thereupon they bring suit, &c.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., C. D. and E. F. (the said A. B. and C. D. being assignees of the estate and effects of L. M. a bankrupt, according to the statutes in force concerning bankrupts,) by Y. Z. their attorney, complain of G. H., who has been summoned to answer the plaintiffs. For that, &c.

25. Do. by one partner and the assignees of another.

(m) The defendant need not be declared against as surviving partner; 1 B. & A. 29; 2 Chitty's Rep. 406.

(n) Whenever the wife joins, her interest in the debt or claim must appear; 2 Bla. Rep. 1236. How to sue, and when husband and wife may join, see ante, vol. i. See a form at the suit of baron and feme sole trader, 1 Wentw. 381.

(o) See form, Lil. Ent. 27. No count on a promise by the feme or by the husband during the coverture should be added; 1 Taunt. 212; Palm. 313. As to when husband and wife should jointly sue, see ante, vol. i.

(p) The pleading rules of Hil. T. 4 W. 4, expressly declare that the representative character of plaintiffs as assignees shall not be

deemed as in issue, unless specially denied by plea, Reg. 31. See forms, Morg. Prec. 453; Plead. Assist. 311; 2 Rich. C. P. 80, 93; Lil. Ent. 41. As to how assignees should sue when there are different fiats, &c. see ante, vol. i. It is sufficient if assignees of a bankrupt or insolvent declare so as to make it appear that they are assignees. It is not requisite to allege that they sue "as assignees;" *Fergusson and another v. Mitchell*, 1 Tyr. & Gr. 179.

The trustee or assignee of a bankrupt under the Scotch Sequestration Acts have no power to sue in this country on a *chose in action*; 4 D. & R. 669; 6 M. & S. 126. The precedent therefore on this head, inserted in some prior editions of this work, is omitted.

IN THE SUPERIOR COURTS.

26. Do. by assignees of two or more bankrupts, under several fiats, to recover a debt due to the joint estate. (q)
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —.
- to wit. A. B. and C. D., assignees of the estate and effects of I. K. a bankrupt, under and by virtue of a fiat in bankruptcy duly issued and awarded against the said I. K., and E. F. and G. H. assignees of the estate and effects of L. M. a bankrupt, under and by virtue of a fiat in bankruptcy duly issued and awarded against the said L. M. according to the statutes in force concerning bankrupts, by — their attorney, complain of O. P. who has been summoned to answer the said plaintiff's. For that whereas, &c.
- [By the provisional syndics of the estate and effects of a French bankrupt, *see Alison, jun. v. Beavain, 4 Tyr. 751.*]

4th. BY THE ASSIGNEE OF AN INSOLVENT DEBTOR. (r)

27. Do. by the assignee of an insolvent debtor.
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —.
- to wit. A. B., assignee of the debts, estate and effects of C. D., heretofore an insolvent debtor, according to the statutes in force for the relief of insolvent debtors in England, by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the said A. B. as assignee as aforesaid. For that whereas, &c.
28. Do. by the assignee of an insolvent after the removal of the first assignee by the Insolvent Court.
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —.
- to wit. R. B., assignee of all the debts, estate and effects of T. A., an insolvent debtor, according to the statutes in force for the relief of insolvent debtors in England, left unsettled, undisposed of, and not applied by one A. N., heretofore assignee of the debts, estate and effects of the said T. A., the said A. N. having been removed from such trust and office as assignee as aforesaid, and the said R. B. appointed in his stead, by E. F. his attorney, [*or* "in his own proper person,"] complains of R. S., &c. [*Proceed as usual as in other actions at the suit of an assignee.*]

5th. BY AND AGAINST EXECUTORS.

29. Do. by an executor.
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —.
- to wit. A. B., executor of the last will and testament of E. F. deceased, by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff. For that whereas, &c.
30. Do. against an executor. (s)
- In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] On the — day of — A. D. —.
- to wit. A. B., by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D., executor of the last will and testament of G. H. deceased, who has been summoned to answer the said A. B. For that, &c.

(q) See *ante*, vol. i.; 2 J. B. Moore, 3.(r) As to what is evidence of the date of the vesting order, and of the time when the assignee's title accrued, see *York v. Brown*, 2

Dowl. N.R. 283.

(s) See forms, 2 Rich. C. P. 142; Plead. Assist. 9, 346; Lil. Ent. 26, 27, 50.

[See 1 *Saund.* 112, n. 1, 2. *The form is the same against an executor de son tort,* 1 *Saund.* 265. *In debt, whether by or against an executor or administrator, omit the words "owes to and," although the untechnical insertion of them is not ground of demurrer; Collett v. Collett, 3 Dowl. 211.* IN THE SUPERIOR COURTS.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."] 31. Do. by an
On the — day of — A. D. —. executor against
an executor.

— to wit. A. B., executor of the last will and testament of E. F. deceased, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., executor of the last will and testament of G. H. deceased, who has been summoned to answer the plaintiff. For that, &c.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."] 32. Do. by the
On the — day of — A. D. —. executor of an
executor.

— to wit. A. B., executor of the last will and testament of E. F. deceased, which said E. F. in his lifetime and at the time of his death was executor of the last will and testament of G. H. deceased, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., who has been summoned to answer the said A. B. For that, &c.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."] 33. Do. by a
On the — day of — A. D. —. surviving
executor.

— to wit. A. B., surviving executor of the last will and testament of one E. F. deceased, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff. For that whereas, &c.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."] 34. Do. against
On the — day of — A. D. —. a surviving
executor.

— to wit. A. B., by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., surviving executor of the last will and testament of G. H. deceased, who has been summoned to answer the plaintiff. For that whereas, &c.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."] 35. Do. by hus-
On the — day of — A. D. —. band and wife,
the wife being
executrix.

— to wit. A. B. and C. his wife (which said C. is executrix of the last will and testament of one G. H. deceased), by Y. Z. their attorney, [or "in their own proper person,"] complain of E. F., who has been summoned to answer the plaintiffs. For that whereas, &c.

To the damage of the said A. B. and C. his wife, as executrix as aforesaid, of £—; and thereupon they bring suit, &c.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."] 36. Do. against
On the — day of — A. D. —. husband and
wife, the wife
being executrix.

— to wit. A. B., by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D. and E. his wife, which said E. is executrix of the last will and testament of F. G. deceased, and who have been summoned to answer the plaintiff. For that whereas, &c.

COMMENCEMENTS AND CONCLUSIONS

IN THE SUPRE-
MION COURTS.

37. Conclusion
and profert by
an executor. (s)

To the plaintiff's damage, as such executor as aforesaid, of £—; and thereupon he brings suit, &c. And the plaintiff brings into Court here the letters testamentary of the said E. F. deceased, whereby it fully appears to the Court here that the plaintiff is executor of the said last will and testament of the said E. F. deceased, and hath the execution thereof, &c.

38. Profert by
the executor of
an executor.

And the said plaintiff brings into Court here as well the letters testamentary of the said E. F. deceased, as the letters testamentary of the said G. H. deceased, whereby it fully appears to the said Court here that the said E. F. in his life time was executor of the last will and testament of the said G. H. deceased, and that the said A. B. is executor of the last will and testament of the said E. F., deceased, and hath the execution of the last wills and testaments of the said E. F. and G. H. respectively, &c.

39. Profert by a
surviving exe-
cutor.

And the plaintiff brings here into Court the letters testamentary of the said E. F. deceased, whereby it fully appears to the said Court that the plaintiff and G. H., in the lifetime of the said G. H., were executors of the last will and testament of the said E. F., deceased; with this, that the plaintiff will verify that the said G. H. is deceased, and that he the plaintiff hath thereby become and is the surviving executor of the last will and testament of the said E. F., deceased, and hath the execution thereof, &c.

6th. BY AND AGAINST ADMINISTRATORS.

40. Commence-
ment of declara-
tion by an ad-
ministrator.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., administrator of all and singular the goods, chattels and credits which were of E. F., deceased, at the time of his death, who died intestate, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff. For that whereas, &c.

41. Do. against
an adminis-
trator.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., administrator of all and singular the goods, chattels and credits which were of E. F., deceased, at the time of his death, who died intestate, and who has been summoned to answer the plaintiff. For that whereas, &c.

42. Do. by an
administrator
against an ad-
ministrator. (t)

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B. administrator of all and singular the goods and chattels, rights and credits which were of one E. F., deceased, at the time of his death, who died intestate, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., administrator of all and singular the goods, chattels and credits which were of G. H., deceased, at the time of his death, who

(s) This profert is not necessary until declaration; and the omission of profert is

only ground of special demurrer.

(t) See a precedent Plead. Assist. 369, &c.

died intestate, and who has been summoned to answer the plaintiff. For that, &c. IN THE SUPERIOR COURTS.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 43. Do. by a surviving administrator.
On the — day of — A. D. —.

— to wit. A. B., surviving administrator of all and singular the goods, chattels and credits which were of one E. F., deceased, at the time of his death, who died intestate, by Y. Z. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff. For that whereas, &c.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 44. Do. against a surviving administrator.
On the — day of — A. D. —.

— to wit. A. B., by Y. Z. his attorney, [*or* "in his own proper person,"] complains of C. D., surviving administrator of all and singular the goods, chattels and credits, which were of one E. F., deceased, who died intestate, and which said C. D. has been summoned to answer the plaintiff. For that whereas, &c.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 45. Do. by husband and wife, the wife being administratrix.
On the — day of — A. D. —.

— to wit. A. B. and C. his wife (which said C. is administratrix of all and singular the goods, chattels, rights and credits, which were of D., deceased, at the time of his death, who died intestate), by Y. Z. their attorney, complain of E. F., who has been summoned to answer the plaintiff. For that whereas, &c.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 46. Do. against husband and wife, the wife being administratrix.
On the — day of — A. D. —.

— to wit. A. B., by Y. Z., his attorney, [*or* "in his own proper person,"] complains of C. D. and E. his wife (which said E. is administratrix of all and singular the goods, chattels and credits which were of one G. H., deceased, at the time of his death, who died intestate,) and which said C. D. and E. have been summoned to answer the plaintiff. For that whereas, &c.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 47. Do. by an administrator de bonis non, with the will annexed.
On the — day of — A. D. —.

— to wit. A. B. administrator, with the last will and testament of G. C. deceased, annexed, of all and singular the goods and chattels, rights and credits which were of the said G. C., deceased, at the time of his death, left unadministered by W. B. and E. S. in their lifetime, now respectively deceased, and which said W. B. and E. S. in their lifetime were the executors of the last will and testament of the said G. C. deceased, by Y. Z. his attorney, [*or* "in his own proper person,"] complains of C. D., who has been summoned to answer the plaintiff. For that, &c.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."] 48. Do. against an administrator de bonis non, with the will annexed.
On the — day of — A. D. —.

— to wit. A. B. by Y. Z., his attorney, [*or* "in his own proper person,"] complains of C. D., administrator of all and singular the goods, chat-

IN THE SUPERIOR COURTS.

tels and credits which were of one E. F., deceased, at the time of his death left unadministered by G. H. in his lifetime, now also deceased, and which said G. H. in his lifetime, and at the time of his death, was the executor of the last will and testament of the said E. F. deceased, with the will of the said E. F. annexed, and which said C. D. hath been summoned to answer the said plaintiff. For that whereas, &c.

49. Do. by an administrator durante minority.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., administrator of all and singular the goods, chattels and credits, which were of G. H. deceased, at the time of his death, during the minority of E. F., an infant under the age of twenty-one years, who is executor of the last will and testament of the said G. H. deceased, by Y. Z. his attorney, complains of C. D., who has been summoned to answer the plaintiff. For that &c. [*proferat as in the common form, post, 25, and then proceed as follows:*] with this, that the plaintiff will verify that the said E. F. is still an infant within the age of twenty-one years, to wit, of the age of — years.(u)

50. Do. by an administrator limited until the original will, or a copy thereof, be brought into the Archbishop's Court.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., administrator of all and singular the goods, chattels and credits of E. F. deceased, limited until the original last will and testament of the said deceased, or an attested copy thereof, should be brought into and left in the registry of the Court of the Registry of the Archbishop of Canterbury, Primate of all England and Metropolitan, and letters of administration to the same annexed of all and singular the goods, chattels and credits of the deceased, should be applied for and granted by the same Court, but no further or otherwise, or in any other manner, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., who has been summoned to answer the said plaintiff. For that whereas, &c. [*as usual in other actions at the suit of an administrator, see forms, post.*] Yet &c. [*as post,*] nor to the plaintiff after the death of the said E. F. (to which said plaintiff, after the death of the said E. F., to wit, on &c. administration of all and singular the goods, chattels and credits, which were of the said C. D. at the time of his death, limited until the original, &c. [*as above*] by — was granted.) To the damage of the said plaintiff as administrator as aforesaid, and thereupon he brings suit, &c., with this, that the original last will and testament of the said deceased, or any authentic or other copy thereof, hath not yet been brought into or left in the Registry of the Court of the Registry of the Archbishop of Canterbury, nor have letters of administration, with the will annexed, of all and singular the goods, chattels and credits of the said deceased, been applied for or granted by the same Court, and the said letters of administration so granted to the said plaintiff are now in full force and effect.

51. Conclusion

To the end of all the counts in the declaration preceding the general breach,

(u) Before the 38 Geo. 3, c. 87, s. 6, a person might have acted as an executor at seventeen years, *Freke v. Thomas*, 1 Salk. 39; but by that statute it is enacted that where an

infant is sole executor, probate shall not be granted until he shall attain the full age of twenty-one years.

and then as follows :]—And the plaintiff saith, that after the death of the said E. F., to wit, on the — day of — A. D. — [*date of the grant*], administration of all and singular the goods, chattels and credits, which were of the said E. F. deceased, at the time of his death, who died intestate, by William [*christian name of the existing archbishop*], by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, (y) in due form of law was granted in this behalf: Yet the defendant hath disregarded his promises, and hath not paid any of the said monies or any part thereof: To the plaintiff's damage as administrator as aforesaid of £ — ; and thereupon he brings suit, &c. : And the plaintiff brings here into Court the letters of administration of the said archbishop [*or "bishop," as the case may be*], which give sufficient evidence to the Court here of the grant of administration to the plaintiff as aforesaid, and the date whereof is the day and year aforesaid.

IN THE SUPERIOR COURTS.

and profert by an administrator. (x)

To the end of the general breach stating nonpayment of monies, and concluding, "To the damage of the plaintiff as administrator as aforesaid of £—, and thereupon he brings suit, &c." and then as follows :]—And the plaintiff brings here into Court the letters of administration of all and singular the goods, chattels and credits which were of the said G. H., deceased, at the time of his death, and which said letters of administration were, after the death of the said G. H., to wit, on the — day of —, A. D. —, granted to the plaintiff by William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, in due form of law. And which said letters of administration give sufficient evidence to the Court here of the grant of administration to the said plaintiff as aforesaid, and the date whereof is the day and year last aforesaid.

52. The like in another form.

Same as above.] Was granted to the plaintiff by J. S. L. Clerk, Master of Arts, Commissary and Official Principal of the Right Reverend Father in God, John Bird, by Divine permission Lord Bishop of Chester, in and throughout the whole archdeaconry of Richmond, in the diocese of Chester, lawfully constituted (to whom the granting of administration in that behalf of right belonged) in this behalf.

53. Statement of grant by vicar-general of the Bishop of Chester.

And the plaintiff brings into Court here the letters of administration of the said archbishop [*or "bishop"*], which give sufficient evidence to the Court here of the grant of administration to the plaintiff and the said G. H. deceased, as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above-mentioned: with this, that the plaintiff will verify that the said G. H. is deceased, and that he

54. Profert by a surviving administrator.

(x) See the older forms, Lil. Ent. 165, 166, 369; and as to administration by a diocese, Com. Rep. 17. Formerly in an action of assumpsit the statement of the grant of letters of administration was introduced as part of the general concluding breach, see 2 Chitty on Pleadings, 5th edit. 35 a; and Petersdorf's Proc. 32, 33, 34, and the forms ante. But it is now considered preferable to state them in an independent averment, as in this

precedent.

(y) The description is to be taken from the grant of the administration. If the administration was granted by the vicar-general and official principal of a bishop, instead of the words "by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan," say, "by A. B. vicar-general and official principal of the Lord Bishop of Chester," as in next form but one.

IN THE SUPERIOR COURTS.

the plaintiff hath thereby become and is the surviving administrator as aforesaid, &c.

55. Profert by an administrator de bonis non of an administrator. (s)

And the plaintiff brings into Court here the letters of administration of the said archbishop, which give sufficient evidence to the said Court here of the grant of administration to E. F. as aforesaid, as also the letters of administration of the said archbishop, after the death of the said E. F., to the plaintiff as aforesaid, which give sufficient evidence to the Court here of the grant of administration to the plaintiff as aforesaid, the respective dates whereof are the days and years aforesaid in that behalf.

56. Profert by administrator de bonis non with the will annexed.

And the plaintiff brings into Court here the letters of administration of the said "archbishop," [or "bishop,"] which give sufficient evidence to the Court here of the grant of administration to the plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned.

57. Profert by an administrator with the will annexed.

And the plaintiff brings here into Court the letters testamentary of the said G. C., deceased, whereby it fully appears that the said W. B. and E. S. were executors of the last will and testament of the said G. C., and in their life time had the execution thereof, and the plaintiff brings here into Court the letters of administration of — [as in the grant] after the death of the said W. B. and E. S. to the plaintiff as aforesaid, which give sufficient evidence to the Court here of the grant of administration to the plaintiff as aforesaid, the respective dates whereof are the days and years aforesaid in that behalf.

7th. BY AND AGAINST CLERKS, TREASURERS, TRUSTEES, AND PUBLIC OFFICERS APPOINTED TO SUE AND BE SUE BY STATUTE.

58. Commencement of declaration by a clerk or treasurer to trustees, &c. empowered to sue under a statute.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., clerk [or "treasurer"] to the trustees for putting into execution and acting under and by virtue of a certain act of parliament, made and passed in the — year of the reign of her present Majesty [or "late Majesty King — the —,"] intituled (a) "An Act," &c. [here set out the title of the act. If the authority to sue be under more than one statute, then, after stating the title of the first act, say, "and of a certain other act of parliament made and passed in the — year of the reign of, &c."] according to the force, form and effect of the said statute [or "statutes"], by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D. who has been summoned to answer the said plaintiff. For that, &c. [state the promises or causes of action to have been made with, or to have accrued to "the said trustees," and conclude thus:] To the damage of the said trustees of £—; and therefore the said plaintiff as clerk, [or "treasurer,"] as aforesaid, according to the said statute, [or "statutes,"] brings suit, &c.

(s) The production of this profert is sufficient evidence without production of the original grant to the deceased administrator; 1 B. & C. 150.

(a) The misrecital of the title of an act does not vitiate the declaration; *Chance v. Adams*, 1 Lord Raym. 77; *Nixon v. Nanney*, 1 G. & D. 373.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

IN THE SUPERIOR COURTS.

On the — day of — A. D. —.

— to wit. A. B., clerk [*or* "treasurer"] to a certain company called the — company, according to the force, form and effect of a certain act of parliament made and passed in the — year of the reign of her present Majesty [*or* "his late Majesty King — the—"], by Y. Z. his attorney, complains of C. D., who has been summoned to answer the said plaintiff. For that, &c. [*State the debt or cause of action to have accrued to* "the said company," *and conclude thus:*] To the damage of the said company of £—; and therefore the said A. B. as clerk, [*or* "treasurer,"] as aforesaid, according to the said statute, brings suit, &c.

59. Do. by clerk or treasurer to a company, empowered to sue under a statute.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., by Y. Z. his attorney, [*or* "in his own proper person,"] complains of C. D., clerk [*or* "treasurer"] to the trustees for putting into execution, &c. and acting under and by virtue of a certain act of parliament made and passed, &c., and intituled, &c., and who has been summoned to answer the said A. B. For that, &c. [*stating the promises or causes of action to have been made by or accrued against* "the said trustees."]

60. Do. against such clerk or treasurer.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B. and C. D., stewards and trustees of a certain friendly society, commonly called —, held at, &c. [*according to the fact*], by Y. Z. their attorney, complain of E. F., who has been summoned to answer the said plaintiffs. For that, &c.

61. Do. by the trustees of a friendly society.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B., one of the present registered public officers of certain persons united in copartnership for the purpose of carrying on and carrying on the trade and business of bankers in England, under the name, style or firm of —, according to the provisions of the statute made and passed in the 7th year of the reign of his late Majesty King George the Fourth, for the better regulating of copartnerships of certain bankers in England, and which said A. B. hath been duly nominated and appointed, and before and at

62. Do. by one of the public officers of a banking company under 7 G. 4. c. 46. (b)

(b) The declaration must allege that the copartnership carried on business as bankers; *Fletcher v. Crobbie and others*, 9 M. & W. 252; 1 Dowl. N. R. 149, S. C.; but it is sufficient to describe the plaintiff as the duly appointed public officer of the company without averring that the requisites of the stat. 7 Geo. 4 have been complied with; so it is sufficient to state that the plaintiff is the manager duly named and appointed as the nominal plaintiff on behalf of the copartnership, without stating expressly that he has been named as manager, or that the copartnership has been established under the provisions of the act; *Christie v. Peart*, 7 M. & W. 491.

As to public officers suing where there has been a change in the name of the bank,

see *Wilson v. Craven*, 8 M. & W. 584.

An allegation, in a plea to a count on a bill of exchange, that the plaintiffs were a banking company consisting of more than six persons, and that they were illegally associated together under 3 & 4 W. 4, c. 98, is compounded of law and fact, and therefore traversable; *Ransford v. Copeland*, 6 A. & E. 482; 1 N. & P. 671, S. C.; where see a form of plea and replication in such case.

As to the powers of the copartnership to sue any of its members, and the power of a member to sue the copartnership, see 1 & 2 Vic. c. 96, continued by 2 & 3 Vic. c. 68, and 3 & 4 Vic. c. 111, and made perpetual by the 5 & 6 Vic. c. 85.

IN THE SUPERIOR COURTS.

the time of the commencement of this suit was and now is, one of the public officers of the said copartnership, and, according to the force, form and effect of the said act of parliament, entitled to sue for and on behalf of the said copartnership, by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., who has been summoned to answer the said plaintiff as such public officer as aforesaid. For that, &c. [*laying the debt and promise "to the copartnership," and concluding as follows:*] To the damage of the said copartnership of £—; and thereupon the plaintiff as such public officer as aforesaid, by virtue of the said statute, brings suit, &c.

63. Do. against one of the public officers of a banking company. (c)

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of — A. D. —.

— to wit. A. B. by Y. Z. his attorney, [or "in his own proper person,"] complains of C. D., one of the public officers, &c. [*as in the last form, except that instead of stating him entitled to sue, state him entitled to be sued*] and which said C. D., as such public officer as aforesaid, has been summoned to answer the plaintiff. For that, &c. [*stating all the debts and promises from the company, and concluding "To the damage of the plaintiff of £—; and thereupon by virtue of the said statute the plaintiff brings suit against the defendant, as such public officer as aforesaid."*]

(c) On a judgment against the registered public officer of a banking company, execution may issue against him without a scire facias; *Harwood v. Law*, 8 Dowl. 899; 7 M. & W. 203, S. C.; but in order to proceed to execution against a particular partner, not being such officer, a scire facias is necessary; *Bossanquet v. Ransford*, and *Paulot and another v. Law*, 11 A. & E. 520; *Whittenbury v. Law*, 6 Bing. N. C. 345.

Where it is intended to proceed against parties who were members of the company at the time of judgment, a scire facias may be issued without leave of the Court, but where it is sought to affect those who were members at the time of making the contract and not at

the time of judgment, the leave of the Court must be obtained for that purpose; *Cross and others v. Law*, 8 Dowl. 789. See form of declaration in scire facias, *post*, and 9 Dowl. 682.

When a plaintiff has recovered judgment and sued out a fruitless execution against the public officer of a banking company, the Court will not give the plaintiff leave to proceed against former members by scire facias under the 13th section of the statute, unless it be made to appear that he has really and bona fide attempted to enforce the judgment against the members for the time being; *Eardley v. Law*, 4 P. & D. 379; 12 A. & E. 802, S. C.

MODELS OF CONCISENESS

IN

DECLARATIONS IN ASSUMPSIT AND DEBT

AS PRESCRIBED BY REG. GEN. TRINITY TERM, 1 W. 4,
AND REG. GEN. HILARY TERM, 4 W. 4.

REG. GEN.
TRIN. T. 1 W. 4.

Observations on
these in general.

THE very great and important improvements in the *Forms of Pleadings* are attributable principally to the statutes 11 G. 4 & 1 W. 4, c. 70, s. 11, and 3 & 4 W. 4, c. 42, s. 1, and to the general Rules of Trinity Term, 1 W. 4, and Hilary Term, 4 W. 4. It should be understood by all practitioners that the excellent concise forms of declaration in *assumpsit* and *debt*, prescribed in the Reg. Gen. 1 Will. 4, were intended by the judges as *models* for imitation not only in those particular instances, but also on all other occasions when they could possibly be applied. The late Lord Tenterden, certainly the most distinguished pleader and lawyer of his time, honoured the author by delivering to him a copy of those rules in manuscript, and requesting him, with a view to conciseness, to strike out every allegation, *even to a word*, the omission of which would not subject either of the forms to a *sustainable special demurrer*; and in consequence the author suggested some few abbreviations, which he has the satisfaction of knowing were adopted when the rules were ultimately promulgated. According to the examples given in those rules, it would suffice in all cases, in describing a contract not under seal, to state that the *defendant promised*, without as heretofore using and repeating the words "*undertook and then and there faithfully promised*." It will be observed that the length of the *indebitatus counts* are by the same rule very materially shortened; and although there is no express enactment or rule prohibiting the use of the *quantum meruit* or *quantum valebant* counts, yet their use is *impliedly* to be abandoned, especially as the Reg. Gen. Hil. Term, 4 W. 4, prohibits any second count on the same subject of debt, and it is manifest that the *indebitatus* count was always sufficient, and the *quantum meruit* or *valebant* counts were unnecessary, (2 Saunders' Rep. 122 a, note 2,) and now it would be improper to attempt to introduce either of those counts; and consequently many of the forms in the fifth edition of this work are entirely useless, though it is singular that the learned commentator, Sir William Blackstone, enumerated those very counts as instances of the use of a second count to prevent a nonsuit on an *indebitatus* count, in consequence of the plaintiff's inability to prove a contract to pay a *fixed price* for work or goods, a doctrine that has changed by decision and not by express enactment.

As the forms prescribed by Reg. Gen. Trin. Term, 1 W. 4, were certainly intended as *models or examples to be extended* and applied much beyond the instances, and as far as practicable to other cases, it is considered advisable here to give them at length as proper subjects of constant reference. Some

REG. GEN.
TRIN. T. 1 W. 4.

notes are subscribed to those forms, in which it is attempted to show that even some of the statements suffered to continue in the promulgated forms, might safely be omitted, on the principle that the *omission* would not subject the declaration to a special demurrer. It is further to be observed, that the Reg. Gen. Trin. Term, 1 W. 4, was promulgated at a time when, according to the existing law, it was absolutely necessary to *repeat place or venue*, as well as time, to every new allegation; see 14 East's Rep. 300; and 11 Price, 400. By the subsequent General Pleading Rule of Hil. Term, 4 W. 4, *venue* is alone to be stated in the *margin*, and is *not to be repeated* in the *body*, and though the repetition would not be demurrable, yet it might be the subject of an application by summons to strike out the useless and now improper repetition of venue or place; and therefore throughout the following prescribed forms venue or place in the body of the counts has been erased.

REGULA GENERALIS.

TRINITY TERM, 1 WILLIAM IV. 1831.

Recites that declarations on bills, notes and common counts, may be drawn concisely, and orders that if any declaration in assumpsit or debt for demands mentioned in the schedule of forms, or demands of a like nature, shall exceed the length of the form applicable to the case, plaintiff's attorney shall have no costs of the excess, but shall defray the same. (a)

Whereas declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion *unnecessary* expense to parties by reason of their length, and the same may be drawn in a more concise form; now, for the prevention of such expense, It is ordered, that if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or *demands of a like nature*, (a) shall exceed in length such of the said forms set forth or directed in the said schedule as may be applicable to the case; or if any declaration *in debt* to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as shall have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN.	J. VAUGHAN.
N. C. TYNDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.

(a) The words in this rule, "or demands of a like nature," and the direction as to drawing *foreign* bills, established that these particular forms are merely given as a few

instances, and that in *all other cases*, at least of *common debts*, it is intended that the pleadings may and ought to be framed in the like concise manner.

SCHEDULE OF FORMS AND DIRECTIONS. (b)

REG. GEN.
TRIN. T. 1 W. 4.

For that whereas the defendant, on the — day of —, in the year of our Lord —, made his promissory note in writing, *and delivered the same to the plaintiff*, and thereby promised to pay to the plaintiff £—, — days [or “weeks,” or “months,”] after the date thereof, [or *as the fact may be*] which period has now elapsed, [or *if the note be payable to A. B.*] and then delivered the same to A. B., and thereby promised to pay the said A. B., or order, £—, — days [or “weeks,” or “months,”] after the date thereof, [or *as the fact may be*], which period has now elapsed, and the said A. B. then indorsed the same to the plaintiff, *whereof the defendant then had notice*, and then in consideration of the premises promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

1. Count on a promissory note against the maker, by payee or indorsee, as the case may be.

Indorsee against maker.

Whereas (c) one C. D., on the — day of —, in the year of our Lord —, made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days [or “weeks,” or “months,”] after the date thereof, [or *as the fact may be*], which period has now elapsed, and the defendant then indorsed the same to the plaintiff, [or “and the defendant

2. Count on a promissory note against payee by an indorsee.

(b) It will be found that the following forms considerably diminish the usual length of counts of this nature, by omitting the long-used formal modes of stating each fact; such as in stating an acceptance—“and which said bill of exchange the said defendant afterwards, to wit, on the day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants from time immemorial used and approved of;” and which is now to be thus shortly stated—“and the defendant then accepted the said bill,” and so on. The concise mode of stating an indorsement, which has long been recommended and partially used, (see Chitty on bills, 7th ed. 474,) is now enjoined.

But even in some of these prescribed forms there are unnecessary allegations; as in the 1st, 3d, 5th, 8th, and 11th forms, which state unnecessarily the delivery of the note or bill to the plaintiff or indorsee, (7 T. R. 596; 5 East, 478; Bayley on Bills, 180); and in the 1st and 6th forms the statement of the notice to the defendant of the indorsements are unnecessary, (1 Bos. & Pul. 624; Bayley on Bills, 184); and in the 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th forms, and consequently in the directions relative to declarations on foreign bills, the statements that the bill was directed to the drawee or acceptor are clearly unnecessary, (Gray v. Milner, 3 Moore's Rep. 91; 2 Stark. Rep. 336). The allegation, “*which period has now elapsed*,” though otherwise unobjectionable, seems also unnecessary where the bill or note has been shown to have been payable after date, or where there is an averment that it was presented for payment *when due*. In the 4th, 5th, 7th, and 8th counts against the acceptor, where a general unqualified acceptance is stated, it would suffice to state the promise to pay according to the tenor of the bill, omit-

ting “*and of his acceptance thereof*.”

In the common *indebitatus* forms also, it is submitted, that some of the words printed in italics might be omitted, viz.—“*price and value*,” “*and then and there*,” and some other words which were not adopted even in the ancient forms.

These observations are not made in disparagement of this excellent rule, but merely to show how much the pleadings may be contracted when there is a disposition to save expense.

It is clearly intended by these rules that the use of the *quantum meruit* and *quantum valebant* counts should be abandoned as being certainly unnecessary, and that all debts, however numerous, shall be comprised, as they always might have been (Cro. Jac. 245; 10 B. & C. 342, *post*), in one count, and that separate formal commencements and conclusions in the description of each debt shall no longer be adopted.

The comprehensive collection of the different descriptions of almost every possible demand recoverable in assumpsit under an *indebitatus* count in assumpsit and debt in the following pages, will be found in this edition altered according to these rules. Each practitioner should study further curtailment when practicable.

Of course the declaration must vary according to the circumstances of each particular case. When the action is on a bill or note, one of the following forms is to be selected, and a count on the original debt and on an account stated may be added, but no more.

(c) If either this or the subsequent forms should constitute the first count of the declaration, then insert, “For that”; so that it will read, “For that whereas one C. D.” &c. If it be a second or subsequent count, then insert, “And,” “also”; so that it will read, “And whereas also one C. D.” &c.

REG. GEN.
TRIN. T. 1 W. 4.

Several indorsements.

then indorsed the same to X. Y., and the said X. Y. then indorsed the same to the plaintiff;"] and the said C. D. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant then had due notice.

3. Count on a promissory note against indorser by indorsee.

Whereas one C. D., on —, made his promissory note in writing, and thereby promised to pay X. Y., or order, £—, — days [or "weeks," or "months,"] after the date thereof, [or *as the fact may be,*] *which period has now elapsed, and then delivered the said note to the said X. Y.,* and the said X. Y. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff, [or "and the defendant then indorsed the same to Q. R., and the said Q. R. then indorsed the same to the plaintiff;"] and the said C. D. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant then had due notice.

4. Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

Whereas the plaintiff, on —, made his bill of exchange in writing, *and directed the same to the defendant,* and thereby required the defendant to pay to the plaintiff £—, — days [or "weeks," or "months,"] after the date [or "sight"] thereof, *which period has now elapsed, and the defendant then accepted the said bill, and promised the plaintiff to pay the same, according to the tenor and effect thereof, and of his said acceptance thereof,* but did not pay the same when due, or at any time before or since.

5. Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

Whereas the plaintiff, on —, made his bill of exchange in writing, *and directed the same to the defendant,* and thereby required the defendant to pay to O. P., or order, £—, — days [or "weeks," or "months,"] after the date [or "sight"] thereof, *which period has now elapsed, and then delivered the same to the said O. P.,* and the said defendant then accepted the same, and promised the plaintiff to pay the same, according to the tenor and effect thereof, and of his acceptance thereof, yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then returned to the plaintiff, of all which the defendant then had notice.

6. Count on an inland bill of exchange against the acceptor by indorsee.

Whereas one E. F., on —, made his bill of exchange in writing, *and directed the same to the defendant,* and thereby required the defendant to pay to the said E. F. [or to "H. G."] or order, £—, — days [or "weeks," or "months,"] after sight [or "date"] thereof, *which period is now elapsed, and the defendant then accepted the said bill, and the said E. F. [or "the said H. G."] then indorsed the same to the plaintiff, [or "and the said E. F.," or "the said H. G. then indorsed the same to K. J., and the said K. J. then indorsed the same to the plaintiff;"] of all which the defendant then had due notice, and then promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.*

7. Count on an inland bill of exchange against the acceptor by the payee.

Whereas one E. F., on —, made his bill of exchange in writing, *and directed the same to the defendant,* and thereby required the defendant to pay to the plaintiff £—, — days [or "weeks," or "months,"] after the sight [or "date"] thereof, *which period has now elapsed, and the defendant*

then accepted the same, and promised the plaintiff to pay the same, according to the tenor and effect thereof, *and of his acceptance thereof.*

REG. GEN.
TRIN. T. 1 W. 4.

Whereas the defendant, on —, made his bill of exchange in writing, *and directed the same to J. K.*, and thereby required the said J. K. to pay to the plaintiff £—, — days [or “weeks,” or “months,”] after the sight [or “date”] thereof, *and then delivered the same to the said plaintiff*, and the same was then presented to the said J. K. for acceptance, and the said J. K. then refused to accept the same, of all which the defendant then had due notice.

8. Count on an inland bill of exchange against the drawer by payee on non-acceptance.

Whereas the defendant, on —, made his bill of exchange in writing, *and directed the same to J. K.*, and thereby required the said J. K. to pay to the order of the said defendant £—, — days [or “weeks,” or “months,”] after the sight [or “date”] thereof, and the said defendant then indorsed the same to the plaintiff, [or “and the said defendant then indorsed the same to L. M., and the said L. M. then indorsed the same to the plaintiff;”] and the same was then presented to the said J. K. for acceptance, and the said J. K. then refused to accept the same, of all which the defendant then had due notice.

9. Count on an inland bill of exchange against the drawer by indorsee on non-acceptance.

And whereas one N. O., on —, made his bill of exchange in writing, *and directed the same to P. Q.*, and thereby required the said P. Q. to pay to his order £—, — days [or “weeks,” or “months,”] after the date [or “sight”] thereof, and the said N. O. then indorsed the said bill to the defendant, [or “to R. S., and the said R. S. then indorsed the same to the defendant,”] and the defendant then indorsed the same to the plaintiff, and the same was then presented to the said P. Q. for acceptance, and the said P. Q. then refused to accept the same, of all which the defendant then had due notice.

10. Count on an inland bill of exchange against indorser by indorsee on non-acceptance.

Whereas one N. O., on —, made his bill of exchange in writing, *and directed the same to P. Q.*, and thereby required the said P. Q. to pay to the defendant, or order, £—, — days [or “weeks,” or “months,”] after the sight [or “date”] thereof, *and then and there delivered the same to the defendant*, and the defendant then indorsed the said bill to the plaintiff, [or “to R. S., and the said R. S. then indorsed the same to the plaintiff;”] and the same was then presented to the said P. Q. for acceptance, and the said P. Q. then refused to accept the same, of all which the defendant then had due notice.

11. Count on an inland bill of exchange against payee by indorsee on non-acceptance.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time *after date*, and the action not brought till the time is expired, it will be *necessary* to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, *viz. which period has now elapsed*, and instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

12. Directions for declarations on bills where action brought after time of payment expired.
Is'.—On bills payable after Date.

REG. GEN.
TRIN. T. 1 W. 4.

2d.—On bills
payable *after*
Sight.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time *after sight*, it will be necessary to insert after the words denoting the time appointed for payment, the following words, viz. *and the said drawee [naming him] then saw and accepted the same, and the said period has now elapsed*, and, instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due*.

Directions for
declarations on
bills or notes
payable *at sight*.

If a *note* or *bill* be payable *at sight*, the form of the declaration must be varied so as to suit the case, which may be easily done.

Directions for
declarations on
foreign bills.

Declarations on *foreign* bills may be drawn according to the principle of these forms, with the necessary variations.

COMMON COUNTS. (c)

1. Goods sold.

Whereas the defendant, on —, was indebted to the plaintiff in £—, for *the price and value of goods then bargained and sold* [or “*sold and delivered*”] by the plaintiff to the defendant at his request.

2. Work and
materials.

And in £— for *the price and value of work then done*, and materials for the same provided, by the plaintiff for the defendant at his request.

3. Money lent.

And in £— for money *then lent* by the plaintiff to the defendant at his request.

4. Money paid.

And in £— for money *then paid* by the plaintiff for the use of the defendant at his request.

5. Money re-
ceived.

And in £— for money *then received* by the defendant for the use of the plaintiff.

6. Account
stated.

And in £— for money *found to be due* from the defendant to the plaintiff on an account *then stated* between them.

7. *General pro-
mise* applicable
to all the counts.
8. General
breach.

And whereas the defendant afterwards, on &c., in consideration of the premises respectively, *then* promised to pay the said several monies respectively to the plaintiff on request, YET he hath disregarded his promises, and hath not paid *any of the said monies*, or any part thereof, to the plaintiff's damage of £—, and thereupon he brings suit, &c.

Directions how
to frame decla-
rations when
there is a count
on a bill or note
besides the com-
mon counts.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them *first* in the declaration, and then in the general conclusion to say, “*promised to pay the said last-mentioned several monies respectively.*”

[N.B. Conclusion of Reg. Gen. Trin. T. 1 W. 4.]

(c) The common counts are considered as well as for the purposes of costs; *Jourdain v. Johnson*, 2 C. M. & R. 564.

After the promulgation of these forms, several cases occurred of objections to declarations, on the ground of the insufficiency of the allegation, "which period has now elapsed," in the counts on promissory notes and bills of exchange, it being contended that there should be an averment of the time having elapsed "before the commencement of the suit;" and although in one case the Court was disposed to think the objection well founded (see *Abbott v. Arlett*, 3 Crom. M. & Ros. 209; 4 Dowl. 759), yet in a subsequent case a demurrer on this ground was overruled (see *Owen v. Wallers*, 2 M. & W. 91; 5 Dowl. 324). Another objection also taken to the forms was, that the promise was insufficiently alleged, in not stating it to have been made to the plaintiff; but this also was overruled (*Jones v. Owen*, 5 A. & E. 222), Lord Denman in his judgment observing, that the declaration was in the form given by the judges' own rules, and that they could not call them in question.

REG. GEN.
TRIN. T. 1 W. 4.

DECLARATIONS IN ASSUMPSIT.

COMMON COUNTS.

COMMON
COUNTS.
1. Present form
of a declaration
in assumpsit
containing only
indebitatus
counts.

Commencement as ante, 13.] For that whereas the defendant, on the ——— (f) day of ———, in the year of our Lord ———, was indebted to the plaintiff in £—— (g), for &c. [*Here the subject-matter of the debt must be stated, as that the defendant was indebted for "land" or "goods sold," or for "work done," or for "money lent," &c., as in the following counts, 2 Saund. 350, n. 2; and except in the counts for money had and received, it must be alleged that the debt was incurred at the defendant's request, as follows, 1 Saund. 264, n. 1,*] at his request. [*If there be another debt or debts, the same may be here introduced, as in the forms prescribed ante, 34, viz. "And in £——, for &c."*]

Conclusion. (h) And whereas the defendant, afterwards, on the day and year aforesaid, in consideration of the premises respectively, then promised the plaintiff to pay him the said several monies respectively on request, Yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, to the plaintiff's damage of £—— (i), and therefore he brings suit, &c.

2. Conclusion where the declaration contains a count on a note, bill, or check, and no common count. Yet the defendant hath disregarded his promise [*or "promises"*] and hath not paid any of the said monies [*or if only one count "the said monies"*] or any part thereof, to the plaintiff's damage of £——, and therefore he brings suit, &c.

3. Present form of a declaration in assumpsit, on a note, bill, or check, with a count on the consideration and an account stated. (j)

Commencement as ante, 13.] For that whereas [*set out the count on the note, bill, or check, with the promise applicable thereto, and then commence a fresh count as follows :*] And whereas also the defendant, on the ——— day of ——— A. D. ———, was indebted to the plaintiff in £——, for &c. [*Here state the consideration for the note, bill, or check, as "for goods sold," &c.*] And in £—— for money found to be due from the defendant to the plaintiff on an account then stated between them: And whereas the defendant afterwards, on the day and year last aforesaid, in consideration of the premises respectively, then promised the plaintiff to pay him the said last-mentioned several monies respectively [*or, if only one common count, "last-mentioned sum of money"*] on request, Yet the defendant hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, to the plaintiff's damage of £——; and therefore he brings suit, &c.

(f) Insert a day after the debt or debts accrued, and before the issuing of the writ. It is usual to insert the day before the date of the writ, but the day is not material; *Arnold v. Arnold*, 3 Bing. N. C. 81.

(g) State sufficient to cover the plaintiff's demand.

(h) See prescribed form of conclusion, *ante*, p. 34.

(i) State sufficient to cover the plaintiff's claim with interest, if interest be recoverable.

(j) In all cases where there was a consideration between the parties to the action for

the note, bill, or check, and the cause of action on the note, bill, or check is at all doubtful, a count on such consideration, as well as a count on an account stated, should be inserted; but where there was no consideration, nor any immediate privity, between the parties to the action, or those whom they represent, the declaration should be framed on the note, bill, or check only, unless there has been an admission of the debt by the defendant, in which case a count on an account stated should be inserted.

The same as the preceding to the breach, and then proceed as follows :] And although the defendant, in part performance of his said promise, hath paid to the plaintiff the sum of £—— [or, “ divers sums of money, amounting in the whole to the sum of £——,”] parcel of the said monies, Yet he hath not further performed his said promises [or “ promise,”] and hath not paid the residue of the said monies, or any part thereof, to the plaintiff’s damage of £——, and therefore he brings suit, &c.

COMMON
COUNTS.

4. Breach admitting part payment. (k)

For that whereas the defendant heretofore, to wit, on &c., was indebted to the plaintiff in divers goods and chattels, to wit, 100 fish of the value of £10., for divers tolls or dues, due and of right payable from the defendant to the plaintiff, for and in respect of the defendant having before then used and enjoyed, and having, at his request, and by the sufferance and permission of the plaintiff, had the liberty and privilege of using and enjoying, divers capstans, machines, windlasses, and ropes of the plaintiff, to haul and assist in the hauling on the beach and shore of divers boats of the defendant, and of divers other boats which the defendant had used, at the request of the defendant; and being so indebted, he the defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, promised the plaintiff to pay him the said goods and chattels when he the said defendant should be thereunto afterwards requested, Yet the defendant hath disregarded his promise, and hath not paid the plaintiff the said goods and chattels, or any or either of them, or any part thereof, to the plaintiff’s damage of £——; and therefore he brings suit, &c.

5. Indebitatus assumpsit count on a promise to pay by chattels. (l)

I. RESPECTING REAL PROPERTY.

Commencement of count as ante, 36, inserting these words :] For a certain messuage, tenements, and premises, with the appurtenances, of the plaintiff(n), before that time bargained, sold, and released, (o) by the plaintiff to the defendant, and at his request. [Conclude as ante, 36.

I. RESPECTING
REAL
PROPERTY.

For a freehold estate sold and conveyed.(m)

Commencement of count as ante, 36.] For certain messuages, tenements, and premises, with the appurtenances, (q) before that time bargained, sold, and surrendered by the plaintiff to and for the defendant, and at his request. [Conclude as ante, 36.

For a copyhold estate surrendered.(p)

(k) This breach is rarely used since the rule authorizing credit to be given in the particulars of demand; *vide ante*, 5 and 6. As to the effect of this admission of part payment, see *Hollis & Uz. v. Palmer*, 2 Bing. N. C. 713.

(l) The subject-matter of the above form is from 6 B. & C. 385, where it was held that *indebitatus assumpsit* would lie for goods and chattels. The form may be readily adapted to other claims for goods. See 6 B. & C. 385, as to the use of this count.

(m) It is usual to insert this count; but, from *James v. Shore*, sittings at Westminster after Mich. T. 1816, Stirling, attorney for plaintiff, Lord Ellenborough expressed his opinion that the declaration must be special; but see observation of Bayley, B., in *Hallen*

v. Runder, 1 C. M. & R. 269.

(n) It is unnecessary and unadvisable, to state the situation; 6 East, 348. If misstated, the variance might, in some cases, be a ground of nonsuit, unless the judge amended at the trial; 1 Esp. Rep. 273; 3 Campb. 235; but see 1 Taunt. 570, 571; 13 East, 9; 3 Taunt. 128.

(o) This allegation will depend on the nature of the conveyance, as whether it were by release, feoffment, &c. If not actually conveyed, only state the sale, as an action lies to recover the price of an estate bargained and sold. Per Bailey, B., *Hallen v. Runder*, 1 C. M. & R. 269.

(p) See note (m), *supra*.

(q) See note (n), *supra*.

I. RESPECTING
REAL
PROPERTY.

For a leasehold
estate sold and
assigned. (r)

Commencement of count as ante, 36.] For certain messuages, tenements, and premises, with the appurtenances, (s) before that time bargained, sold, and assigned by the plaintiff to the defendant, and at his request, for the remainder of a certain term of years then to come and unexpired therein. [*Conclude as ante, 36.*]

For the good-
will of a busi-
ness. (t)

Commencement of count as ante, 36.] For the good-will of a certain trade and business of the plaintiff, before then relinquished and given up by the plaintiff to and in favour of the defendant, and at his request. [*Conclude as ante, 36.*]

For the good-
will of a public-
house, and the
plaintiff's busi-
ness therein. (u)

Commencement of count as ante, 36.] For the good-will of a certain public-house, called or known by the name or sign of —, (x), and the trade and business of the plaintiff as a publican or victualler therein, before that time relinquished and given up by the plaintiff to and in favour of the defendant, and at his request. [*Conclude as ante, 36.*]

By outgoing
against in-
coming tenant,
for fixtures left
by plaintiff on
premises. (y)

Commencement of count as ante, 36.] For so much money before that time and then due and payable from the defendant to the plaintiff, upon, for, and in respect of the plaintiff having, at the defendant's request, relinquished and given up certain buildings, erections, and improvements, before then made and erected by the plaintiff, in and upon certain other lands and premises, with the appurtenances, to and in favour of the defendant, and at his request. [*Conclude as ante, 36.*]

For the use and
occupation of
a house and
land. (z)

Commencement of count as ante, 36.] For the use and occupation of a

(r) See note (m), *ante*, 37; and see form, 3 D. & R. 99; 1 B. & C. 704, S.C.

(s) See note (n), *ante*, 37.

(t) A contract for the transfer of the good-will of a business is good in law; see 4 East, 190; 4 Esp. 179. An agreement for the sale of a business, will sometimes be enforced in equity; 1 Sim. & Stu. Rep. 74.

(u) See form, *post*, for the use, occupation and profits of an inn.

(x) See note (n), *ante*, 37.

(y) See special counts, and notes, *post*, "Landlord and Tenant."

(z) The statute 11 Geo. 2, c. 19, s. 14, gives this remedy in order to avoid difficulties in suing on a demise; see the forms, Morgan's Prec. 17; 2 Rich. C. P. 90; Lil. Ent. 38; Pl. Ass. 5, 215, 268, 276. Although the statute makes provision only for an action on the case, and protects the plaintiff from being nonsuited in such action, if any parol demise or any agreement not under seal, whereon a certain rent is reserved, shall appear, yet according to the late case of *Gibson v. Kirk*, 1 G. & D. 252, an action of debt may be supported at common law, though there be an express demise, if it be not by deed.

This action seems the only remedy where there is no specific rent agreed upon; 5 B. & A. 322.

The statute is not usually referred to in the declaration, and it is unnecessary in debt or assumpsit for use and occupation, to state where the premises lie, or any of the particulars of the demise. *King v. Fraser*, 6 East, 348.

The venue is not local; *Egler v. Marsden*,

5 Taunt. 25. This count is sufficient, though the defendant may not himself have occupied the premises; 8 T. R. 327; 16 East, 33; 2 Stark. 527. But if the plaintiff has recognised another person as his tenant, he cannot afterwards charge the defendant; 2 B. & A. 119; 2 Stark. 235. Although the premises demised have been destroyed by fire; 4 Taunt. 45; or the occupation has been otherwise merely constructive, the above common count will suffice; *Pinero v. Judson*, 6 Bing. 206.

This action may be brought by the assignee of the reversion before attornment, for rent due after he became assignee; 16 East, 99; but not for rent due before the assignment of the reversion; *Cobb v. Carpenter*, 2 Campb. 13, n.; *Mortimer v. Preedy*, 3 M. & W. 602. So it may be brought by the assignee of a rent-charge; 1 T. R. 378; or by a succeeding incumbent, 5 T. R. 4; *Peake's Ev.* 242.

A corporation may be sued in assumpsit for use and occupation; 6 A. & E. 843; 4 Bing. 75.

As to the right to sue for use and occupation where premises are destroyed by fire, and for what time the tenant remains liable, see *Isod v. Gorton and another*, 5 Bing. N. C. 501; *Packer v. Gibbins*, 1 G. & D. 10.

As to the right of a vendor to recover for the use and occupation of premises after the contract goes off, see *Howard v. Shaw*, 8 M. & W. 118.

A mortgagee has the same rights against a tenant by lease granted before the mortgage as the mortgagor had, but when a lease is made by a mortgagor subsequently to the mortgage,

certain messuage, tenements, and premises, (a) [*or, "of a certain messuage, buildings, farm, and land," as the case is,*] with the appurtenances, of the plaintiff (b), by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed (c), had, held, used, occupied, possessed and enjoyed. [*Conclude as ante, 36.*]

I. RESPECTING
REAL
PROPERTY.

Commencement of count as ante, 36.] For the use and occupation of a certain fishery, and the right of fishing in a certain river called the —, in the county of —, of the said plaintiff, by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, had, held, used and occupied, possessed and enjoyed. [*Conclude as ante, 36.*]

For the use and
occupation of
a fishery. (d)

Commencement of count as ante, 36.] For the use of a certain way and passage for divers cattle, waggons, and other carriages, loaded with timber, wood, and bark [*as the right of way may be,*] in, through, over and along certain closes of the plaintiff, before then had, used and enjoyed by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time then elapsed. [*Conclude as ante, 36.*]

For the use of
a way. (d)

and the mortgagee afterwards requires the rent to be paid to him, and it is paid accordingly, although the mortgagee is not entitled to distrain or sue in covenant on the lease, yet such a relationship arises between the parties as entitles the mortgagee to sue for use and occupation; *Rogers v. Humphreys*, 4 A. & E. 299; *Pope v. Biggs*, 9 B. & C. 245; *Evans v. Elliot*, 1 P. & D. 256; *Doe d. Higginbotham v. Barton and another*, 3 P. & D. 199. As to the liability of a party holding over, and for what time he is liable, see *Christy v. Tancard*, 7 M. & W. 127; *Waring v. King and others*, 8 M. & W. 571; *Ibbs v. Richardson and others*, 9 A. & E. 849.

As to the apportionment of rents where a tenant for life dies before or on the day the rent is reserved, see 11 Geo. 2, c. 19, s. 15; and as to the apportionment of rents reserved on leases which determine on the death of the person making them, although such person were not tenant for life, or on the death of the life for which such person was entitled, see 4 & 5 W. 4, c. 22, s. 1; and as to the apportionment of rent in case of eviction from part, see *Noale v. Mackenzie*, 2 C. M. & R. 64.

The defendant cannot plead *nihil habuit*; 1 Wils. 314; 2 Wils. 208; and therefore it does not seem material to allege that the estate was the plaintiff's.

Where there is an agreement under seal for a lease, not containing any covenant for the payment of rent, this action may be supported; 4 Esp. 58.

If it be doubtful whether there be a demise under seal, it may be advisable to declare in debt on demise, as in 1 Saund. 276, n. 1, 202, 203; 1 New Rep. 104; Lord Raym. 1503. See form, post.

When this action lies against administrators, &c., 2 J. B. Moore, 100, and *ante*, vol. i. When against assignees of bankrupt, see *ante*, vol. i.

How to declare against executors for rent due since testator's death; 1 Saund. 112, 5th edit.; 3 B. & Ald. 101; and *ante*, vol. i.

(a) In *Bird v. Wilton*, Chelmsford Assizes, 9th March, 1830, cor. Bayley, J., the declaration was for use and occupation of a messuage, with the appurtenances. The evidence was of a demise, not under seal, of a messuage, with a garden and paddock, and a point was reserved as to whether this was not a variance. Bayley, J., said, that stating the use and occupation to be "of premises, with the appurtenances," would in general be safe. On a motion for a new trial, the Court held this was no variance, Easter Term, 1830, K. B.; and see 2 Saund. 400; 6 B. & C. 251. As the rent issues out of the realty, if the demise be of a house and furniture, the latter need not be noticed; 6 B. & C. 251.

(b) It is not necessary or advisable to state the local situation; it might be fatal if misstated, unless the judge amended on the trial; 3 Campb. 235; 3 Taunt. 128; 3 M. & S. 380. But if described by a name generally known, a mistake may be immaterial; 1 Taunt. 670; 13 East, 9.

(c) In 1 Rich. C. P. 1, and Morg. 17, the time is stated under a videlicet, but this is not necessary.

(d) See form for the use and occupation of a water-course, 4 B. & C. 8. As to the law and form of an indebitatus count for the use of tolls or other incorporeal hereditament, see *The Mayor of Carmarthen v. Lewis*, 6 Car. & P. 608; *Bird v. Higginson*, 2 A. & E. 696; 1 Harr. & Woll. 61; 4 Nev. & Man. 505, S. C. Although by an agreement not under seal no interest will pass in any incorporeal hereditament, yet if a lessee or other party has had the enjoyment thereof, indebitatus assumpsit for the rent or other agreed sum may be supported; *ibid.* As to what constitutes an hereditament within the 11 Geo. 2, c. 19, s. 4, *Jones v. Reynolds*, 4 A. & E. 805.

I. RESPECTING
REAL
PROPERTY.

For the use and
occupation of
a pew in a
church. (f)

Commencement of count as ante, 36.] For the use and occupation of a certain pew and seats in the parish church of —, in the county of —, by the defendant, and at his request, and by the sufferance and permission of the plaintiff, had, used, occupied, possessed and enjoyed by him the said defendant and divers other persons, on divers Sundays and holidays and other days and times, for and during a long time before then elapsed, for the attending and hearing divine and church service performed in the said church. [*Conclude as ante, 36.*]

For the use and
occupation of a
seat in a house
to view a public
procession.

Commencement of count as ante, 36.] For the use and occupation of divers seats and places in and parcel of a certain messuage and premises of the plaintiff by the defendant and divers others before that time used, occupied, possessed and enjoyed, for the viewing of a certain procession on a certain day then past, and at the request of the defendant. [*Conclude as ante, 36.*]

For the use of a
tennis court,
balls, and
rackets.

Commencement of count as ante, 36.] For the use of a certain tennis court of the plaintiff by the defendant, and divers other persons, at his request, and by the sufferance and permission of the plaintiff, before that time used in and for the playing of divers lawful sets and games at tennis therein, and for the use and hire of divers dresses, balls and rackets of the plaintiff, before that time let to hire to the defendant, at his request, and by the defendant, and divers other persons, according to that letting to hire had and used in and for the playing of the said sets and games. [*Conclude as ante, 36.*]

For the use,
occupation and
profits of an
inn. (g)

Commencement of count as ante, 36.] For the use, occupation and profits of a certain inn, called and known by the name and sign of the — inn, of the plaintiff by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, had, held, used, occupied, received and taken. [*Conclude as ante, 36.*]

On 11 Geo. 2, c.
19, s. 18, for
double rent,
tenant having
neglected to quit
in pursuance of
his own no-
tice. (h)

Commencement, ante, 13.] For that whereas the defendant, after the 24th of June, A. D. 1738, mentioned in a certain act of parliament made in the 11th year of the reign of his late Majesty King George the Second, to wit, on the — (i) day of —, A. D. —, by force of the said statute, became and was indebted to the plaintiff in a large sum of money, to wit, the sum of [£100,] for the use and occupation of a certain messuage and premises, with the appurtenances, on the — day of —, A. D. —, held by the defendant, as tenant thereof to the plaintiff, at and under the yearly rent of [£50], payable quarterly (to wit, on &c., on &c., on &c., and on &c.) [*according to the fact*] by the defendant and at his request, for a long space of time, to wit, from the — day of —, A. D. —, till the said — day of —, A. D. —, [*according to the fact,*] had, used, occupied, possessed

(f) It is unusual and unnecessary to state the situation of the pew and the purposes for which it was used.

(g) See note (t), *ante*, 38.

(h) See a good precedent with notes, and a suggestion that the venue is local, 2 Wentw. 64, 65. See also a precedent and law, *Crocker v. Fothergill*, 2 B. & A. 652. See also the

notes, Chitty's Col. Stat. vol. 1, 647. The remedy where the landlord gives notice to quit is debt for double value; 4 G. 2, c. 28, s. 1; and see a form of declaration for it, *post*, *Debt on Statutes by party aggrieved*.

(i) Any day before the commencement of the action.

and enjoyed, notwithstanding a certain notice theretofore given by the defendant to the plaintiff of his intention to quit, and that he the defendant would quit and deliver up unto the plaintiff the said messuage and premises, with the appurtenances, upon the said — day of —, A. D. —, and being so indebted, the defendant, in consideration of the premises, afterwards, to wit, on the — day of —, A. D. —, [*the day before the writ was issued*] promised the plaintiff to pay him the said sum of [£100] on request. [*Conclude as ante*, 36.

I. RESPECTING
REAL
PROPERTY.

Commencement of count as ante, 36.] For the use of certain pasture land of the plaintiff, and the eatage of the grass thereon growing, by the plaintiff before that time let to the defendant, at his request, and by the defendant, according to such letting, had and used in and for the depasturing of cattle, for a long time before then elapsed. [*Conclude as ante*, 36.

For the use of
pasture land,
and eatage of
the grass. (k)

Commencement of count as ante, 36.] For the use, occupation and enjoyment of certain barns and a barn-yard [*according to the fact*] and premises, with the appurtenances, and of certain prædial tithes of the plaintiff by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, had, held, used, occupied, received, taken and enjoyed. [*Conclude as ante*, 36.

For the use, oc-
cupation and
enjoyment of
buildings and
prædial tithes.

Commencement of count as ante, 36.] For the use and occupation of a certain [messuage and buildings, lands and premises,] with the appurtenances, and certain tithes of the plaintiff by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, held and enjoyed, and for certain tithes whereof the plaintiff was the proprietor, issuing and arising from and out of certain lands and premises in the occupation of the defendant, and by the defendant before that time, and at his request, and by the sufferance and permission of the plaintiff, had, taken and retained to his the defendant's own use. [*Conclude as ante*, 36.

For the use and
occupation of
lands, with the
right to take the
tithes.

Commencement of count as ante, 36.] For the use and occupation of certain rooms and apartments of the plaintiff, in and parcel of a certain dwelling-house, (l) by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long space of time before then elapsed, had, held used, occupied, possessed and enjoyed. (m) [*Conclude as ante*, 36.

For the use and
occupation of
unfurnished
lodgings.

Commencement of count as ante, 36.] For the use and occupation of divers standings in certain market places and sheds of the plaintiff by the defendant, and at his request, and by the sufferance and permission of the plain-

For the use of
standings in
market places
and tolls. (n)

(k) This count is proper where the defendant has the use of the land, and turns on his cattle himself. When the plaintiff retains the land in his own possession, and depastures the defendant's cattle himself, the declaration should be for agistment, as *post*, 49; and when cattle are taken care of under cover, or in a straw yard, then the precedent for feeding and taking care of cattle, *post*, 48, will apply.

(l) It is not necessary nor advisable to state the local situation.

(m) The count is sustainable, though the defendant may have refused to occupy; though in such case it is sometimes advisable to declare on the agreement.

(n) Though a demise of tolls, unless under seal, is void, yet, after the beneficial occupation thereof, assumpsit or debt lies for the rent. *Mayor, &c. of Carmarthen v. Lewis*, 6 Car. & P. 608; *Bird v. Higginson*, 2 A. & E. 696; 4 N. & M. 505; 1 Har. & Woll. 61.

DECLARATIONS IN ASSUMPSIT.

I. RESPECTING
REAL
PROPERTY. tiff, for a long time before then elapsed, held and enjoyed, and for certain tolls, whereof the plaintiff was the proprietor, by the defendant, and at his request, and by the sufferance and permission of the plaintiff, had, taken and retained to his own use. [*Conclude as ante*, 36.]

For the use and occupation of furnished lodgings. (o)

Commencement of count as ante, 36.] For the use and occupation of certain rooms and apartments of the plaintiff, in and parcel of a certain dwelling-house, (p) by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long space of time before then elapsed, had, held, used, occupied, possessed and enjoyed, together with certain household furniture, linen and other necessaries, goods and chattels of the plaintiff therein being. [*Conclude as ante*, 36.]

For board and lodging. (q)

Commencement of count as ante, 36.] For the use and occupation of certain rooms, apartments and furniture of the plaintiff before that time used and enjoyed by the defendant at his request, and by the permission of the plaintiff, and for meat, drink, fire, candles, attendance, goods, chattels and other necessaries by the plaintiff found and provided for the defendant at his like request. [*Conclude as ante*, 36.]

For warehouse room of goods. (r)

Commencement of count as ante, 36.] For warehouse room by the plaintiff found and provided for, in and about the stowing and keeping of certain goods and chattels before then stowed and kept in certain warehouses and other erections, buildings and premises of the plaintiff for the defendant, and at his request. [*Conclude as ante*, 36.]

For the standing of carriages, &c.

Commencement of count as ante, 36.] For the standing of certain carriages and chattels by the plaintiff kept and taken care of in certain buildings and premises for the defendant, and at his request. [*Conclude as ante*, 36.]

For the moorage of ships. (s)

Commencement of count as ante, 36.] For the mooring and fastening of a certain ship or vessel, called &c. — to a certain chain of the plaintiff, lying and being in the river Thames, in the county of Middlesex, for a long space of time then elapsed moored and fastened by the defendant to the said chain of the plaintiff by his permission and sufferance, and at the request of the defendant. [*Conclude as ante*, 36.]

For fines on ad-

Commencement of count as ante, 13.] For that whereas the defendant, on &c.,

(o) See Plead. Assist. 282, and forms, *post*, for necessaries found and provided for defendant or third parties at his request. As to the right of the assignees of a bankrupt mortgagor to recover for the use and occupation of furniture in the mortgaged premises, and not included in the mortgage, see *Salmon and another, Assignees, &c. v. Matthews*, 8 M. & W. 827. If a landlord of furnished lodgings by his misconduct justifies a tenant in an abrupt departure during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation; *Kirkman v. Jarvis*, 7

Dowl. P. C. 678.

(p) It is not necessary nor advisable to state the local situation.

(q) See the counts, *post*, 48, for necessaries found and provided. When let for illegal or immoral purposes this action does not lie; *Selw. N. P.* 10th edit. 63; see 1 Camp. 348.

(r) See form, *Morg. Prec.* 19.

(s) See a similar form, *Morg. Prec.* 24. For boomage, pilotage, buoys, and sea-marks, see *Plead. Assist.* 52, 53. For moorage, see 3 *Wentw.* 69. For a quarterage on goods loaded on board ships in a port, 1 *Wentw.* 132. For buoyage and anchorage, 1 *Wentw.* 183. For the use of a dock, *Lil. Ent.* 38.

being tenant of certain customary tenements, with the appurtenances, parcel of the manor of —, was indebted to the plaintiff, then and still being lord of the said manor, in the sum of £—, for certain reasonable fines duly assessed, due and payable from the defendant to the plaintiff, for and on the admission of him the defendant, according to the usage and custom of the said manor, into the said customary tenements, with the appurtenances, to hold to him, his heirs and assigns, of the lord of the said manor, at the will of the lord, according to the custom of the said manor. [*Conclude as ante*, 36.]

I. RESPECTING
REAL
PROPERTY.

mission to copyhold premises.
(t)

Commencement of count as ante, 36.] For divers tolls and duties due from the defendant to the said bailiffs, &c. for the passage of divers loaded wagons and loaded carts of the defendant, drawn over a certain bridge, which said bridge the said bailiffs, &c. and their predecessors, by their said several names of incorporation, from time whereof the memory of man is not to the contrary, have from time to time repaired and supported, and have been used and accustomed to repair and support. [*Conclude as ante*, 36.]

For tolls on loaded carriages passing over a bridge. (u)

Commencement of count as ante, 36.] For toll due from the defendant to the said mayor and burgesses, &c. for weighing at a certain beam of them the said mayor and burgesses, divers goods, wares and merchandize of the defendant, before that time brought by the defendant to the said market of and in the said borough, to be there sold, and by the said mayor and burgesses, at the request of the defendant, weighed at the said beam. [*Conclude as ante*, 36.]

For tolls on goods brought to market and weighed in plaintiff's beam. (v)

Commencement of count as ante, 36.] For divers reasonable tolls due from the defendant to the plaintiff, as the farmer and proprietor of a certain market called the cattle-market, situate, &c. and of the dues, duties, tolls and privileges thereto belonging and accruing and arising thereby and therefrom, from a certain time now elapsed, for and in respect of his the defendant having, whilst he the plaintiff was such farmer and proprietor as aforesaid, brought into the said market and sold therein divers live cattle. [*Conclude as ante*, 36.]

For tolls due for having brought into a market, and sold therein, live cattle, at the suit of the farmer of such tolls. (w)

Commencement of count as ante, 36.] For divers tolls and duties due from the defendant to the plaintiff, for and in respect of his the defendant's having brought into a certain market called the cattle-market, situate, &c. and sold therein, divers live cattle. [*Conclude as ante*, 36.]

The like in another form.

Commencement of count as ante, 36.] For divers tolls due from the defendant to the plaintiff as farmer and renter, duly made and appointed,

By the farmer,

(t) This general count is sufficient; 1 T. R. 618, 619; 3 B. & P. 346; 1 B. & P. 102; 2 Doug. 727; 6 East, 56. The particulars of the land holden need not and ought not to be set out; 1 Bridg. Eq. Dig. 3d ed. 381. The fine must be reasonable or plaintiff cannot recover *pro tanto*; *Wilson v. Hoare and others*, 2 B. & Adol. 350.

(u) This general count is sufficient; 1 T. R. 616; 1 B. & P. 102. For tolls for passing over a manor with cattle, 1 Wentw. 180.

(v) As to this count, 4 T. R. 104; and when the plaintiff must declare specially, see 6 East, 438. See form and necessary evi-

dence, 3 Bing. 8.

(w) See a precedent for tolls for goods pitched and exposed to sale in Newgate Market, 1 Wentw. 153; in Covent Garden Market, 3 B. & A. 366. For toll on wool bought in a market, see 1 Wentw. 156; and other precedents referred to in Petersdorff's Index, tit. Tolls; 1 T. R. 616; 1 B. & P. 102; 4 B. & A. 268. In general, the buyer is the party liable, 3 B. & A. 370; and see the law as to markets and tolls, 2 Chit. Commercial Law, 142, &c.; Com. Dig. tit. Market; Selw. N. P. 10th edit. 67.

**I. RESPECTING
REAL
PROPERTY.**

for tolls due for
passing through
turnpike-gate.
(*z*)

according to the form of the statute in such case made and provided, of the tolls due and payable according to the form of the statute in such case made and provided, at a certain turnpike-gate, duly erected and placed upon a certain turnpike-road, and at certain cranes, engines, and weighing-machines also erected upon and near to the said turnpike-road, according to the form of the statute in that case made and provided [*or instead of the preceding statement, say, "constituted and appointed according to the form of the statute in such case made and provided, of the tolls due and payable for carriages and cattle travelling upon a certain turnpike-road in the county of —, and through a certain gate erected upon the said road, according to the form of the said statute;"*] for divers cattle and carriages of the defendant which before that time had travelled upon the said turnpike-road and through the gate aforesaid, and for divers other carriages of the defendant, which had before then travelled upon the said turnpike-road, and been weighed at the said cranes, engines, and weighing-machines. [*Conclude as ante, 36.*]

The like, more
general.

Commencement of count as ante, 36.] For divers tolls and duties due and payable by and from the defendant to the plaintiff, for divers cattle and carriages of the defendant, which before that time had travelled upon a certain turnpike-road, of which said last-mentioned tolls and duties the plaintiff had been and then was renter and collector in that behalf duly constituted and appointed. [*Conclude as ante, 36.*]

For port duties.

See the law and declaration relating to port duties, Jenkins v. Harvey, 1 Gale, 28, 29.

Petty cus-
toms. (*y*)

Commencement of count as ante, 36.] For so much money due and payable to the said mayor, &c. for petty customs, for divers goods, wares, and merchandize, by the defendant before that time imported into the port of —. [*Conclude as ante, 36.*]

For calls on
shares in a
bridge. (*z*)

Commencement ante, 26 or 27.] For that whereas the defendant, on &c. was indebted to the said company in £—, for monies payable and due and owing from the defendant to the said company, for and in respect of divers, to wit, — shares, of which the defendant was proprietor, and which he held in the said — bridge, by virtue of divers calls before then duly made by the said committee for the time being of the said — bridge for the said monies. (*a*)

The like in
another way.

Commencement, ante, 26 or 27.] For that whereas the defendant, on &c., was indebted to the plaintiff, who then, and at the several times in this count mentioned, was and still is such treasurer as aforesaid, in the sum of £—

(*z*) This, though on a local act, will serve as a general precedent; see 1 Wentw. 180; see also a precedent in 10 East, 104; and see the law as to turnpike roads, Burn's J., tit. *Highways, Turnpike.*

(*y*) See a form for tolls and buoys, 4 M. & S. 288.

(*x*) See special counts and notes, *post.*

(*a*) The form of the count and conclusion

must entirely depend on the language of the statute applicable to the particular case. If the act of parliament vests the cause of action in the company, the promise should be to the company; if in the treasurer or clerk, the promise should be to him; and the language of the breach will of course be regulated by the form of the promise.

for money due and payable from the defendant to the plaintiff as such treasurer, for a certain call or sum, to wit, the sum of £—, duly called for and required by five and more of the commissioners for putting in execution the powers and authorities by the said act given and granted, to be paid by the defendant to the plaintiff, so being treasurer to the said commissioners, at a certain time then elapsed, upon and in respect of a certain sum, to wit, the sum of £—, which the defendant had, before the passing of the said act, subscribed and agreed to advance for the purposes in such act mentioned. (b)

I. RESPECTING
REAL
PROPERTY.

Commencement, ante, 27.] For that whereas the defendant, on &c., was indebted to the said company in £—, for monies due and payable from the defendant to the said company, for and in respect of divers, to wit, ten shares, of which the defendant was proprietor, and which he held in the said Vauxhall bridge, by virtue of divers calls before then duly made by the said committee for the time being of the said Vauxhall, &c. for the said monies; and the defendant afterwards, to wit, on &c. aforesaid, in consideration of the premises, promised the said company, &c. (b)

The like in another form, at the suit of the treasurer to Vauxhall Bridge Company.

Commencement of count as ante, 36.] For and in respect of his the defendant having before then subscribed a certain sum of money, to wit, the sum of £—, for and towards the making of the said road in the said act mentioned, and which said sum of £— he the defendant hath been duly required to pay, in pursuance of the said act, at certain times now past, but hath neglected to pay the same, &c. (b)

For calls under a road act. (c)

Commencement, ante, 27.] For that whereas the defendant, on &c., was indebted to the plaintiff, who then, and at the several times in this count mentioned, was, and still is, such treasurer as aforesaid, in £— for money due and payable from the defendant to the plaintiff, as such treasurer as aforesaid, for a certain call or sum, to wit, &c. duly called for and required by five or more of the commissioners for putting in execution the powers and authorities by the said first-mentioned act given and granted, to be paid by the defendant to the plaintiff, so being treasurer to the said commissioners, at a certain time before then elapsed, upon and in respect of a certain sum, to wit, the sum of £—, which the defendant had, before the passing of that act, subscribed and agreed to advance for the purposes in such act mentioned; and the defendant, in consideration of the premises, afterwards, to wit, on &c., aforesaid, promised the said treasurer, &c. (b)

At the suit of the treasurer of a canal company, for calls. (d)

As to declarations for railway calls, and pleas to such declarations, see *The Edinburgh, Leith, and Newhaven Railway Company v. Hebblewhite*, 6 M. & W. 707; *London and Brighton Railway Company v. Fairclough*, 8 Dowl. 278; *The Grand North of England Railway Company v. Biddulph*, 7 M. & W. 243; *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company v. Woodcock*, 7 M. & W. 574; and see a form by the secretary of a coal com-

For railway calls. (e)

(b) See *ante*, 44, note (a).
(c) See 2 Cbit. on Commercial Law, 133.
(d) See special counts and precedents, *post*.
For the law, &c. see 2 Cbit. on Commercial Law, 134, &c.

(e) The form of declaration in these cases depends upon the language of the particular statute applicable to the case; in almost all Railway Acts a general form of declaration is given.

I. RESPECTING
REAL
PROPERTY.

For contribu-
tion to a party-
wall. (f)

pany under a local act against a shareholder for instalments due in respect of shares, *Lawrence v. Wynn*, 5 M. & W. 355; and see a form for calls by the Southampton Dock Company, 1 M. & Gr. 448; where see also as to the recovery of interest as damages.

Since Reg. Gen. Hilary Term, 4 Will. 4, reg. 5, the plaintiff must make his election either to declare specially, as post, Spec. Ass. or as follows, for he will not be allowed two counts. In general a special count will be preferable, but this will depend on circumstances. If the common count be preferred, then proceed as follows:] For that whereas the defendant on the — day of —, A. D. —, was indebted to the plaintiff in £—, for part of the expense of building a certain party-wall, before then built at the expense of the plaintiff, agreeably to the directions of the statute in that case made and provided, to wit, an act &c. intituled &c. [*setting forth the title,*] between a certain messuage or building of the plaintiff, situate and being within the limits in the said act mentioned, and a certain other messuage or building adjoining thereto; and which said last mentioned party-wall had been made use of by the defendant, who before and at the time of building and finishing the same was the owner of and person entitled to the improved rent of such messuage or building, and also for part of certain other expenses which were necessary for the pulling down of a certain old party-wall between the said several buildings, before then pulled down by and at the expense of the plaintiff, agreeably to the direction of the said act of parliament.

For the use of a
patent inven-
tion. (g)

For whereas the defendant, on the — day of —, A. D. —, was indebted to the plaintiff in £—, for the licence, consent, and permission of the plaintiff before then granted by him to the defendant, at his request, to erect, set up and use at and upon certain premises of the defendant a certain patent invention, whereof the plaintiff was then the owner and proprietor, called &c. [*state the name*] and to use and apply the same for the use and benefit of the defendant, which patent invention of the plaintiff the defendant had then erected, used, set up and applied to his own use and benefit under and by virtue of the said licence and permission.

II. RESPECTING
PERSONAL
PROPERTY.

For goods or
animals sold
and delivered
to the defend-
ant. (h)

II. RESPECTING PERSONAL PROPERTY.

Commencement of count as ante, 36.] For divers goods, wares, merchandize, chattels, fixtures and effects, (i) [*or when for live animals, say, "horses,*

(f) The 14 Geo. 3, c. 78, after pointing out how the expenses of erecting party-walls are to be defrayed, enacts, that, "in case the same be not paid within twenty-one days next after demand thereof, then the same shall and may be recovered, together with full costs of suit, of and from such owner or owners by action of debt, or on the case, in any of his Majesty's Courts of Record at Westminster;" sect. 41. As to the construction on this statute, see a full note, Chit. Col. Stat. 127; see also 3 T. R. 458; 5 T. R. 130; 8 T. R. 602; 1 B. & P. 303; 9 East, 322; 10 East, 227; 2 Taunt. 63; 5 Taunt. 90; 2 Comyn on Contracts, 191, &c. As

to who is the owner of the improved rent, see 2 B. & A. 467.

See the special count, *post*, *Spec. Ass.* It should seem that plaintiff might recover on a common count for money paid; 5 T. R. 130; 8 T. R. 602; 2 Comyn on Contracts, 194.

The parties may by express agreement waive the formalities prescribed by the 14 Geo. 3, c. 78; *Stuart v. Smith*, 2 Marsh. Rep. 435; 1 Holt, 321; 7 Taunt. 158, S. C.

(g) See form, *Chanter v. Hopkins*, 4 M. & W. 399.

(h) See concise form, *ante*, 34. As to this count, when it lies, and its general application, see *ante*, vol. i. ch. *Declaration*; 2 Stark.

mares, geldings, bulls, cows, oxen, sheep, cattle, animals, goods and chattels," as the case may be,] by the plaintiff then sold and delivered to the defendant, and at his request. (k) [Conclude as ante, 36.

II. RESPECTING PERSONAL PROPERTY.

Commencement of count as ante, 36.] For goods and chattels, [or, "horses, mares, &c." as in last precedent,] by the plaintiff then bargained and sold to the defendant, and delivered to one E. F. at the request of the defendant, &c. [Conclude as ante, 36.

For goods bargained and sold to defendant, and delivered to a third person. (l)

Commencement of count as ante, 36.] For divers goods and chattels, [same description as in first precedent, supra,] then bargained and sold by the plaintiff to the defendant, at his request, &c. [Conclude as ante, 36.

For goods bargained and sold to defendant generally. (m)

Commencement of count as ante, 36.] For a certain crop of grass, [or "turnips," as the case is,] of the plaintiff, then bargained and sold by the plaintiff to the defendant, at his request, and by the defendant under and by virtue of that bargain and sale then accepted, mowed, cut down, [or if for a crop of turnips &c. "accepted, gathered,"] had, taken, and carried away. [Conclude as ante, 36.

For a crop of grass or turnips, &c. bargained and sold. (n)

39; 19 Ves. 609. To support this count, there must have been an actual delivery, or something equivalent to it; 2 B. & A. 755. See as to contracts relating to the sale of goods, 3 Chit. Com. Law, 273; and Harrison's Index, tit. "Sale." A count merely for goods is not sustainable for fixtures; 2 Marsh. Rep. 495; see 4 J. B. Moore, 73. The word "chattels" is more comprehensive than "goods," as it includes animate property, &c. The word "effects" will include fixtures, and it should seem that *indebitatus assumpsit* for divers "fixtures, effects and goods and chattels," would entitle the plaintiff to recover the price of fixtures, and is a proper and comprehensive form; *Hallen v. Runder*, 1 Cramp. M. & Ros. 266; 1 Chit. Gen. Prac. 94, 95; 4 B. & Ald. 206. Where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date, as interest would have run upon the bill if given, it may be recovered in an action for the price of the goods brought after the time when the bill would have become due, and may be recovered as part of the value of the goods upon the common count; 13 East, 98; *Farr v. Ward*, 6 Dowl. 163.

(i) It is not necessary to say, "of the plaintiff;" Bul. N. P. 139; and those words should, according to the decision in 5 Esp. Rep. 31, 32, be omitted, if the action be at the suit of a broker, factor, &c.; but see 6 Taunt. 65, 67, that this is not material.

(k) As the word "sold," (like the word "hired," 6 Taunt. 389,) implies a contract, perhaps the omission of the words "at the request of the defendant," would not be material; 2 T. R. 30.

(l) This count, though usual, is not necessary; the delivery may, according to the legal operation, be stated to have been to the defendant; 8 T. R. 328; Stra. 127; see *vide* Bul. F. P. 136. See also 1 Selw. N. P. 10th edit,

297. But if the defendant be sued on a collateral liability to pay for goods sold to another, the count must be special; 1 Saund. 211 b; see form, *post*, Spec. Ass.; Plead. Assist. 11, &c.

(m) See form. Plead. Assist. 10. See distinction between this count and that for goods sold and delivered, 19 Ves. 609. This count is proper where there has not been an actual delivery of the goods; ante, vol. i. Declaration. When it will not suffice; *id*. See form of declaration for not accepting goods, *post*, Spec. Ass.; and see *Atkinson v. Ball*, 8 B. & C. 277, cited in *Laythorp v. Bryant*, 1 Bing. N. C. 430, as to when a special count is necessary.

(n) See as to this count, 1 B. & P. 397. As to what crops agreed to be taken by incoming against outgoing tenant, are recoverable under this count, 3 B. & C. 357, 364; and see another form there suggested by Abbott, C. J. A sale of a growing crop of grass has been holden to be within the Statute of Frauds, 29 Car. 2, c. 3, s. 4; Chitt. jun. on Contracts, 3d ed. 301; Chitt. Col. Stat. vol. i. 371; and the cases in 5 B. & C. 829. But when at the time of sale the crop of any description is ripe, and the future growth forms no part of the substance of the contract, it is otherwise, and the crop is to be considered as goods and chattels, that may be affected by 29 Car. 2, c. 3, s. 17, but not by s. 4; *Smith v. Surman*, 9 Bar. & Cres. 561, 577; *Watts v. Friend*, 10 Bar. & Cres. 109; 5 B. & Adol. 105; 1 Chitt. Gen. Prac. 93. See further as to what is a contract for an interest in land and what not, and when this action lies, *Sainsbury v. Matthews*, 4 M. & W. 343; *Jones v. Flint*, 10 A. & E. 753; *Rodwell v. Phillips*, 9 M. & W. 501; *Harvey v. Gratham*, 6 Adol. & E. 62; *Earl of Falmouth v. Thomas*, 1 C. & M. 89.

II. RESPECTING
PERSONAL
PROPERTY.

For tithes bargained and sold. (o)

Commencement of count as ante, 36.] For certain tithes, whereof the plaintiff was the farmer and proprietor, issuing and arising from and out of and upon certain land and premises in the occupation of the defendant, (p) by the defendant, and at his request, and by the permission of the plaintiff, then had, taken, and retained to the defendant's own use. [*Conclude as ante, 36.*

The like in another form. (q)

Commencement of count as ante, 36.] For certain tithes arising, growing, renewing, and happening, upon and from certain lands and premises of the defendant, in the parish of —, in the county of —, and due and of right payable to the plaintiff, as rector of the rectory or parish church of — aforesaid, [or "as farmer and proprietor thereof,"] by the plaintiff then bargained and sold to the defendant, and at his request, and by the defendant, according to that bargain and sale, then had, taken and retained, to and for his own use and benefit. [*When the plaintiff's title is doubtful, a general indebitatus count may be advisable, for "certain tithes, goods and chattels then bargained and sold by the plaintiff to the defendant, and at his request," without stating where they grew, or that plaintiff is proprietor thereof. Conclude as ante, 36.*

For small tithes. (r)

Commencement of count as ante, 36.] For certain tithes whereof the plaintiff was the proprietor, by the defendant, at his request, and by the sufferance, &c. [*Conclude as in the preceding precedents for tithes.*

For necessities found and provided for defendant. (s)

Commencement of count as ante, 36.] For meat, drink, washing, lodging, and other necessities, goods and chattels, by the plaintiff then found and provided for the defendant, and at his request. [*Conclude as ante, 36.*

For necessities found and provided for third persons. (t)

Commencement of count as ante, 36.] For meat, drink, washing, and lodging, goods, chattels, and other necessities, by the plaintiff then found and provided, at the request of the defendant, for one E. F. and divers other persons. [*Conclude as ante, 36.*

For horse-meat and stabling. (u)

Commencement of count as ante, 36.] For horse-meat, stabling, care and attendance, by the plaintiff then found, provided and bestowed for, in, and about

(o) As to this count, see 1 Lev. 141; Sid. 223. For precedents for use and occupation of premises, and the tithes arising therefrom, see *ante*, 41. As to the evidence and law, see Chitt. jun. on Contracts, 468. This action is not sustainable unless there be evidence of an agreed composition in lieu of tithes. If such evidence be doubtful, the declaration should be in debt on the statute, for not setting out the tithes, and treble value, as *post*, Debt. Since the 5 & 6 Will. 4, c. 44, no suit or other proceeding can be had or instituted in any of her Majesty's Courts in England having cognizance of such matter, for or in respect of any tithes, oblations, or compositions withheld of or under the yearly value £10, (save and except in the cases provided for in the two acts of parliament therein firstly recited,) but all complaints touching the same are, except in the case of Quakers, to be heard and determined only under the powers and provisions contained in the said two first-

recited acts of parliament, in such and the same manner as if the same were therein set forth and re-enacted. As to determining a yearly composition for tithes, see *Goode v. Howels*, 4 M. & W. 198.

(p) Or, "for certain tithes, whereof, &c. arising in the parish of, &c. by the said C. D."

(q) See form, Plead. Assist. 71.

(r) For prædial tithes, see *ante*, 41.

(s) See the form for board and lodging, *ante*, 42, and forms, Plead. Ass. 224; Morgan, 29.

(t) See forms, 2 Rich. C. P. 89; Lil. Ent. 31, 39. As to the necessity for this count, see *ante*, 47 n. (l); Stra. 127; 8 T. R. 328; Bul. N. P. 136.

(u) See *ante*, p. 41, n. (k); Plead. Assist. 41; Morg. 30. Where vendor liable for, when contract of sale rescinded; 2 Chit. Rep. 416; 2 Camp. 82; 2 Moore, 106, 582; 8 Taunt. 535; and for how much, see *Street v. Bray*, 2 B. & Adol. 456; and see *post*, Decla-

the feeding and keeping of divers horses, mares, geldings, and cattle, of and for the defendant, and at his request. [*Conclude as ante*, 36.]

II. RESPECTING
PERSONAL
PROPERTY.

Commencement of count as ante, 36.] For agisting, depasturing, and feeding of divers cattle, by the plaintiff before that time agisted, depastured and fed in certain pastures and premises for the defendant, and at his request. [*Conclude as ante*, 36.]

For the agist-
ment of
cattle. (x)

Commencement of count as ante, 36.] For the use and hire of divers [horses, mares, and geldings, cattle, bridles, saddles, and harness, and of divers chaises and other carriages, or "of certain lighters and other vessels," or, "of certain plate, linen, china, furniture [*as the case may be*], goods and chattels,"] by the plaintiff before that time let to hire and delivered to the defendant, and at his request, and by the defendant and divers other persons, under and by virtue of that letting to hire, before then had and used. [*Conclude as ante*, 36.]

For the hire of
goods, horses,
&c. ship's furni-
ture, &c. (y)

Commencement of count as ante, 36.] For the use of divers stallions of the plaintiff before that time had and used, by and with the sufferance and permission of the plaintiff, in and for covering of divers mares for the defendant, and at his request. [*Conclude as ante*, 36.]

For covering
mares.

Commencement of count as ante, 36.] For the use of divers bulls of the plaintiff, before that time used for the bulling of divers cows of the said defendant, by the sufferance and permission of the plaintiff, and at the request of the defendant. [*Conclude as ante*, 36.]

For bulling
cows.

Commencement of count as ante, 36.] For freight [primage and average] due and payable from the defendant to the plaintiff, upon, for and in respect of the carriage and conveyance of divers goods, merchandize and chattels, by the plaintiff before that time carried and conveyed, in and on

For freight,
primage,
average. (z)

ration, Assumpsit, Special, for breach of warranty, and notes thereto.

(x) See note (k), *ante*, p. 41; Morg. 27.

(y) As to this count, see 1 Com. Rep. 116; 6 Taunt. 389; Plead. Assist. 5; 1 Rich. C. P. 210; Lil. Ent. 28.

(z) As to who may sue for freight, see *ante*, vol. i.; 3 Chitty's Com. Law, 416, 421. As to the form of the count, see Lil. Ent. 33, 54; Plead. Assist. 70; Morg. 23. As to the law; 3 M. & S. 482; 4 Id. 141; 6 Taunt. 608; 2 Marsh. 309; 4 Campb. 337; 1 Marsh. 123; 4 Taunt. 125; 3 Chitty's Com. Law, 407; and see Abbott on Shipping, Index, "Freight." And as to primage, see Holt, 420.

The usual form is more particular, but it seems less subject to variance to say, "in and on board of divers ships and vessels, for the said defendant, and at his request," as in the above precedent, without stating the name of the ship, voyage, &c.

This common count will suffice even in an action against the indorsee of a bill of lading; *Dugel v. Kemble*, 3 Bing. 383; Burrow, J.,

diss. The indorsee's acceptance of goods under a bill of lading does not of itself constitute an agreement to pay freight, &c. the acceptance in such case being only evidence (stronger or weaker according to other circumstances) of a new contract to make the payments stipulated by the bill of lading between the shipowner and the indorsee to whom the goods are delivered; *Moorson v. Kymer*, 2 M. & S. 318; *Cock v. Taylor*, 13 East, 399; *Wilson v. Kymer and others*, 1 M. & S. 157; *Sanders v. Vanseller*, 2 G. & D. 244. The consignee is *prima facie* the owner of the goods, but if he be not the owner, he is not liable *simpliciter* as consignee, except on a new contract to pay the freight, which contract is evidenced in ordinary cases by the bill of lading; *Coleman v. Lambert*, 5 M. & W. 505; *Cock v. Taylor*, 13 East, 399; *Amos v. Temperley*, 8 M. & W. 805. As to when an agent is personally liable for freight, and as to the necessity in such a case of stating a delivery of the goods as in the above form, or declaring specially, see the case last cited, and *Catling v. Aubert*,

E

II. RESPECTING
PERSONAL
PROPERTY.

board of divers ships and vessels, (a) from divers ports and places to divers other ports and places, and there, to wit, at the last-mentioned ports and places delivered by the plaintiff for the defendant, and at his request; [and for the care and attendance of the plaintiff and his servants, in and about the loading and unloading of the said goods, merchandize, and chattels, and the delivery thereof as aforesaid. (b)] [*Conclude as ante*, 36.

For the use of
an entire vessel.

If the defendant have chartered or had the unqualified use of an *entire vessel*, then the count should be for the use and hire of ships, &c. as *ante*, 49. (c)

For general
average. (d)

Commencement of count as ante, 36.] For certain general average due and payable from the defendant, upon, for, and in respect of divers goods, merchandizes, and chattels, of the said defendant, having been before then carried and conveyed by the plaintiff in and on board divers other ships or vessels, in and during divers voyages for the defendant, and at his like request, and in respect of certain losses, damages and expenses by the plaintiff incurred in and about the preservation of the said ship and cargo, and the said last-mentioned goods, merchandizes and chattels, from damage and loss during the said last-mentioned voyage. [*Conclude as ante*, 36.

The like in
another form.

Commencement of count as ante, 13.] For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had before that time carried and conveyed certain goods, merchandizes, and chattels, in and on board certain ships or vessels of the plaintiff, in and during a certain voyage, and had incurred and sustained certain losses, damages, and expenses, as to the said ship or vessel, in and about the preservation of the said goods, merchandizes and chattels whilst on board thereof as aforesaid, he the defendant promised the plaintiff to pay him so much money as he therefore reasonably deserved to have of and from the defendant, when he the defendant should be thereunto afterwards requested; and the plaintiff avers, that he therefore reasonably deserved to have of and from the defendant the sum of £—, whereof the defendant, afterwards, to wit, on the day and year last aforesaid, had notice. [*Conclude as ante*, 36.

2 East, 325. As to the duty of the ship-owner or master to transmit, where an event occurs to interrupt the voyage, and as to the amount recoverable in such a case for freight, see *Shipton v. Thornton*, 1 P. & D. 216. See as to this count, and when the declaration should be special, 2 B. & P. 323. If there be a charter-party or a contract under seal, in general the declaration must be on the deed; 1 New Rep. 104; when not, see *id.* and Abbott, 5th edit. 163, 170, 188; 12 East, 578; J. B. Moore, 358; 7 Taunt. 656, S. C.; 4 B. & C. 962. Extra freight may be recovered under the count for work and labour, especially if there be a promise to pay it; Holt, C. N. P. 392. If the demand be for freight only, erase the words "primage and average;" if for average only, erase the words

"freight and primage." See a count for average, 1 East, 220. For average it was never usual to add a *quantum meruit* count. When freight cannot be apportioned, the voyage being incomplete, Chitty, jun. on Contracts, 3d edit. 735.

(a) They may be laid to be the vessels of the plaintiff, though he be only captain; 6 Taunt. 65.

(b) If only for freight, leave out these words between brackets.

(c) See *Harrison v. Wilson*, 2 Esp. Rep. 708.

(d) See special counts, *post*; for law, see Abbott on Ship, 5th edit. 342, &c.; 3 Chitty's Com. Law, 433; Hughes on Insurance, 284 to 300; Smith's Mercantile Law.

Commencement of count as ante, 36.] For the tonnage of divers goods, merchandize, and chattels, of the defendant by the plaintiff before then carried and conveyed upon divers parts of a certain cut or canal, navigable and passable from divers places to divers other places, in certain boats, barges, and other vessels, for the defendant, and at his request. [*Conclude as ante, 36.*]

II. RESPECTING
PERSONAL
PROPERTY.
For the tonnage
of goods. (e)

Commencement of count as ante, 36.] For the passage of the defendant [or "of divers persons before then carried and conveyed by the plaintiff,"] in and on board of a certain ship or vessel of the plaintiff, from divers ports and places to divers other ports and places, and at the request of the defendant. [*Conclude as ante, 36.*]

For a passage
on board a
ship. (f)

Commencement of count as ante, 36.] For the use of a certain ship or vessel whereof the plaintiff was owner, (h) by the defendant before that time retained and kept on demurrage, with certain goods, merchandize and chattels on board thereof, for a long time before then elapsed, and at his request. [*Conclude as ante, 36.*]

For demur-
rage. (g)

Commencement of count as ante, 36.] For the lighterage of divers goods, merchandize, and chattels, by the plaintiff before that time carried and conveyed in certain lighters and other vessels of the plaintiff, and by him and his sailors, mariners, and servants, shipped and landed from and out of the same for the defendant, and at his request, and being &c. [*Conclude as ante, 36.*]

For lighterage.

Commencement of count as ante, 36.] For the lighterage, wharfage and warehouse-room of divers goods, merchandize, and chattels, by the plaintiff before that time shipped and landed in and by certain lighters and other vessels of the plaintiff, and deposited and kept in and upon a certain wharf and certain warehouses and premises of the plaintiff, for the defendant, and at his request. [*Conclude as ante, 36. (k)*]

For lighterage,
wharfage, and
warehouse-
room. (i)

(e) 3 Wentw. 70.

(f) Governed by rules as to freight; 5 East, 320, 321; 2 Campb. 15, 16; 3 Chitty's Com. Law, 424; Abbott on Ship, 5th edit. 206. As to the law relating to a captain or master's duty to passengers, and contract under seal as to passage, *Corbyn v. Leader*, 6 Car. & P. 32.

(g) As to demurrage, see Abbott on Ship, by Stree; 3 Chitty's Com. Law. 427, 430; and Smith's Mercantile Law. The above count will in general suffice where there is a contract for demurrage, and such contract is not under seal; see *Lear v. Yate*, 3 Taunt. 389; but if the contract be under seal, the declaration must be in debt or covenant; 1 New Rep. 104; see forms, *post*.

Indebitatus assumpsit will not lie for demurrage unless there be an express contract to pay it; but if the defendant detained the ship longer than the usage of trade authorized, the remedy is by a special action; per *Fiske, B.*; *Horn v. Bensusan*, 2 M. & Rob. N. P. C. 326; 9 C. & P. 709, S. C.; 2 New Rep. 258; 4 Campb. 131; 12 East, 179;

6 J. B. Moore, 415, 425; 3 C. & P. 186; Abbott, 181; and see a form, *post*. The common count will not suffice where the demurrage has arisen *ex delicto*; *Harrison v. Wilson*, 2 Esp. Rep. 707. For what detention the charterer of a ship is liable, see *Pringle v. Mollett*, 6 M. & W. 80.

(h) The owners, and not the master, must sue for demurrage, or on an implied contract to pay a compensation for the detention of the vessel, where there has been no express contract; Abbott, 4th edit. 169, 170; 4 Taunt. 1; *Evans v. Foster and another*, 1 B. & Adol. 118. *Aliter* on an express contract; *Jesson v. Solly*, 4 Taunt. 52; see further, Chitty, jun. 3d edit. 230, note (a).

(i) This form may be easily applied to a demand for wharfage, or for warehouse-room only. And see the precedent for warehouse-room, *ante*, 39; Morg. 26.

(k) For boomage, buoys, and sea-marks, see *Plead. Assist.* 52, 53. For moorage, see 3 Wentw. 69; and *ante*, 42. For pilotage, crimpage, and salvage, see *post*, 53 and 54.

III. RESPECT-
ING PERSONAL
SERVICES.

III. RESPECTING PERSONAL SERVICES. (I)

First—WAGES.

For wages as a
hired ser-
vant. (m)

Commencement of count as ante, 36.] For the wages or salary of the plaintiff, then due and payable from the defendant to the plaintiff, for the service of the plaintiff, by him done and performed as the hired servant of and for the defendant, and on his retainer. *If the service has been performed on board a ship, add these words, "in and on board a certain ship or vessel."* [*Conclude as ante, 36.*]

For wages as a
sailor, against
the captain or
owner. (n)

Commencement of count as ante, 36.] For the wages of the plaintiff before that time and then due and payable from the defendant to the plaintiff, for the service of the plaintiff before then done and performed as a mariner, of

(l) When the demand is for *wages, fees, or work and labour in particular professions, &c.* it has been usual to insert a count stating concisely the nature of the service, as in the above precedents, and then to add the common count for work and labour generally, without stating the particulars, or in what character or capacity the service was performed; but the latter count would in all cases suffice; 3 Campb. 37; 2 Wils. 20; 1 New Rep. 289; 2 Saund. 350, n. 2, 373. And in the recent case of *Fisher v. Snow*, 3 Dowl. Rep. 29, it was considered that under a count for *work done and materials found*, an attorney might recover his fees for conducting an action or defence, and for preparing deeds and securities.

(m) As to the wages of servants in general, if the hiring be a general one, without mention of time, it is considered to be for a year certain; and if the servant continue beyond that time, a contract for a second year will be implied; *Beeston v. Collyer*, 4 Bing. 311; *Fawcett v. Cash*, 5 B. & Ad. 904; *Turner v. Robinson*, id. 790; *Williams v. Byrne*, 7 A. & E. 177; *Huttman v. Bullinois*, 2 C. & P. 510. If the defendant has refused to employ the plaintiff, and the action be brought before the wages under the contract would have accrued due, or if the plaintiff was turned away without notice, pursuant to the contract, the declaration must be special; 2 East, 145; 3 C. & P. 349; and see forms, *post*, *Spec. Ass.* and notes to those forms. Where wages are payable quarterly, or at other intervals, and the servant is wrongfully discharged in the middle of the quarter, &c., he cannot recover for the remainder of the quarter, &c., on a general count for work and labour; *Smith v. Hayward*, 7 A. & E. 544; 2 N. & P. 432, S. C.; see also *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171; *Archard v. Horner*, 3 C. & P. 349; but see *Gandell v. Pontigny*, 4 Campb. 375; 1 Stark. 198, S. C. *contra*. A servant dismissed for improper conduct cannot recover any part of the salary current from the last pay-day at the time of his dismissal; *Ridgway v. Hungerford Market Co.*, 3 A. & E. 171. As to the servant's right to recover wages where the remuneration is left entirely to the master, see *Taylor v. Brewer*, 1 M. & S. 290; *Bryant v. Flight*, 5 M. & W. 114.

No new contract arises by implication of law upon a simple dissolution of a special contract of hiring and service in respect of services performed under such special contract previously to its being dissolved; but under certain circumstances it is a question for the jury whether the parties may not have come to a new agreement; *Lambourn v. Creuden*, 2 M. & G. 253.

(n) If it be against the owner of the ship, say, "a certain ship or vessel of the defendant," and omit the words in italics. The observation in the note to the last precedent is applicable to this. If the contract be under seal, and delivered as a deed, an action of debt or covenant must be brought; if it be not under seal, or not so delivered, then an action of assumpsit or debt; *Abbott on Ship.* 5th ed. 485. Where the defendant has refused to employ the plaintiff as seaman, or improperly dismissed him, the declaration should be special. See form, *post*, *Spec. Ass.* The plaintiff is not bound to show that the ship earned freight, the defendant must prove the negative, if such proof will furnish a defence; 7 Taunt. 319; 1 Hagg. Ad. Rep. 227; *Abbott on Ship.* 5th ed. 485. For the law in general, see *Abbott on Shipping*; *Holt on Shipping*; 1 Chit. Gen. Prac. 73, 74; and 2 id. 520 to 526. If there was no contract as to wages, the declaration should be for work done. As to seamen's contracts for wages, see 5 & 6 W. 4, c. 19; by the 15th section of which statute a summary remedy is given before a justice of the peace, if the claim do not exceed £20. Where a seaman, who has signed the articles of agreement required by 5 & 6 W. 4, c. 19, absolutely quits the ship without any *animus revertendi* after her arrival, and being moored at her port of delivery, but before her cargo has been discharged, he does not thereby incur a total forfeiture of his wages within the 9th section of that statute, but only of a month's wages under the 7th section; *M'Donald v. Jopling*, 4 M. & W. 285. As to the right of a sailor or other person to wages where the accruing of the debt depends on a special agreement, see *Cutter v. Powell*, 6 T. R. 320; and the notes to that case in 2 Smith's Leading Cases.

and belonging to a certain ship or vessel, *whereof the defendant, during the time of such service, was master and commander*, and for the defendant, and on his retainer. [*Conclude as ante, 36.*]

III. RESPECT-
ING PERSONAL
SERVICES.

Commencement of count as ante, 36.] For and in respect of his the plaintiff having, at the request of the defendant, for a long time, to wit, for — months (o) then elapsed, and whilst the plaintiff served as a mariner on board the said ship or vessel of the defendant and for the defendant, relinquished his right to and not received from the defendant a great part of his daily allowance of meat, drink, and other necessaries, which the plaintiff was, during that time, entitled to receive and have as such mariner as afore-said of and from the defendant, under and by virtue of a certain agreement before then made between the plaintiff and the defendant. [*Conclude as ante, 36.*]

For short allow-
ance money by
a seaman.

Commencement of count as ante, 36.] For the wages or salary of the plaintiff then due and payable from the defendant to the plaintiff, for his service, by him done and performed, as the *steward of the said defendant, for a long time before then elapsed, in and on board of a certain ship or vessel* whereof the defendant was, for and during all that time, master and commander, and for the defendant, and at his request. [*If at the suit of the mate, instead of the words in italics, insert "mate of."* *Conclude as ante, 36.*]

For wages, as a
ship-steward or
mate, against
the captain. (p)

Commencement of count as ante, 36.] For the wages of the plaintiff due and owing for his service, before then done and performed by him as master and commander of a certain ship or vessel for the defendant, and at his request. (r) [*Conclude as ante, 36.*]

For wages, as
captain, against
the owner. (q)

Commencement of count as ante, 36.] For certain prize-money, wages, and reward, then due and payable from the defendant to the plaintiff, for his service before that time done and performed as quarter-master on board a certain ship or vessel of the defendant, and at his request. (s) [*Conclude as ante, 36.*]

For prize-mo-
ney, wages, &c.
by a quarter-
master against
the owner.

Commencement of count as ante, 36.] For the pay or salary of the plaintiff then due and payable from the defendant to the plaintiff for his services before then done and performed as quarter-master of a certain corps, called, &c., for the defendant, and at his request. (t) [*Conclude as ante, 36.*]

For salary, as a
quarter-master
of a corps of
troops.

Commencement of count as ante, 36.] For certain pilotage and reward then due and payable from the defendant to the plaintiff for the pilotage, mooring and unmooring of a certain ship or vessel of the defendant, by the plaintiff

For pilotage. (u)

(o) Any time sufficient to cover the real time.

(p) A parner's steward on board one of her majesty's ships cannot recover wages from the parner without express contract to pay; 2 Stark. 361.

(q) What evidence sufficient to entitle him to wages, see 1 J. B. Moore, 65.

(r) See observations, *ante*, 52, n. (n).

(s) *Ibid.*

(t) *Ibid.*; Plead. Assiat. 52, 58.

(u) As to pilotage, see 6 Geo. 4, c. 125, and 1 Taunt. 300; Peake's C. N. P. 107; 2 Chit. Com. Law, 46; Abbott on Ship. 5th ed. 148 to 161.

DECLARATIONS IN ASSUMPSIT.

III. RESPECT-
ING PERSONAL
SERVICES.

before then piloted, moored and unmoored for the defendant, and at his request. [*Conclude as ante*, 36.]

For crimpage.

Commencement of count as ante, 36.] For certain crimpage and reward before that time and then due and payable from the defendant to the plaintiff upon, for and in respect of the plaintiff having procured, raised and shipped certain seamen in and on board of a certain ship or vessel for the defendant, and at his request. [*Conclude as ante*, 36.]

For salvage. (s)

Commencement of count as ante, 36.] For salvage of a certain anchor and cable by the plaintiff before then saved for and delivered to the defendant. [*Conclude as ante*, 36.]

Secondly—FEES.

As an attorney and solicitor in prosecuting and defending suits, &c. and preparing deeds, &c. (a)

Commencement of count as ante, 36.] For the work and labour, care, diligence and attendance of the plaintiff by him and his clerks before that time done, performed, and bestowed, as the attorney and solicitor of and for the said defendant and otherwise, and upon his retainer, in and about the prosecuting, defending, and soliciting of divers causes and suits and certain business for the defendant, and for fees due and of right payable to the plaintiff in respect thereof. And also for other the work and labour, care, diligence and attendance of the plaintiff by him done, performed and bestowed, in and about the drawing, copying, and engrossing of divers conveyances, deeds and writings, for the defendant, and in and about other the business of the defendant, and for him, and at his request. And also for divers journies and other attendances by the plaintiff before then made, performed and given, in and about the business of the defendant, and for him and at his request. [*Add a count for money paid, and the account stated, if the evidence will prove them, and conclude as ante*, 36. (b)]

As attorney, for prosecuting a fiat in bankruptcy.

Same as preceding form, except, instead of the words "prosecuting, defending and soliciting of divers causes, suits, and businesses," *say*, "procuring, suing out, prosecuting, managing and conducting of a certain fiat in bankruptcy against one E. F., and in and about the" [*&c.*]

The like for procuring a bankrupt's certificate.

Same as in preceding form, supra, except, instead of the words "prosecuting, defending and soliciting of divers causes, suits, and businesses," *say*, "pro-

(s) In the case of salvage from perils of the sea, the statutes have not taken away the common law remedy, *Abbott on Ship*. 5th ed. 397; 3 B. & P. 612, and the precedent there; but in the case of *re-capture*, as the admiralty has peculiar jurisdiction over prize causes (see 2 Dougl. 594, &c.), the 33 Geo. 3, c. 66, s. 42, renders it necessary for the re-captor to resort to that court. As to the mode of recovering salvage, see the acts 48 Geo. 3, c. 130; 49 Geo. 3, c. 123; 53 Geo. 3, c. 87; 1 & 2 Geo. 4, c. 75 and 76; and 3 & 4 Vict. c. 65. See 2 Holt on Ship. 230; 2 Chit. Gen. Prac. 528; and Smith's Mercantile Law, 296.

(a) This form will suffice in all cases by an attorney or solicitor against his client, for business done at law or in equity. Where there was no suit carried on, or no deeds prepared, &c. or no journies taken, the parts of

this form not applicable to the case should be omitted. If the suit were carried on for a third person at the defendant's request, this count, with a little alteration, will suffice; 2 Show. 421. But if the defendant be liable in respect of a collateral undertaking in writing, the declaration must be special; see 1 Saund. 211 b, and a form, *post*. A common count for work and labour will, however, in most cases suffice. And in *Fisher v. Snow*, 3 Dowl. 29, a count for *work and materials*, without stating particulars, was holden sufficient. And if there be any doubt as to the particular work done, a very general but comprehensive count is to be preferred; *Skin*. 218.

(b) When an attorney may recover on the count for money paid, though his bill has not been delivered, see *Tidd*, 9th ed. 335; 11 East, 285; 5 B. & A. 896.

caring and obtaining the certificate of conformity of the said defendant to a certain fiat in bankruptcy, before then issued and awarded against him, and also for other the work and labour, care, diligence, and attendance of the plaintiff done and performed in and about other the business of the defendant, and at his request."

III. RESPECT-
ING PERSONAL
SERVICES.

Same as in preceding form, supra, except, instead of the words "prosecuting, defending, and soliciting of divers causes, suits, and businesses," say, "endeavouring to procure and obtain, and procuring and obtaining the said defendant's discharge from imprisonment as an insolvent debtor, in pursuance of the statutes then in force for the relief of insolvent debtors in England."

The like for pro-
curing defend-
ant's discharge
as an insolvent.

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff, as a clerk in court, before that time done, performed, taken and bestowed by the plaintiff, upon the retainer and at the request of the defendant, in and about the prosecuting and defending of divers causes and suits, and transacting divers other businesses for the defendant, and for money laid out and expended and paid by the plaintiff, at the like request of the defendant, in and about the prosecuting and defending the said causes and suits, and transacting the said other businesses, and for money due from the defendant to the plaintiff for his fees due and of right payable to him in that respect. [Conclude as ante, 36.]

As a clerk in
court in the Ex-
chequer. (c)

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff as a solicitor, and also as one of the sworn clerks of E. F. Esq., one of the six clerks of her Majesty's High Court of Chancery at Westminster, in the county of Middlesex, before that time done, performed and bestowed by the plaintiff, upon the retainer, and at the request of the defendant, in and about the prosecuting, defending, and soliciting of divers causes, suits, and businesses in the said court, for the defendant, and for certain fees due and of right payable to the plaintiff in respect thereof. [Conclude as ante, 36.]

As one of the
six clerks in the
Court of Chan-
cery. (c)

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff by him done, performed, and bestowed, as the proctor of and for the defendant, and upon his retainer, in and about the prosecuting of an appeal from a sentence pronounced by the Arches Court of Canterbury, and in and about other the business of the defendant, and for the defendant, and at his request, and also for fees due and of right payable from the defendant to the plaintiff in respect thereof. [Conclude as ante, 36.]

As a proctor, in
prosecuting an
appeal to the
High Court of
Delegates. (d)

Commencement of count as ante, 36.] For the work and labour, care, and diligence of the plaintiff, by him the said plaintiff before then done, performed, and bestowed for the defendant, as his agent, and upon his retainer,

By an attorney,
as agent, against
another attor-
ney.

(c) As the offices of the sworn and side clerks of the Exchequer and the six clerks of the Court of Chancery have been abolished by the 1 W. 4, c. 70, and the 5 & 6 Vict.

c. 103, these forms will probably be of no use, except as guides to the framing of other counts at the suit of other officers.

(d) 1 Wentw. 193, 194.

III. RESPECT-
ING PERSONAL
SERVICES.

and at his request, in and about the prosecuting and defending of divers suits at law and in equity, for the defendant, and for fees due and of right payable to the plaintiff in that respect, and in and about the drawing and engrossing of divers deeds and writings for the defendant, and at his like request, and also for other work and labour, care, diligence, and attendance of the plaintiff by him then done, performed, and bestowed for the defendant, and at his request, and also for divers journies and attendances by the plaintiff before then taken, made, and performed for the defendant, and at his like request. [*Conclude as ante*, 36.]

As a messenger
under a fiat in
bankruptcy.(f)

Commencement of count as ante, 36.] For the work and labour, care and diligence of the plaintiff, by him before then done, performed and bestowed for the defendant, and at his request, as a messenger in and under a certain fiat and proceedings in bankruptcy before then issued and awarded against one E. F., and for fees due and of right payable to the plaintiff in respect thereof, and also for other the work and labour, care, diligence and attendance of the plaintiff, by him before then done, performed and bestowed, in and about the drawing, copying and engrossing of divers summonses, advertisements, documents and writings for the defendant, and in and about other the business of the defendant, for him and at his request, and also for divers journies and other attendances by the said plaintiff before then made, performed and given, in and about the said business and other the business of and for the defendant, and at his request. [*Conclude as ante*, 36.]

As a sheriff's
officer, bailiff,
&c.(g)

Commencement of count as ante, 36.] For certain fees, perquisites and sums of money, then due and owing and of right payable from the defendant to the plaintiff, as a bailiff to the sheriff of the county of —, upon and for the execution of divers writs and proceedings for the defendant, at his request; and also upon and for the work and labour, trouble, care, diligence, journies and attendance of the said plaintiff, as such bailiff, done performed and bestowed, in and about the executing and serving the said writs and proceedings, and in and about the conducting, guarding and keeping of divers persons arrested by the plaintiff for the defendant, under and by virtue of the said writs and proceedings, at the like request of the defendant. [*Conclude as ante*, 36.]

The like, in
another form.

Commencement of count as ante, 36.] For fees and rewards due and payable from the defendant to the plaintiff, as a sheriff's officer, for the work, care, diligence and attendance of the plaintiff, done, performed and bestowed

(f) The messenger may sue for his fees, and in general the action should be against the petitioning creditor, and not the solicitor, unless he expressly retained him on his own responsibility; 2 M. & S. 438. If the solicitor agree with the petitioning creditor to work (i. e. *conduct*) the fiat for a sum certain, and receive a great part of that sum, he will be liable to such messenger on account of money had and received; *id.* The messenger may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt; although the party was duly declared a bankrupt, and the

messenger's bill was ordered by the commissioners to be paid by the assignee out of the estate; 2 C. & P. 123. As to actions by a messenger, in general, see Chitty, jun. on Contracts, 3d ed. 573.

(g) The action for fees, &c. payable to the sheriff for executing writs, should in general be brought in the name of the sheriff; but if the sheriff's officer has been specially retained by the plaintiff or his attorney, he may sue for his labour; see 5 B. & C. 328; 1 Ry. & Moo. 314. See a form, *post*, by a sheriff for poundage.

as such officer, in and about the making of divers captions, and executing certain writs and proceedings for the defendant, and at his request. [*Conclude as ante*, 36.]

III. RESPECTING PERSONAL SERVICES.

Commencement, ante, 19.] For that whereas a certain person, to wit, E. F., now is and for a long time now elapsed hath been lord of the manor of —, in the county of —, and the plaintiff now is, and during all the time aforesaid hath been, his steward of the Courts of the said manor. And whereas the said defendant, whilst the said E. F. was lord of the said manor, to wit, on [&c.] was indebted to the plaintiff, as such steward of the Courts of the said manor, in the sum of £—, for his fees due and of right payable to him as steward of the Courts of the said manor, for and on the admission of G., the wife of the said defendant, to certain copyhold tenements of the said manor, held of the lord of the said manor as of his manor, by copy of the Court rolls of the said manor, according to the custom of the same manor before then thereto duly admitted, and for the engrossing and entering the said admission on the Court rolls of the said manor, and for the copies thereof before then made for and delivered to the defendant and G. his wife, by the plaintiff, at the request of the defendant, and for stamps and parchments in that behalf before then found, provided, and used by the plaintiff, at the like request of the defendant. [*Conclude as ante*, 36.]

As a steward of a manor, for fees on admission to a copyhold. (h)

Commencement of count as ante, 36.] For the work and labour, journeys and attendances of the plaintiff, by him done, performed, bestowed, made and given, as a witness, at the request of the defendant, in and about the attending to give his the plaintiff's evidence upon the trial of a certain action. [*Conclude as ante*, 36.]

As a witness. (i)

Thirdly—FOR SERVICES IN GENERAL.

Commencement of count as ante, 36.] For the work and labour, care and diligence of the plaintiff, by him then done, performed and be-

For work and labour done and materials found in the form adopted before Reg. Gen. Trin. T. 1 W. 4. (k)

(h) See Morgan's Precedents, 577. As to what fees the steward is entitled to, see 6 Taunt. 425; 2 Marsh. 84; Holt, C. N. P. 1, S. C.

(i) See Chit. jun. Contr. 3d ed. 52, 586, 587; 1 Taunt. 10. A promise to pay for loss of time is not binding; 1 B. & B. 515; 4 J. B. Moore, 300, S. C.; 5 M. & S. 156; Collins v. Godefroy, 1 Bar. & Adol. 960. A person who is subpoenaed, and attends, but refuses to give evidence, unless his expenses are paid, may sue in assumpsit for his necessary expenses of attendance against the party who subpoenaed him; 13 East, 15. There is no implied contract with an attorney who subpoenas a witness to pay his expenses; Robins v. Bridge, 6 Dowl. P. C. 140.

(k) See Forms, Lil. Ent. 26, 38, 43, &c.; for work and labour as an attornay; 2 Rich. C. P. 83; for forms for recovery of wages, &c. ante, 52 and 53.

As to this count in general, see fully ante, vol. i. chapter on Declarations, Common Counts. The Reg. Gen. Trin. T. 1 W. 4,

prescribe a concise form of count for work done and materials provided, therefore the following forms should be shortened according to the judgment of the pleader and the particular circumstances of the case. A contract to pay money for any description of work and labour done for the defendant may be given in evidence under this count, and medicines, &c. administered may be considered as materials found by the plaintiff, and used in and about the work and labour; 3 Campb. 37; 1 N. R. 189; Skin. 218; so preparing and executing deeds by an attorney may be proved as materials found; Fisher v. Snow, 3 Dowl. 29; ante, vol. i. chap. Declarations. When the work or service has been completely performed for the defendant, and accepted by him, though under a special agreement, if the agreement was not under seal, and was for payment in money, this count is sufficient; Fitzg. 302; 1 Wils. 117; Bull. N. P. 139; 2 Chit. Rep. 320; 2 M. & W. 448; and in some cases, though the original agreement be not performed, yet if the defendant has ac-

III. RESPECT- ING PERSONAL SERVICES.

stowed for the defendant and at his request. And also for divers mate-

tually derived benefit from the part performance, he will be liable to pay the reasonable value; *Peake*, 103; 1 *Stark*. 275; 6 *Taunt*. 322; 1 *Marsh*. 581; 4 *Taunt*. 745; 2 *Taunt*. 150; 3 *Chit. Com. Law*, 271, *acc.*; but see 1 *New Rep.* 355. Where new or extra work is not applicable to the special contract, plaintiff may recover under this count; *Holt's C. N. P.* 236; 1 *Stark*. 275, *S. C.* And this common count will suffice to support a claim for the services of the plaintiff's apprentice whilst he was harboured by defendant, for plaintiff may waive the tort and sue in assumpsit; 3 *M. & S.* 191.

But this count will not suffice where the work remains incomplete, and the defendant has not accepted the part of the work done under it, and in such case, if the plaintiff can recover at all, the declaration should be special; or if the defendant has prevented plaintiff from completing the agreement in consequence of defendant's nonperformance of some condition precedent, or the like, the declaration should state such prevention; *Hulle v. Heightman*, 2 *East*, 145; see the form, *post*; or if the agreement was conditional, and the defendant has not waived or assented to the complete performance of the condition, as where the plaintiff agreed to build a mill, and if it did not answer to build another, and the defendant had not admitted that the mill answered; 2 *Chit. R.* 320.

An action for work and labour will not lie by a person who manufactures a chattel out of his own materials. When the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an action for goods sold and delivered; or if the employer refuses it, a special action on the case for such refusal; but he cannot maintain an action for work and labour, because the labour was bestowed on his own materials and for himself, and not for the person who employed him; see the judgment of *Bayley, J.*, in *Atkinson v. Bell*, 8 *B. & C.* 283. But a person who contracts to build a house, furnishing both timber and labour, cannot recover for the materials on a count for goods sold and delivered, although, by reason of a deviation from the original plan, the contract has been superseded as to price; 6 *Taunt*. 322. As to builders, carpenters and workmen in general, see *Chit. jun. on Contracts*, 3d ed. 565.

Before the General Rules, *Hil. T.* 4 *W.* 4, prohibiting two counts on the same transaction, it was held that if the plaintiff declared upon a special agreement, and also upon a quantum meruit, and at the trial proved a special agreement, but different from that stated in the declaration, he could not recover on either count; not on the first, because of the variance, nor on the second, because there was a special agreement; but if he proved a special agreement, and the work done, but not pursuant to such agreement, he was allowed to recover on the quantum meruit, for otherwise he would not be able to recover at all; *Bul. N. P.* 2d ed. 139; 1 *New Rep.* 355.

It is a general rule, that if there has been no beneficial service whatever, there shall be no pay; 3 *Stark*. 6; 1 *Campb.* 38; 3 *Campb.* 451; 1 *Ry. & Moo.* 317; 9 *B. & C.* 92; and see 2 *Chitty jun. on Contracts*, 443 to 447; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for the plaintiff's nonperformance of the agreement; 3 *Stark*. 6; 1 *Campb.* 39, 190; 7 *East*, 484; and though a party undertakes a work of specified dimensions and materials, and deviates from the specification, yet, if the defendant expressly or impliedly suffer the deviation, or accept the thing manufactured in its incomplete state, then the defendant will be bound by the original contract, as far as it can be traced, and a fair remuneration for the work done is recoverable; 1 *Stark*. 275; 6 *Taunt*. 322; 1 *Marsh*. 581; 4 *Taunt*. 745; 2 *Taunt*. 150; *Bla. Rep.* 103, *acc.*; but see 1 *New Rep.* 355; and where some additions are made to a building, which the workman contracts to finish for a certain sum of money, the contract shall bind as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. But if a man contract to work by a certain plan, and that plan be so entirely abandoned, that it is impossible to trace the contract and say to which part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done by measure and value, as if no such contract had been made; per *Lord Kenyon*, *Peake's Rep.* 103.

Where the plaintiff undertook, for a specified sum, to repair and make perfect an article then in a damaged state, and did repair it in part, but did not make it perfect; it was held he could not recover even for the work actually done; 9 *B. & C.* 92. See the various cases collected on this subject in the notes to *Cutter v. Powell*, 2 *Smith's Leading Cases*. And as to contracts for work and labour in general, see fully *Chit. jun. on Contracts*.

If the plaintiff has put better materials into work than those contracted for, he cannot in general compel the defendant to pay an increased sum for them; 3 *Car. & P.* 453.

Though a specified sum be agreed on for the performance of the work, defendant may reduce that sum on showing the inferiority of the work to what it ought to have been, and giving the plaintiff notice that the defendant intends setting up such a defence at the trial; 7 *East*, 479; 1 *Campb.* 38; 3 *Stark*. 32 *Cousins v. Padden*, 4 *Dowl.* 488. And where the claim is on a quantum meruit, the defendant may, without notice, reduce the damages, by showing that the work was improperly done, and may entitle himself to a verdict, by showing its total insufficiency, *id.*; 1 *Campb.* 191; 3 *Campb.* 451; 1 *Stark*. 106; 4 *Dowl.* 488; 2 *C. M. & R.* 547. If a bill of exchange has been accepted for the work, the bad quality and partial insufficiency do not form a ground for reducing the amount claimed,

rials (1) and other necessary things by the plaintiff then found and provided, and used and applied, in and about that work and labour for the defendant, and at his like request. [*Conclude as ante, 36.*]

III. RESPECT- ING PERSONAL SERVICES.

Commencement of count as ante, 36.] For the work and labour, care, and diligence of the plaintiff, then done, performed and bestowed by him and his servants, and with his horses, cart and carriages, [*or "with his lighters and other vessels,"*] goods and chattels, in and about the business of the defendant, and for him, and at his request. [*If it be for the carriage of goods, instead of the words between the brackets, say "in and about the carrying and conveying of divers goods, chattels and effects, and delivering the same for the defendant, and at his request," &c., or the count may be as in the next count. Conclude as ante, 36.*]

For work with horses and carriages, or with lighters, &c.

Commencement of count as ante, 36.] For the carriage and conveyance of divers goods, chattels and effects by the plaintiff before then carried and conveyed in certain carts and other carriages for the defendant, and at his request. [*Conclude as ante, 36.*]

For the carriage of goods by land.

Commencement of count as ante, 36.] For the work and labour, care and diligence of the plaintiff, by him before that time done, performed and bestowed, in and about the business of the defendant, and for him, and at his request, and for divers journeys and attendances by the plaintiff made, performed and given, in and about the said work and labour for the defendant, and at his like request. [*Conclude as ante, 36.*]

For work, jour-
nies, and attend-
ance.

1 Campb. 40 ; 2 Campb. 346 ; 3 Campb. 38 ; 14 East, 486.

To entitle the plaintiff to recover, there must have been an express or implied contract for remuneration. Therefore an action cannot be maintained for services performed with a view to a legacy, and not in expectation of reward in nature of a debt ; Str. 728 ; 1 Esp. 188. Where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right ;" it was held no action would lie to recover a recompense for such work ; *Taylor v. Brewer*, 1 M. & S. 290 ; but see *Bryant v. Flight*, 5 M. & W. 114. Bail cannot sue for trouble and loss of time in going to a place to become bail for another ; 1 Car. & P. 434 ; nor an attorney for the usual allowance for attending as a witness ; 1 B. & Adol. 950. As to the right of arbitrators to remuneration, see Chit. jun. on Contr. 3d ed. 554.

But where the defendant requested the plaintiff to take care of and show defendant's horse, and promised to make him a handsome present, it was held the plaintiff might recover a reasonable recompense for the work and labour ; 5 Taunt. 302 ; Fitzg. 302. Where a special contract is entered into under a fraudulent representation by the defendant, the plaintiff can only recover according to the

terms of such contract ; but where the fraud was discovered, he might have repudiated the contract and sued for deceit ; *Selway v. Fogg*, 5 M. & W. 83.

If a slave comes over from the West Indies, and continues in the service of his master here, he is not entitled to wages, unless there has been some agreement or contract of service to be paid for in money ; 3 Esp. R. 3 ; and see 2 Car. & P. 231.

See further as to the right to recover for work and labour in particular cases, and for wages and fees, the various notes, *ante*, 52 and 53 ; and Chitty, jun. on Contracts.

(1) The value of materials cannot be recovered under a count for work done, without mentioning materials for the same provided ; *Keatly v. Fresland*, 1 M. & W. 543. But the plaintiff may recover for work done although the count include also a demand for materials not sustained by evidence.

Where materials for the work are provided by the defendant, the plaintiff's right of action will be considered complete as soon as the work is finished and a reasonable opportunity has been given of ascertaining its correctness ; and although the plaintiff may have refused to deliver the goods, except on payment of a larger price than he is entitled to, yet he is not thereby precluded from recovering a reasonable price ; *Hughes v. Lenny and another*, 5 M. & W. 183.

III. RESPECT- ING PERSONAL SERVICES.

As an agent generally, and for commission. (m)

Commencement of count as ante, 36.] For the work and labour, care, diligence, journies and attendances of the plaintiff, by him before then done, performed, and bestowed, as the agent of and for the defendant, and on his retainer, and for commission and reward due and of right payable from the defendant to the plaintiff in respect thereof. [*Conclude as ante, 36.*

As a factor or agent in selling goods. (n)

Commencement of count as ante, 36.] For the work and labour, care and diligence, journies and attendances of the plaintiff, then done, performed, and bestowed, as the factor and agent of the defendant, in and about the selling and disposing of and endeavouring to sell and dispose of divers goods, chattels and effects, and in and about other the business of the defendant, and for him and at his request. [*Conclude as ante, 36.*

As an insurance broker. (o)

Commencement of count as ante, 36.] For the work and labour, care, and diligence, of the plaintiff done, performed, and bestowed, in and about the writing, drawing, and making out of divers policies of insurance of divers ships and vessels, goods, merchandize, and chattels, before that time written, drawn, and made out by the plaintiff, as an insurance-broker, and in and about the causing and procuring divers persons to insure divers sums of money upon the said ships and vessels, goods, merchandize, and chattels, at the request of the defendant, and for divers sums of money before that time advanced and paid by the plaintiff for the defendant, at his like request, to divers persons, as and for premiums and rewards, for the underwriting and subscribing the said policies of insurance, before that time underwritten and subscribed for the insurance of the said ships and vessels, goods, merchandize, and chattels, during certain voyages undertaken by the said ships and vessels, and for the trouble, care and diligence of the plaintiff in that behalf, at the like request of the defendant. [*Conclude as ante, 36.*

For premiums of insurance. (p)

Commencement of count as ante, 36.] For certain premiums of insurance due and payable from the defendant to the plaintiff, upon, for and in

(m) See 1 Wentw. 195; and see in general as to an agent's right to commission, Chit. jun. on Cont. 3d ed. 547, 548; 3 Chit. Com. Law, 221; Paley, Prin. and Agent. Where the principal derives no benefit whatever from the acts of his agent, in consequence of some misconduct or mismanagement on the part of the latter, no remuneration can be recovered; 1 Com. Contr. 271; 8 Bro. P. C. 339; 3 Stark. C. N. P. 161; 1 Car. & P. 384; 3 Taunt. 32; 3 Campb. 451; M'Clel. Rep. 25. An agent cannot recover commission for effecting sales in an illegal undertaking; 3 B. & Cres. 639; 5 D. & R. 542, S. C. And when the negotiation goes off, a broker is not entitled to commission; *Read v. Rann*, 10 B. & C. 438.

(n) See a form for *del credere* commission, for which *indebitatus assumpsit* will lie, 14 East, 578; at least it would be good after verdict, 8 Taunt. 371; 2 J. B. Moore, 420, S. C. See the preceding note. A person employing a broker on the Stock Exchange is bound by the broker's rules, whether he is cognizant of them or not; *Sutton and others v. Tatham*, 2 P. & D. 308.

(o) As to these counts, see 1 Hen. Bla. 241. This count is proper where the plaintiff, in the character of broker, has got a policy effected by third persons for the defendant. When the action is at the suit of the underwriter for the premiums, the count is to be as in the next precedent. The policies must be produced at the trial; 1 Stark. 139. In *Broad v. Thomas*, C. P. 9th July, 1830, where an action was brought by a broker against the captain of a ship for brokerage and reward for endeavouring to effect a charter-party and with the authority of defendant, who afterwards refused to proceed on the voyage and execute the charter-party, the jury found, that by usage of merchants, as the charter-party was not effected, plaintiff could not recover. See form in *Power v. Butcher*, 10 B. & C. 329.

(p) This count is sufficient; 2 Lev. 153; Park. 26. In *Hobson v. De Tastet*, before Abbott, C. J., Guildhall, 14th Feb. 1823, the declaration was precisely in the above form; and upon Scarlett and Littledale, for defendant, objecting that the same was insufficient, because the policies were for the bene-

respect of his the plaintiff having, at the request of the defendant, underwritten and subscribed divers policies of insurance for and on the behalf and on the account of the defendant, for the insurance of divers large sums of money upon divers ships and vessels, and also divers goods, merchandize, chattels, and effects by the said plaintiff before that time insured for the defendant, and at his request. [*Conclude as ante*, 36.]

III. RESPECT-
ING PERSONAL
SERVICES.

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff, by the said plaintiff done, performed, and bestowed, as a surveyor, in and about the drawing of divers plans, elevations, and sections of buildings, for the defendant, and at his request, and in and about the surveying and superintending the erection thereof, and of divers other works for the defendant, and at his request, and in and about the appraisement, admeasurement, and valuation of certain works, and the payment of certain workmen's bills for the defendant, and in and about other business of the defendant, and at his like request, and for divers journeys and attendances made, performed, and given by the plaintiff, in and about the business of the defendant, and at his like request. [*Conclude as ante*, 36.]

As a surveyor. (r)

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff, done, performed, and bestowed, as an auctioneer and appraiser, in and about the selling and disposing of, and endeavouring to sell and dispose, by auction and otherwise, of divers goods, chattels and effects, for the said defendant, and on his retainer and request, and in and about the appraising and valuing divers other goods, chattels, and effects, for the defendant, and at his request, and in and about other the business of the defendant, and for the defendant, and at his request, and for divers journeys and attendances before then made, performed and given by the plaintiff in and about the business of the defendant, and for him, and at his like request. [*Conclude as ante*, 36.]

As an auctioneer and appraiser. (r)

Commencement of count as ante, 36.] For the work and labour, care, diligence, journeys, and attendances of the plaintiff, done, performed, and bestowed, as an accountant and otherwise, in and about the investigating, copying, writing, making extracts from, making out, settling, arranging, managing, and adjusting, and endeavouring to investigate, copy, write, make extracts from, make out, settle, arrange, manage, and adjust, divers accounts, bills, debts, documents, and writings for the defendant, and at

As an accountant.

fit of third persons, and not for defendant, though on his retainer, Abbott, C. J., said, "This count has existed for upwards of fifty years. It is true the defendant is a broker, but still the business is done in the employment of defendant, and therefore the policies, as to him, are for money had and received; if the broker had not received money from his principal, then the plaintiff could not recover;" 2 Starkie, Rep. 294; Chitty jun. on Contracts, 3d ed. 637. See form, 10 B. & C. 329.

(r) A surveyor is to be paid according to his labour, and not according to the amount of the bills which he looks over; Peake, 103;

and where a surveyor claimed 5l. per cent. on the money laid out by him as such, Lord Ellenborough left it to the jury to say, whether this mode of charging was vicious or unreasonable; and if they thought it was, to deduct accordingly, whatever the custom or usage in charging might be; 2 Stark. 294. See 1 C. & P. 352; and in general as to surveyors, Chitty jun. on Contr. 3d ed. 585.

(r) If an auctioneer, employed to sell an estate, is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to any compensation for his services; 3 Campb. 451; McClel. Rep. 25.

III. RESPECT-
ING PERSONAL
SERVICES.

his request, and in and about other the business of the defendant, and for him, and at his like request; and also for divers materials, quantities of paper, pens, ink, and other necessary things before then found and provided, and used and applied by the plaintiff in and about the said work and labour, care, and diligence of the plaintiff for the defendant, and at his like request. [*Conclude as ante, 36.*]

As a school-
master, and for
books, board,
and lodging,
&c. (s)

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff, and his ushers and teachers, done, performed, and bestowed for the defendant as a school-master, in and about the teaching and instructing of divers infants and persons, (s) in reading, writing, and arithmetic, and in divers languages, drawing and dancing, good manners, and other necessary and useful accomplishments and qualifications, and at the request of the defendant,* and for divers books, paper, pens, and other necessary things, by the plaintiff found and provided, and used and employed in and about that work and labour for the defendant, and at his like request, and also for meat, drink, washing, lodging, and other necessities by the plaintiff found and provided for the said infants and persons, at the like request of the defendant. [*Conclude as ante, 36.*]

The like, and for
entrance-money.

If there be a demand for entrance-money, proceed as in the above indebitatus count, inserting at the asterisk the following words, "and for certain entrance-money then due and payable from the defendant to the plaintiff, upon, for, and in respect of the admission of the said infants and persons into the school of the plaintiff, for the purpose of being taught and instructed as aforesaid." If the action be for instruction by the plaintiff's wife as a school-mistress, it is not advisable for her to join in the action, (unless the demand accrued before marriage, (u)) and the count may as well state, "for the work, &c. of E. F. the wife of the said plaintiff," &c.—If it be for taking children away without notice given, then a special count may be essential as post, and see 2 New. Rep. 333.

As a surgeon
and apothecary,
and for medi-
cines, &c. (x)

Commencement of count as ante, 36.] For the work and labour, care, diligence, journies, and attendance of the plaintiff, done, performed, and bestowed, as a surgeon and apothecary for the defendant, and at his request,

(s) See 2 New Rep. 333, and the precedent, Morg. 12. If there be a claim for taking away a scholar before notice, the plaintiff should declare specially. See form, post.

(t) It is usual here to say, "of one E. E., the infant son of the said defendant;" but this is unnecessary, and may be dangerous in proof.

(u) 1 Salk. 114.

(x) See forms, Morg. 9, 14; Lil. Ent. 25, 26; Plead. Assist. 43, 63. *Semble*, that the count would be good if the words within the brackets were omitted, and if so it would certainly be a preferable count, as admitting of more general evidence. There is no rule of law which prevents an apothecary from making distinct charges for attendance and for medicines; whether the patient be liable to a separate demand for attendances, is a question to be decided by the jury in each case, on the facts proving or disproving a contract

to that effect, as the prior dealings between the same parties, or the reasonableness or unreasonableness under the circumstances in the particular case of making a charge for attendances as well as for medicines; *Morgan v. Hallen and another*, 8 A. & E. 489. In an action to recover the amount of a chemist's bill, it being suggested that the items were properly within the scope of an apothecary's profession, it was held that the proper question for the jury was, whether the plaintiff had acted as an apothecary, and not whether he had charged as a chemist or an apothecary; *Richmond v. Coles*, 1 Dowl. N. R. 560. A certificated surgeon cannot recover charges for attending in a fever, unless he also have a certificate from the Apothecaries' Company; 4 Bing. 619. A physician cannot maintain an action for his fees, they being considered honorary, unless a contract to pay can be

[in and about the healing and curing of the defendant and divers other persons of divers diseases, disorders and maladies, under which they had before then respectively laboured and languished, and in and about the endeavouring to heal and cure the said defendant and divers other persons of divers other diseases, disorders and maladies, under which they had before then also respectively laboured and languished,] and for divers medicines and other necessary things before that time found and provided, administered, delivered, and applied by the plaintiff for the defendant, and at his like request. [*Conclude as ante, 36.*]

III. RESPECTING PERSONAL SERVICES.

Commencement of count as ante, 36.] For the work and labour, care, diligence, and attendance of the plaintiff, by him before that time done, performed, and bestowed as a surgeon, apothecary, and man-midwife, at the request of the defendant, [in and about the visiting and attending upon (x) a certain female then pregnant and labouring with child, and languishing under divers sicknesses and maladies, and in and about the delivering of the said female of the child with which she was then pregnant, and in and about the healing and curing of the said female of divers disorders, sicknesses and maladies, with which she was during the time aforesaid and afterwards afflicted,] and for divers medicines, and other necessary things before that time found and provided, and used and applied by the plaintiff [in and about the healing and curing the said female of the said sicknesses, disorders, and maladies] at the [like] request of the defendant. [*Conclude as ante, 36.*]

As a surgeon, apothecary, and man-midwife. (y)

Commencement of count as ante, 36.] For the work and labour, care, and diligence of the plaintiff, done, performed and bestowed, as a nurse, for the defendant, and at his request, in and about the nursing, attending, and taking care of the defendant and divers other persons, whilst he and they were sick and labouring under divers diseases, disorders, and maladies. [*Conclude as ante, 36.*]

As a nurse.

Commencement of count as ante, 36.] For the work and labour, care, diligence and attendance of the plaintiff, as an undertaker of funerals, before that time done, performed, and bestowed by him and his servants, in and

As an undertaker of funerals. (a)

proved; 4 T. R. 317; 3 B. & C. 745; *Feitch v. Russell*, 12 L. J. R. (N. S.) Q. B. 13; and when a surgeon assumes the character of a physician he cannot sue; 2 Camp. N. P. 441. If the patient has been injured rather than benefited in his health, in consequence of any gross unskilfulness or carelessness on the part of the plaintiff, the latter cannot sue for fees; see 3 Stark. Rep. 6. If the plaintiff has professed to cure the patient in a specified time by means of sovereign medicines, and has induced him to continue to employ him by false and fraudulent professions of skill and success, he cannot recover for medicines and attendance in the event of no benefit being derived; 3 Stark. 6. If, however, the plaintiff has acted improperly through the advice of a physician called in, he may, notwithstanding, recover; *Peake*, C. N. P. 59.

(y) See forms, *Plead. Assist.* 63; *Morg.*

10; and last note.

(x) A misnomer seems immaterial, 2 Marsh. Rep. 159, but it may be advisable not to mention the name, and it is as well not to state that the female was the defendant's wife.

(a) See forms, 1 Rich. C. P. 362; *Lil. Ent.* 27, 31. When husband liable for, 1 Hen. Bla. 90. If an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given such orders, he makes himself individually liable for the reasonable expenses; and although no such orders are given or ratified, he is liable upon an implied promise at common law to pay the reasonable expenses of the funeral of the testator, if no other person be liable on an express contract, and the executors or administrators have assets; *Brien v. Wilson*, 8 A. & E. 349; *Corner v. Shew*, 3 Mee. & Wel. 350.

III. RESPECT-
ING PERSONAL
SERVICES.

about the funeral of one E. F. [or "a certain person deceased"] on the retainer, and at the request of the said defendant, and for divers hearses, coaches, horses, materials, chattels, and other necessary things used and applied in and about the furnishing and conducting of the said funeral by the plaintiff, before that time found and provided for the defendant, and at his like request. [*Add a count for goods sold, money paid, and an account stated, and conclude as ante, 36.*]

As a curate. (b) *Commencement of count as ante, 36.* For the work and labour, care, diligence, and attendance, of the plaintiff, done, performed, and bestowed, in preaching and celebrating divine service in the parochial church of —, for the defendant, and at his request. [*Conclude as ante, 36.*]

For composing paragraphs for newspapers, and inserting the same therein. *Commencement of count as ante, 36.* For the work and labour, care, and diligence of the plaintiff done, performed, and bestowed, in and about the composing and writing of certain paragraphs for the defendant, and at his request, and for the insertion and publication by the plaintiff of such paragraphs, in a certain newspaper called the — for the defendant, and at his like request. [*Conclude as ante, 36.*]

For booking, receiving, and keeping passengers and parcels for coaches of the defendant, and the use of a shop of the plaintiff for that purpose. *Commencement of count as ante, 36.* For the work and labour, care, diligence, and attendance of the plaintiff, done, performed, and bestowed, at the request of the defendant, in and about the taking an account of places for passengers, and the booking and keeping of parcels, to be carried and conveyed, in and by certain coaches for the defendant, and for the use of a certain shop, in and parcel of a certain dwelling-house of the plaintiff, before that time occupied and used by and with the said passengers and parcels, by and with the sufferance and permission of the plaintiff, and at the request of the defendant. [*Conclude as ante, 36.*]

IV. RESPECTING MONIES.

For money lent. (c) *Commencement of count as ante, 36.* For money then (d) lent by the plaintiff to the defendant, at his request. [*Conclude as ante, 36.*]

For money paid. (e) *Commencement of count as ante, 36.* For money then (d) paid by the plaintiff for the use of the defendant, at his request. [*Conclude as ante, 36.*]

(b) See Cowp. 437; Dougl. 142; 1 T. R. 399; 3 Wentw. 68.

(c) See Lil. Ent. 29; Plead. Assist. 1; Rich. C. P. 119; Morg. 6. *Seem*, this form will suffice, though the loan was made in foreign coin; 1 Marsh. 33; 5 Taunt. 228. As to when this count lies, see fully, *ante*, vol. i. For law relating to contracts of loan, see 3 Chitty's Com. Law, 309; Chitty, jun. on Contracts, 3d edit. 588 to 591.

(d) As to the allegation of time in the common counts, see *Lane v. Thetwall*, 1 Tyr. & Gr. 334; *Bingley v. Durham*, 1 P. & D. 58; *Leaf v. Lees*, 4 M. & W. 679; and *ante*,

vol. i.

(e) See form, Plead. Assist. 1; Morg. 6; Lil. Ent. 31, 43. Where at the time of payment anything remains to be done under a special contract, of which the plaintiff must show performance, the action must be on the contract; but where all has been done, and the plaintiff has only to prove the payment of the money, then he may sue on the general count. See *Gressell v. Robinson*, 3 Bing. N. C. 10; also *Lucas v. Godwin*, 3 Bing. N. C. 737; *Johnson v. Kirkclady*, 1 Arn. & Hod. 7. See fully, *ante*, vol. i., as to when this count is sufficient.

Commencement of count as ante, 36.] For money then (e) received by the defendant for the use the plaintiff. [*Conclude as ante, 36.*]

IV. RESPECT-
ING MONIES.

Commencement of count as ante, 36.] For interest upon and for the forbearance of money before then lent by the plaintiff to the defendant, at his request, [or "of money due from the plaintiff to the defendant,"] and by the plaintiff forborne to the defendant for divers long spaces of time before then (e) elapsed, at the request of the defendant. [*Conclude as ante, 36.*]

Money had and
received. (f)
For interest. (g)

Commencement of count as ante, 36.] For money found to be due from the defendant to the plaintiff on an account then (e) stated between them. [*Conclude as ante, 36.*]

On an account
stated. (h)

Commencement of count as ante, 36.] For the price and value of work then done and materials for the same provided by the plaintiff for the defendant, at his request, and for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request, and for money by the plaintiff then lent to, and paid, laid out, and expended for the defendant, at his request, and for money by the defendant then received for the use of the plaintiff. [*Conclude as ante, 36.*]

For work done,
goods sold,
money lent,
paid, had and
received, in one
count. (i)

Commencement of count as ante, 36.] Upon and by virtue of a certain award made by E. F. upon and by virtue of a certain submission made by the plaintiff and the defendant to the award, order and determination of the said E. F. of and concerning all matters in difference then depending between the plaintiff and defendant, and upon and by virtue of which reference, the said E. F. had awarded that the defendant should pay a certain sum of money, to wit, the said last-mentioned sum of money to the said plaintiff. [*Conclude as ante, 36.*]

On an award
made by an
arbitrator. (k)

Commencement of count as ante, 36.] Upon and by virtue of an award or umpirage made by one E. F. upon and by virtue of a certain submission

On an award or
umpirage. (k)

(e) See *ante*, 64, note (d).

(f) See *forms*, Lil. Ent. 23, 24; *Plead. Assmt.* 2, 245. As to the application of this count, see fully, *ante*, vol. i. Chap. Declarations; *Chit. jun. Contr.* 3d edit. 601 to 643.

(g) As to interest, see 3 & 4 W. 4, c. 42, s. 28; 1 *Chit. Gen. Prac.* 498; and *ante*, vol. i. Chap. Declarations.

(h) The rules of Hilary Term, 4 W. 4, permit this count to be added in all cases without being subject to be struck out as a second count in contravention of the rule. A parol admission of a debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods the subject of the action; *Newell v. Holt*, 6 M. & W. 662. As to the application of this count in general, see vol. i.

(i) In the last edition of this work, the above comprehensive count was framed differently, viz., by stating a certain sum to be due for each cause of action; but as such a form might be considered nothing more than the common counts prescribed by the rule of

Court, *ante*, 34, and therefore several counts within that rule, it has been altered so as to make it only *one count* including several causes of action. As to the goodness of the count, see 2 *Saund.* 122 a. n. 2; *Cro. Jac.* 245; *Yelv.* 175; 1 *Brownl. Ent.* 71; 2 *Bl. Rep.* 910; 10 B. & C. 342; *Galway v. Rose*, 8 *Dowl.* 240. It is questionable whether the Courts would now permit this count unless the plaintiff actually has a separate demand under each head; because the common counts are, for the purposes of pleading and as to costs, considered several counts; *Jourdain v. Johnson*, 2 C. M. & R. 561.

(k) It was usual to add this count to the special count on an award, *post*; see the notes there. But now that there can be only *one count* upon the same transaction, the special count will in general be preferable, and this common count of but little utility: that a common count is however sustainable, see observation of Bayley, B. in *Crump v. Udney*, 3 *Tyr.* 279.

IV. RESPECT-
ING MONIES.

made and entered into by the plaintiff and the defendant to the award, order and determination of G. H. and I. K. of and concerning all matters in difference then depending between the plaintiff and the defendant, and thereby empowering the said G. H. and I. K. in case they should not agree in making such award, to appoint a third person to award, determine and finally settle the said matters in difference, and whereupon the said G. H. and I. K. not agreeing in making their award in the premises, they by virtue of the aforesaid power, and by and with the consent and approbation of the plaintiff and defendant, nominated and appointed the said E. F. as an umpire, to award, order and finally determine of and concerning all matters in difference between the plaintiff and the defendant; and upon and by virtue, &c. [*Conclude as in the last precedent.*]

For stock sold
and transferred.
(1)

Commencement of count as ante, 36.] For certain, to wit, £—, interest or share in the joint stock of £3 per cent. Annuities, transferable at the Bank of England, called the Consolidated £3 per cent. Annuities, then sold and caused to be transferred by the plaintiff to the defendant, at his special instance and request, and by the defendant then, to wit, on the same day and year aforesaid, duly accepted. [*Conclude as ante, 36.*]

V.—RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED.

First—SURVIVING PARTNERS.

By a surviving
partner, on a
promise to both
partners. (m)

Commencement, ante, 18.] For that whereas the defendant, in the lifetime of the said E. F., *since deceased*, (n) to wit, on &c. (o) was indebted to the plaintiff and the said E. F. in £— (p) for the price and value of work then done and materials for the same provided [*or "for money paid," &c. according to the fact,*] by the plaintiff and the said E. F. for the defendant, and at his request, and in £— for money found to be due from the defendant to the plaintiff and the said E. F. on account then stated between them; and whereas the defendant afterwards, on the day and year aforesaid, in consideration of the premises respectively, then promised the plaintiff and the said E. F. to pay them the said several monies respectively on request. Yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Breach. (q)

Conclusion
where the de-
claration con-
tains a count on
a note, bill or
check.

If there be no common count to be added, insert breach as above; but if there was any consideration between the plaintiff and the deceased partner and the

(1) See form, *Mortimer v. M'Callan*, 7 M. & W. 20.

(m) See forms, *Lil. Ent.* 34; *Plead. A.* 4. As to this count in general, see 2 *Saund.* 121, 122; 5 *Exp. Rep.* 32; *Vin. Ab. Partners*, D.; 3 *T. R.* 433; 5 *T. R.* 493; *ante*, vol. i. 11, 183. The plaintiff must sue as surviving partner, 4 *B. & A.* 374; 6 *J. B. Moore*, 332; 2 *Stark.* 356. See 2 *Marsh.* 319; 6 *Taunt.* 597, *S. C.*; *ante*, vol. i. The survivor may include a demand due in his own right, *ante*, vol. i.

(n) According to *Underhill v. Hurney*, 3 *Dowl.* 495, the omission of the words "*since deceased*," in a declaration, is no ground of demurrer.

(o) It is usual to insert a day before the death of the deceased partner; but the precise day, whether before or after the death, is immaterial.

(p) Any sum enough to cover the real demand.

(q) See forms, *Plead. Assist.* 35.

defendant for the note or bill, after setting forth the count on the note, bill or check, add counts as follows :] And whereas also the defendant, on the — day of —, A. D. — [*a day just before the death of E. F.*], was indebted to the plaintiff and E. F. deceased, in £—, for &c. [*state the consideration, and add an account stated as in the last precedent.*] And whereas the defendant, afterwards, and in the lifetime of the said G. H. deceased, to wit, on the day and year last aforesaid, in consideration of the premises respectively, promised the plaintiff and the said E. F., since deceased, to pay them the said last-mentioned monies respectively [*or "last-mentioned sum of money"*] on request. Yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, To the plaintiff's damage of £—, and therefore he brings suit, &c.

V. RESPECTING
CHARACTER, &c.

If the deceased partner has been dead six years, or it may on any other account be advisable for the plaintiff to avail himself of a promise or acknowledgment to himself separately since the death of his partner, insert before the breach the following counts, or such one as may be applicable. See 3 East, 409.

And whereas also the defendant in the lifetime of the said E. F. deceased, to wit, on the day and year aforesaid, was indebted to the plaintiff and the said E. F. in £—, for the price and value of work, &c. [*State the subject-matter of the debt as ante, 66.*] And thereupon the defendant, in consideration of the premises respectively, and that the said last-mentioned monies respectively still remained unpaid and unsatisfied, afterwards, and after the death of the said E. F., to wit, on &c., (q) promised the plaintiff to pay him the said several last-mentioned monies respectively on request. Yet he hath disregarded his promises, and hath not paid any of the monies, or any part thereof, To the plaintiff's damage of £—, and thereupon he brings suit, &c.

Counts on promises to the surviving partner to pay debts due to both before the death.

Promise after death.

Breach.

If the plaintiff declare in other counts, as he may (1 B. & A. 29; 2 Chit. Rep. 436; 3 T. R. 433; 5 T. R. 493; 1 Esp. Rep. 47; 2 T. R. 476; 6 T. R. 582;) for money due to him after the death of his partner, and on a contract merely with himself, insert counts applicable thereto just before the breach, commencing as follows :] And whereas also the defendant, on &c., was indebted to the plaintiff, &c. [*Proceed in the usual form at the suit of one plaintiff only, not noticing the deceased partner, and conclude with a general breach applicable to the whole, as supra.*

Counts on promises for work, &c. by the plaintiff only.

Commencement, ante, 19.] For that whereas the defendant and the said E. F. in his lifetime, now deceased, to wit, on &c., (s) were indebted to the plaintiff in £—, for the price and value of work then done and materials for the same provided [*or "money paid" &c., according to the fact*] by the plaintiff for the defendant and the said E. F., at their request; and in £—

Against a surviving partner for work done, &c. (r)

(q) It is usual to insert a day after the death of the deceased partner, but any day before the date of the writ will do.

(r) See forms, 2 Rich. C. P. 92; Lil. Ent. 24; against one partner after outlawry of the other, *ib.* 44; *ante*, 18. As to these counts, Comb. 393; Vin. Ab. Partners, D.; 2 T. R.

478; 6 T. R. 363; 4 Camp. 34. A defendant need not be declared against as surviving partner; 1 B. & A. 29; 2 Chit. Rep. 406.

(s) It is usual to insert a day before the death of the deceased partner, but any day before the date of the writ will do.

V. RESPECTING CHARACTER, &c.

for money found to be due from the defendant and the said E. F. to the plaintiff, on an account then stated between them. And thereupon the defendant and the said E. F., in consideration thereof, afterwards, and in the lifetime of the said E. F., to wit, on the day and year aforesaid, promised the plaintiff to pay him the said several sums of money respectively on request. Yet the defendant and the said E. F., in the lifetime of the said E. F., and the defendant since the death of the said E. F., have disregarded their said promise, and have not, nor hath either of them, paid the said several monies or any part thereof, To the plaintiff's damage of £—, and therefore he brings suit, &c.

Conclusion where declaration contains a count on a note, bill or check.

If there be no common count to be added, insert breach as above; but if there was any consideration between the plaintiff and the defendant and his deceased partner for the note, bill or check, after setting forth the count on the note, bill or check, add counts as follows:] And whereas the defendant and the said E. F. in the lifetime of the said E. F., to wit, on &c., were indebted to the plaintiff in £—, for &c. [*state the consideration and add an account stated, as in the last precedent.*] And whereas the defendant and the said E. F. since deceased, afterwards, to wit, on the day and year last aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said last-mentioned monies respectively on request. Yet the defendant and the said E. F. in the lifetime of the said E. F., and the defendant since the death of the said E. F., have disregarded their promises, and have not, nor hath either of them, paid the said monies, or any part thereof, To the plaintiff's damage of £—, and therefore he brings suit, &c.

Breach.

Counts on promise by the defendant after the death of his partner.

To be inserted after the breach to the other counts.] And whereas also the defendant and the said E. F., in the lifetime of the said E. F., now deceased, to wit, on the day and year aforesaid, were indebted to the plaintiff in £—, for &c. [*Describe the subject-matter of debt concisely.*] And thereupon, in consideration of the premises, and that the said last-mentioned monies remained wholly due and unpaid, the defendant afterwards, and after the death of the said E. F., to wit, on &c., promised the plaintiff to pay him the said last-mentioned monies on request. Yet the defendant hath disregarded his said last-mentioned promise, and hath not paid the said last-mentioned monies, or any part thereof, To the plaintiff's damage of £—, and thereupon he brings suit, &c.

Breach.

If there be any cause of action arising against defendant otherwise than as surviving partner, insert it after the breach to the other counts, not noticing the deceased, and conclude with another breach applicable to "the last-mentioned monies" and "to the plaintiff's damage," &c.

Secondly—HUSBAND AND WIFE.

By husband and wife for work, &c. by wife before marriage.
(t)

Commencement, ante, 19.] For that whereas the said defendant, whilst the

(t) Whenever the wife joins, her interest in the debt or claim must appear, 2 Bla. Rep. 1236. How to sue, and when husband

and wife may join, see ante, vol. i. See a form at the suit of baron and feme sole trader, 1 Wentw. 381; ante, 22.

said C. was sole and unmarried, to wit, on &c., (u) was indebted to the said C. in £—, for the price and value of work then done and materials for the same provided by the said C. for the defendant, at his request, And in £—, &c. [*So stating the other matters of plaintiff's claim as arising to the wife before marriage.*] And thereupon the defendant, in consideration of the premises, afterwards, and whilst the said C. was sole and unmarried, to wit, on the day and year aforesaid, promised the said C. to pay her the said several monies respectively, on request. Yet the defendant hath disregarded his promise, and hath not as yet paid the said several monies, or any part thereof, (x) To the damage of the plaintiffs of £—, and thereupon they bring suit, &c.

V. RESPECTING
CHARACTER, &c.

Breach.

If there be no common count to be added, insert breach as above; but if there was any consideration between the parties for the note, bill or check, after setting forth the count on the note, bill or check, add counts as follows:] And whereas also the defendant, whilst the said C. was sole and unmarried, to wit, on &c., was indebted to the said C. in £—, for &c. [*Stating the consideration for the note, bill or check.*] And in £—, for money found to be due from the defendant to the said C. on an account then stated between them: And whereas the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises respectively, promised the said C. whilst she was sole and unmarried, to pay her the said last-mentioned monies respectively, [or "last-mentioned sum of money,"] on request: Yet the defendant hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, To the damage of the plaintiffs of £—, and therefore they bring their suit, &c.

Conclusion where the declaration contains a count on a note, bill or check.

Breach.

Commencement, ante, 19.] For that whereas the said E., whilst she was sole and unmarried, to wit, on &c., was indebted to the plaintiff in £—, for the price and value of work then done and materials for the same provided by the plaintiff for the said E., and at her request; (a) and in &c. [*So proceeding to state the other causes of action recoverable under the common counts, laying the causes against her only.*] And thereupon the said E., in consideration of the premises, afterwards, and whilst she was sole and unmarried, to wit, on the day and year aforesaid, promised the plaintiff to pay him the said several monies respectively on request. Yet the defendants have disregarded the said promises, and have not, nor hath either of them, paid the said monies respectively, or any part thereof, To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Against husband and wife for work, &c. done for wife before marriage. (y)

Promise by the wife.

Breach.

If there be no common count to be added, insert breach as above, but if there was any consideration between the parties for the note, bill or check, after setting forth the count on the note, bill or check, add count as follows:] And whereas also the said E., whilst she was sole and unmarried, to wit, on &c.,

Conclusion where the declaration contains a count on a note, bill or check.

(u) It is usual to insert a day before the marriage, but any day before the date of the writ will suffice.

(x) As to the language of the breach, see 3 Wils. 208; 1 Ld. Raym. 284; 1 Vent. 119; 2 Rich. C. P. 293.

(y) See form, Lil. Ent. 27. No count on a promise by the feme, or by the husband during the coverture, should be added; 1 Taunt. 212; Palm. 313.

(a) This is a material averment; 3 J. B. Moore, 303; 1 J. B. Moore, 126.

DECLARATIONS IN ASSUMPSIT.

V. RESPECTING
CHARACTER, &c.

Breach.

was indebted to the plaintiff in £——, for &c. [*stating the consideration for the note, bill or check*] and in £——, for money found to be due from the said E. to the plaintiff on an account then stated between them. And whereas the said E., in consideration of the last mentioned premises, afterwards, and while she was sole and unmarried, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said last-mentioned monies respectively on request. Yet the said defendants have disregarded the said promises, and have not, nor hath either of them, paid the said monies or any part thereof, To the plaintiff's damage of £——, and thereupon he brings suit, &c.

Thirdly—By ASSIGNEES OF BANKRUPTS OR INSOLVENTS.

By assignees of
a bankrupt for
work, &c. be-
fore the bank-
ruptcy. (b)

Promise to
bankrupt.

Breach.

Commencement, ante 19.] For that whereas the defendant, before the said E. F. became a bankrupt, to wit, on &c., (c) was indebted to the said E. F. (d) [*the bankrupt*] in £—— (e) for the price and value of work then done and materials for the same provided by the said E. F. for the defendant at his request; and in £——, &c. [*So proceeding to state the other causes of action recoverable under the common count, alleging them to have arisen to the bankrupt only.*] And thereupon, in consideration of the premises, afterwards, and before the said E. F. became bankrupt, to wit, on the day and year aforesaid, the defendant promised the said E. F. to pay him the said several monies respectively on request. Yet the defendant hath disregarded his promises, and hath not paid the said several monies respectively, or any part thereof, To the damage of the plaintiffs, as assignees as aforesaid, of £——, and thereupon they bring suit, &c.

Conclusion
where the de-
claration con-
tains a count on
a note, bill or
check.

If there be no common count to be added, insert breach as in last form, but if there was any consideration between the parties for the note, bill or check, after setting forth the count on the note, bill or check, add counts as follows :] And whereas also the defendant, before the said E. F. became bankrupt, to wit, on &c., was indebted to the said E. F. in £——, for &c. [*stating the consideration for the note, bill or check*], and in £—— for money found to be due from the defendant to the said E. F. on an account then stated between them. And whereas the said defendant afterwards, and before the said E. F. became bankrupt, to wit, on the day and year last aforesaid, in consideration of the premises respectively, promised the said E. F. to pay him

(b) See Form, Plead. A. 44. This form of declaring, without setting out the petitioning creditor's debt, commission, &c. is settled to be good; Lutw. 274, 277; 2 Lord Raym. 1648; Carth. 29. When an assignee has been removed, the last assignee may sue as assignee generally, without naming the former assignee; 6 Geo. 4, c. 16, s. 67; 10 East, 61. When assignees should declare without naming themselves assignees; see Cowp. 569; *ante*, vol. i. As to joinder of different demands, see T. R. 433, 779; *ante*, vol. i. The assignees of two persons may describe themselves as assignees of one for a separate demand, 3 Camp. 399; and as to how assignees should describe themselves, see *ante*, vol. i. Where the plaintiffs sue as assignees of several bankrupts, for money had and received, and some of the money was received

before the bankruptcy of either of the parties, and some after the bankruptcy of one, and before that of the others, the counts must be framed accordingly, 3 B. & P. 465; and see a form of commencement of declaration by assignees of several bankrupts, under several fiats, to recover a debt due to the joint estate, *ante*, 20.

(c) It is usual to insert a day before the bankruptcy, but any day before the date of the writ will suffice.

(d) The bankrupt might be described throughout under the terms of "*the said bankrupt*," or if there be several, "*the said bankrupts*," and in the latter case, for the sake of brevity, it would be desirable.

(e) Any sum enough to cover the real claim.

the said last mentioned monies respectively on request. Yet the defendant hath disregarded his promises and hath not paid any of the said monies or any part thereof, To the plaintiff's damage as such assignee as aforesaid of £—, and thereupon he brings suit, &c.

V. RESPECTING
CHARACTER, &c.
Breach.

As to the joinder of different counts in an action by assignees, see ante, vol. i. Joinder in Action. When there has been any distinct promise or acknowledgment to the assignees, or cause of action accruing after the act of bankruptcy, it may be expedient to declare as in the following counts; and a count on an account stated with the plaintiffs as assignees should be added, when the evidence will support it.

To be inserted after the promises in the other counts.] And whereas also the defendant, before the said E. F. [the bankrupt] became bankrupt, to wit, on &c., (g) was indebted to the said E. F. in £—, for the price and value of goods then sold and delivered by the said E. F. to the defendant, at his request; and in &c. [Proceed as in first count, and then state the promise thus:] And the said defendant being so indebted, and the said several sums of money in this count mentioned remaining wholly unpaid, the defendant, in consideration of the premises, afterwards, and after the said E. F. became bankrupt, to wit, on the — day of —, (g) A. D. —, promised the plaintiffs, as (i) assignees as aforesaid, to pay them the said monies in this count mentioned on request. (i) Yet the defendant hath disregarded his said promises, and hath not paid the several monies respectively, or any part thereof, To the damage of the plaintiffs, as assignees as aforesaid, of £—, and thereupon they bring suit, &c.

The like on prom-
ises to the as-
signees after the
bankruptcy. (f')

Promise to the
assignees.

Breach.

Conclusion.

To be inserted after the promises in the other counts.] And whereas also the defendant, after the said E. F. became bankrupt, to wit, on &c., (l) was indebted to the plaintiff, as assignee as aforesaid, in £— for the price and value of goods then sold and delivered by the plaintiff, as assignee as aforesaid, to the defendant, at his request; and in &c. [So proceeding to state the other causes of action to the plaintiff recoverable under the common count, and insert the usual breach, as supra, last precedent, which, it will be observed, is applicable to the whole declaration.

The like on
causes of action
arising after the
bankruptcy. (k)

If the plaintiff be a surviving assignee, call him so throughout, and insert the usual breach, as supra.

By a surviving
assignee.

Commencement, ante, 19.] For that whereas the defendant, before the said L. M. became bankrupt, to wit, on &c., (n) was indebted to the said

By one partner
and the assignee
of another,
being bankrupt,
for work and
labour, &c. be-
fore the bank-
ruptcy. (m)

(f) When not necessary; Cowp. 569; Wightw. 65.

(g) It is usual to insert a day before the bankruptcy, but any day before the date of the writ will suffice.

(i) See Forms, Lil. Ent. 42; Plead. Assist. 311. If the assignees have in that character sold goods to the defendants, or he has, since the bankruptcy, received money for their use, here add counts for goods sold by them as assignees, or for money had and received to their use as assignees, as in form, post, 72; as to the propriety of which counts, see 2 Show. 250; 6 East, 405. It is now not un-

usual to declare, stating that the defendant being indebted to the plaintiffs, as assignees for goods sold, &c. by the bankrupt, the defendant promised the plaintiffs as assignees to pay them, without stating any promise to the bankrupt, as in the above form.

(k) As to the propriety of these counts, see ante, vol. i.; 2 Show. 250; 6 East, 405.

(l) Any day before the date of the writ.

(m) See 12 Mod. 447; 8 T. R. 140; 10 East, 418.

(n) It is usual to insert a day before the bankruptcy, but any day before the date of the writ will suffice.

DECLARATIONS IN ASSUMPSIT.

V. RESPECTING CHARACTER, &c. E. F. and L. M. in £—— for the price and value of goods then sold and delivered by them to the defendant, at his request [*state the subject-matter of the cause of action recoverable under the common count :*] And thereupon the defendant, in consideration of the premises, afterwards and before the said L. M. became bankrupt, to wit on the day and year aforesaid, promised the said E. F. and L. M. to pay them the said several monies respectively on request. Yet the defendant hath disregarded his said promise, and hath not paid the said several monies, or any part thereof, To the damage of the said A. B. and C. D. as assignees as aforesaid, and also of E. F., of £——, and thereupon they bring suit, &c.

Breach.

By the assignee of an insolvent debtor on promises to insolvent. (o)

Commencement, ante, 20.] For that whereas the defendant, heretofore and before the granting of any orders by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said E. F. according to the form of the statute in such case made and provided, and before the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, to wit, on (p) &c., was indebted to the said E. F. in £——, for &c. [*here state the subject-matter of the debt to the insolvent, and conclude as follows :*] And thereupon the defendant, in consideration of the premises, afterwards and before the granting of the said order and vesting of the said estate and effects of the said E. F. in the plaintiff as assignee as aforesaid, to wit, on the day and year aforesaid, promised the said E. F. to pay him the said several monies respectively on request. Yet the defendant hath disregarded his said promises, and hath not paid the said several monies, or any part thereof, To the damage of the plaintiff, as assignee as aforesaid, of £——, and thereupon he brings suit, &c.

Breach.

Conclusion where the declaration contains a count on a note, bill or check.

If there be no common count to be added, insert breach as in the last form ; but if there was any consideration between the parties for the note or bill, after setting forth the count on the note, bill or check, add counts as follows : And whereas also the defendant, heretofore, and before the granting, &c. [*as in last form*] to wit, on &c., was indebted to the said E. F. in £—— for &c. [*stating the consideration for the note, bill or check*], and in £—— for money found to be due from the defendant to the said E. F. on an account then stated between them : And whereas the defendant in consideration of the premises respectively, afterwards and before the granting of the said order and the vesting of the said estate and effects of the said E. F. in the plaintiff as such assignee as aforesaid, to wit, on the day and year last aforesaid, promised the said E. F. to pay him the said last-mentioned monies respectively on request. Yet the defendant hath disregarded his promises, and hath not paid any of the said monies or any part thereof, To the plaintiff's damage as assignee as aforesaid of £——, and therefore he brings his suit, &c.

Breach.

Counts on causes of action arising to the assignee after the making of the vesting order.

And whereas also the defendant, after the making of the said order, and after the estate and effects of the said E. F. became vested in the plaintiff as

(o) The acts now in force relative to insolvent debtors are the 48 Geo. 3, c. 123, usually called the *Small Debtors' Act* ; the 1 Vict. c. 110 (which is the principal act) ; and the late statute of 5 & 6 Vict. c. 116.

As to the vesting of the estate in the assignee, see 1 Vict. 110, ss. 37 and 45.

(p) It is usual to insert a day before the petition, but any day before the issuing of the writ will suffice.

such assignee as aforesaid, to wit, on &c., (q) was indebted to the plaintiff, as assignee as aforesaid, in £——, for the price and value of goods then sold and delivered by the plaintiff, as assignee as aforesaid, to the defendant, at his request; and in £——, for &c. [*inserting such other debts as may be necessary to cover the plaintiff's claim, and add promise and breach, thus:*] And thereupon the defendant, after the making of the said order, and after the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, to wit, on the day and year last aforesaid, in consideration of the premises respectively, promised the plaintiff, as assignee as aforesaid, to pay him the said several last-mentioned monies respectively on request. Yet the defendant hath disregarded his said promises, and hath not paid any of the said several monies respectively, or any part thereof, To the damage of the plaintiff, as assignee as aforesaid, of £——, and thereupon he brings suit, &c.

V. RESPECTING
CHARACTER, &c.

Breach.

Fourthly.—EXECUTORS.

Commencement, ante, 20.] For that whereas the defendant, in the life-time of the said E. F., to wit, on &c., (s) was indebted to the said E. F. in £—— for the price and value of goods then sold and delivered by the said E. F. to the defendant at his request, and in £——, for &c. [*so stating any other debt to the testator recoverable under a common count:*] And thereupon the defendant, in consideration of the premises, afterwards and in the life-time of the said E. F., to wit, on the day and year aforesaid, promised the said E. F. to pay him the said several monies respectively on request. Yet the defendant hath disregarded his said promise, and hath not paid the said monies respectively, or any part thereof, To the damage of the plaintiff, as executor as aforesaid, of £——, and thereupon he brings suit, &c. And the plaintiff brings into Court here the letters testamentary of the said E. F. deceased, whereby it fully appears to the said Court here that the plaintiff is executor of the said last will and testament of the said E. F. deceased, and hath the execution thereof, &c.

By an executor
for work, &c. on
a promise to tes-
tator. (r)

Breach.

Profert. (t)

If there be no common count to be added, insert breach as in the last form; but if there was any consideration between the parties for the note or bill, after setting out the count on the note or bill, add counts as follows:] And whereas also the defendant, in the life-time of the said E. F., deceased, to wit, on &c., was indebted to the said E. F. in £——, for &c., [*stating the consideration*] and in £—— for money found to be due from the defendant to the said E. F. on an account then stated between them. And whereas the defendant, in consideration of the premises respectively, afterwards, in the life-

Conclusion
where the de-
claration con-
tains a count on
a note, bill or
check.

(q) Any day before the issuing of the writ.

(r) See Forms, Lil. Ent. 50, 83; Plead. Assent. 9. As to the joinder of demands by, and rights of executors, &c. to sue, see *ante*, vol. i.

(s) Some day just before the death of the testator, but the precise time is not material, Cro. Car. 130, and any day before the issuing of the writ will suffice.

(t) See other forms of profert, *ante*, 22. See form, 2 Saund. 209 a; it concludes, "ad-

ministrators," instead of "executors thereof," &c.; but either way will suffice. If the profert be omitted in a declaration in *sci. fa.* the defendant may demur specially, see 4 & 5 Ann. c. 16, s. 1; 2 Saund. 9, note 12; Com. Dig. Plead. O. 3, 17; 2 Doug. 1; so in the other cases. If an executor make profert, not having obtained probate at the time, in order to raise the objection the defendant should demandoyer; 3 C. & P. 123.

V. RESPECTING
CHARACTER, &c.

Breach.

time of the said E. F., to wit, on the day and year last aforesaid, promised the said E. F. to pay him the said last-mentioned monies respectively on request. Yet the defendant hath disregarded his said promises, and hath not paid any of the said monies or any part thereof, To the plaintiff's damage, as executor as aforesaid, of £—, and therefore he brings his suit, &c. [*Profert as in last form.*]

Count on a promise to the plaintiff as executor. (u)

The following counts may be added after the counts on the promises to the deceased, and before the breach.] And whereas also the defendant, in the life-time of the said E. F., deceased, to wit, on the day and year aforesaid, was indebted to the said E. F. in £—, for the price and value of goods by the said E. F. then sold and delivered to the defendant, at his request; and in &c. [*stating the several causes of action.*] And thereupon the defendant, in consideration of the premises and the said last-mentioned debts being and remaining wholly due and unpaid, afterwards, and after the death of the said E. F., to wit, on &c., (x) promised the plaintiff, as executor as aforesaid, (y) to pay him the said several last-mentioned monies respectively on request. (z) And whereas also the said defendant, afterwards, to wit, on the day and year last aforesaid, accounted with the plaintiff, as (b) such executor as aforesaid, of and concerning divers sums of money from the defendant to the plaintiff, as executor as aforesaid, before that time due and owing, and then in arrear and unpaid; and upon that accounting the defendant was then found to be in arrear, and indebted to the plaintiff as executor as aforesaid, in the sum of £—, and thereupon the defendant, in consideration of the premises, then promised the plaintiff, as executor as aforesaid, to pay him the said last-mentioned sum of money on request. Yet the defendant hath disregarded his said promises, and hath not paid the several monies respectively, or any part thereof, To the damage of the plaintiff as such executor, and thereupon he brings suit, &c. [*Add profert as ante, 73.*]

Account stated. (a)

Breach. (c)

By a surviving executor. (d)

Commencement, ante, 21. State the cause of action, promise and breach as

(u) This count is proper, whenever on account of the statute of limitations, &c. it may be expedient to rely on any express promise or acknowledgment since the death of the testator. See *Sarell v. Wine*, 3 East, 409; *Ward v. Hunter*, 6 Taunt. 210; *Short v. M'Carthy*, 3 B. & A. 631. The defendant may plead *non assumpsit* to this count, *Timmins v. Platt*, 2 M. & W. 720; *Gilbert v. Platt*, 5 Dowl. 748. The 3 & 4 W. 4, c. 42, s. 31, subjects executors and administrators, when plaintiffs, to costs, unless the Court or judge otherwise directs. As to when an executor or administrator is entitled to relief from costs under the act, see *Engler v. Twisden*, 2 Bing. N. C. 263; *Southgate v. Creweley*, 1 Bing. N. C. 518; *Wilkinson v. Edwards*, *id.* 301; *Godson v. Freeman*, 2 Crompt. M. & Ros. 585; *Prole v. Wiggins*, 3 Bing. N. C. 235. As to the judge's order in such a case being final, see *Maddock v. Phillips*, 3 Ad. & El. 198; *Lakin v. Massie*, 4 Dowl. 239.

(z) It is usual to insert a day after the death of the testator, but any day before the date of the writ will suffice.

(y) The words "as executor" were omit-

ted in 2 Saund. 208, but improperly so; see 5 East, 150.

(x) If the plaintiff, in the character of executor, has sold goods to the defendant, or paid money for him, here add counts for goods sold, &c. by the plaintiff as executor; 6 East, 405; 3 East, 104. And if the defendant has received money since the death of testator, add a count for money had and received to the plaintiff's use as executor. Since whenever the money recovered will be assets, the counts may be joined in the declaration; 2 W. Saund. 117; 3 Doug. 34; see *ante*, vol. i.

(a) See Form, Lil. Ent. 84. This count may be joined with a count for goods sold by testator; 1 Taunt. 322; 6 East, 406, 403; 5 East, 154.

(b) As to the necessity of this word, see 5 East, 150; 2 Saund. 208; Tidd. Pr. 13, 9th edit.

(c) See Form, Plead. Assist. 33.

(d) See Form, Lil. Ent. 83; and see a form by the executor of a surviving executor against an executor, Co. Ent. 1.

in the ordinary case of an executor suing, see ante, 73.] To the damage of the plaintiff, as such surviving executor, of £——, and therefore he brings suit, &c. [Add proferit as ante, 22.

V. RESPECTING
CHARACTER, &c.

Breach.

Commencement, ante, 21.] For that whereas the said defendant, on &c., was indebted, &c. [state the cause of action, the promise and breach as in the common case at the suit of an executor, ante, 73.] To the damage of the said A. B. and C. his wife, as executrix as aforesaid, of £——, and thereupon they bring suit, &c. And the plaintiffs bring here into Court the letters testamentary of the said E. F., deceased, whereby it fully appears to the said Court here that the said C. is executrix of the last will and testament of the said E. F., deceased, and that the plaintiffs, in right of the said C., have the execution thereof.

By husband and
wife executrix
before or after
marriage. (e)

Proferit.

Commencement, ante, 20.] For that whereas the said E. F., in his life-time, to wit, on &c., (g) was indebted to the plaintiff in £—— for the price and value of work then done and materials for the same provided by the plaintiff for the said E. F. and at his request; and in &c. [so continuing to state any other cause of action to testator recoverable under the common count.] And thereupon the said E. F., in consideration thereof, then promised the plaintiff to pay him the said monies respectively on request. Yet the said E. F. in his life-time, and the said defendant, as executor as aforesaid, since the death of the said E. F. respectively, have disregarded the said promise of the said E. F., and have not, nor hath either of them, paid the said several monies respectively, or any part thereof, To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

Against an exe-
cutor for work,
&c. on promise
by testator. (f)

Breach.

If there be no common count to be added, insert breach as in the last form, but if there was any consideration between the parties for the note or bill, after setting forth the count on the note or bill, add counts as follows:] And whereas also the said E. F. in his life-time, to wit, on &c., was indebted to the plaintiff in £—— for &c. [stating the consideration for the note, bill or check], and in £—— for money found to be due from the said E. F. to the plaintiff on an account then stated between them: And whereas the said E. F., in consideration of the promises respectively, promised the said plaintiff to pay him the said last-mentioned monies respectively [or "last-mentioned sum of money"] on request. Yet the said E. F. in his life-time, &c. [as in the last form.

Conclusion
where the de-
claration con-
tains a count on
a note, bill or
check.

And whereas also the defendant, as executor as aforesaid, after the death

Against an exe-
cutor on pro-
mises by him in
that charac-
ter. (h)

(e) See in general how a debt due to the wife in the representative character is to be stated, 4 Mod. 376; Com. Dig. Pleader, 2 A. 1.

(f) See a form, 2 Rich. C. P. 83, 94; and 1 Saund. 112, n. 1, 2. The form against an executor *de son tort* is the same as above; 1 Saund. 265. In *debt*, whether by or against an executor or administrator, omit the words "ones to end," though, if introduced, it is no ground of demurrer; *Collett v. Collett*, 2 Dowl. 211.

(g) Insert a day before the death of the testator.

(h) See *Secan v. Atkinson*, 1 H. Bl. 102; *Powell v. Graham*, 7 Taunt. 580, as to these counts. And as to the liability of an executor in his representative character on his own contracts, see *Corner v. Shaw*, 3 M. & W. 350, and the various cases collected in Williams's *Executors*, 3d edit. 1389 to 1393. Take care not to insert a count in which the defendant would be personally liable.

**V. RESPECTING
CHARACTER, &c.**

On causes of
action arising
against defend-
ant as exe-
cutor.

Defendant's
promise to pay.

Breach. (k)

of the said E. F., to wit, on the — day of — A. D. —, was indebted to the plaintiff in £—— for the price and value of goods sold and delivered by the plaintiff to the said E. F. in his life-time, and at his request; and in &c. [*so stating the causes of action against testator recoverable under the common count:*] And whereas also the defendant, as executor as aforesaid, after the death of the said E. F., on the day and year last aforesaid, was indebted to the plaintiff in £—— for money paid by the plaintiff for the use of the defendant, as executor as aforesaid, at the request of the said E. F.; and in £—— for money found to be due from the defendant, as executor as aforesaid, to the plaintiff on an account stated by and between them. And thereupon the defendant, as executor as aforesaid, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several monies respectively in this last count mentioned, on request. Yet the defendant hath disregarded his promise, and hath not paid the said several monies respectively in the last count mentioned, or any part thereof, To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

Against a sur-
viving executor.

Commencement, ante, 21. State the causes of action against the testator, and after the promise, proceed as follows:] Yet the said E. F. in his life-time, and the defendant and G. H. in his life-time, now deceased, and whom the said defendant hath now survived (which the said defendant and G. H. in the life-time of the said G. H. were executors of the last will and testament of the said E. F. deceased) after the death of the said E. F., and the said defendant, surviving executor as aforesaid, since the death of the said G. H., have disregarded the said promises of the said E. F., and have not, nor hath either of them, paid the said several monies respectively, or any part thereof, To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

Against hus-
band and wife
executrix, who
became execu-
trix before
marriage. (m)

Commencement, ante, 21.] For that whereas the said F. G. in his life-time, on &c., was indebted, &c. [*as in the usual form against an executor, as ante, 75.*] Yet the said F. G. in his life-time, and the said E., executrix aforesaid, after the death of the said F. G. and whilst she was sole and unmarried, and the said defendants since their said intermarriage, have disregarded the said promise of the said F. G., and have not, nor have nor hath any or either of them, paid the several monies respectively or any part thereof, To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

Against hus-
band and wife,
who became
executrix after
marriage. (n)

As in the last precedent to the breach, which is to be as follows:] Yet the said F. G. in his life-time, and the said C. D. and E. his wife, executrix as aforesaid, since the death of the said F. G., have disregarded the said promise of the said F. G., and have not, nor have, nor hath any or either of them, paid the said several monies respectively or any part thereof, To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

(k) See Form, Plead. Assist. 31, 33.

(m) See a form in debt on bond, 1 Wentw. 370; and Plead. Assist. 31. As to what may

be joined, 3 B. & A. 101, and *ante*, vol. i.

(n) See a form, Plead. Assist. 31.

Fifthly.—ADMINISTRATORS.

V. RESPECTING
CHARACTER, &c.

Commencement, ante, 22.] For that whereas the defendant in the life-time of the said E. F., to wit, on &c., (p) was indebted to the said E. F. in £—— for the price and value of goods then sold and delivered by the said E. F. to the defendant, and at his request; and in £——, for &c. [*so continuing to state any of the causes of action recoverable under the common count.*] And thereupon the defendant, in consideration of the premises respectively, afterwards and in the life-time of the said F. F., on the day and year aforesaid, promised the said E. F. to pay him the said several monies respectively on request. Yet the said defendant hath disregarded his promise, and hath not paid the said monies respectively or any part thereof. And the said plaintiff saith, that after the death of the said E. F., to wit, on &c. [*date of grant*] administration of all and singular the goods, chattels and credits, which were of the said E. F. deceased at the time of his death, who died intestate, by —, [*Christian name of the Archbishop or Bishop who granted the letters of administration,*] by Divine providence Archbishop of Canterbury, Primate of all England, and Metropolitan, in due form of law was granted to the plaintiff. (s) [*It may be sometimes advisable here to add counts on promises to the administrator as such, and which will run precisely as in the precedent, ante, 74, using the word "administrator," instead of "executor." But unless there be some express promise or acknowledgement from which it may be implied, or cause of action arising to the plaintiff as administrator after the intestate's death, it is best not to insert such counts, as they render the plaintiff liable to costs if he do not succeed, see ante, 74, note (u). Conclude thus:*] To the damage of the plaintiff, as administrator as aforesaid, of £——, and thereupon he brings suit, &c. And the plaintiff brings into Court here the letters of administration of the said archbishop, [*or "bishop," &c. as the grant is,*] which give sufficient evidence to the said Court here of the grant of administration to the plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above-mentioned.

By an administrator on promises to the intestate. (v)

Promise.

Breach. (q)

Statement of grant of administration to plaintiff. (r)

Profert. (s)

If there be no common count to be added, insert breach as in the last form; but if there was any consideration between the parties for the note, bill or check, after setting forth the count on the note, bill or check, add counts as follows:] And whereas also the defendant in the life-time of the said E. F., to wit, on &c., was indebted to the said E. F. in £——, for &c. [*stating the consideration for the note, bill or check,*] and in £—— for money found to be due from the defendant to the said E. F. on an account then stated between them. And whereas the defendant, in consideration of the premises respectively, afterwards and in the life-time of the said E. F., to wit, on the day and year last

Conclusion where the declaration contains a count on a note, bill or check.

(p) As to this form, see 3 Wils. 380.

(p) It is usual to insert a day before the death of the intestate, but any day before the date of the writ will suffice.

(q) See a form, Plead Assist. 34.

(r) See forms, ante, 25. The grant of administration must be stated by averment in the body of the declaration, and not merely by profert at the end; *Hughes v. Williams*, 4 Dougl. 169.(s) This is to be taken from the form of the grant of the letters of administration. The words "*cui pertinet*," sometimes stated, are not necessary; *Lutw.* 408.

(t) The omission of the profert of the letters of administration is aided after verdict by 16 & 17 Car. 2, c. 8, s. 1, and upon a general demurrer, by the 4 Anne, c. 16, but it is bad on special demurrer.

V. RESPECTING aforesaid, promised the said E. F. to pay him the said last mentioned monies
CHARACTER, &c. respectively on request. Yet &c. [*as in the last form.*]

By an adminis- *If the plaintiff be an administrator with the will annexed, or durante minore*
trator *durante* *estate of an executor or next of kin, he must be described accordingly as in the*
minore estate. *letters of administration, and, in the latter case, at the end of the declaration,*
there must be an averment that the executor or next of kin is under age.

By a surviving *In an action at the suit of a surviving administrator describe him accordingly*
administrator. *throughout, and state the breach as in the last case, and then state the grant of*
letters of administration as follows:] And the plaintiff avers that afterwards
and in the life-time of one G. H. since deceased, and whom the plaintiff
hath survived, and after the death of the said E. F., to wit, on &c., adminis-
tration of all, &c. [as in the last precedent, stating the grant to both plaintiff
and G. H.] To the damage of the plaintiff, as surviving administrator as
aforesaid, of £—, and thereupon he brings suit, &c. [Add profert of
letters of administration, with averment, as ante, 25, No. 54.

By an adminis- *Commencement, ante, 23.] For that whereas the defendant, on &c., was*
trator *de bonis* *indebted &c. [as in other cases, laying the promise to the intestate and breach*
non, with will *as usual, as supra; and after the breach state the grant of letters of adminis-*
annexed. *tration thus:] And the plaintiff avers that after the respective deaths of the*
Grant of letters *said E. F. and G. H., to wit, on &c., administration of all and singular the*
of administra- *goods, chattels and credits, which were of the said E. F. deceased, at the*
tion. *time of his death, left unadministered by the said G. H. deceased, executor*
as aforesaid, with the will of the said E. F. annexed, by [William, by Divine
Providence, Archbishop of Canterbury, Primate of all England, and Metro-
politan, according to the facts,] in due form of law was granted to the plain-
tiff. To the damage of the plaintiff, as administrator as aforesaid, of £—,
and thereupon he brings suit, &c. [Add profert of letters of administration,
as ante, 26, No. 56.

By husband *Commencement, ante, 23.] For that whereas the defendant, on &c., was*
and wife, ad- *indebted &c. [as in the common case at the suit of an administrator, as ante,*
ministratrix *77.] And the plaintiffs aver, that after the death of the said D. and whilst*
before marriage. *she the said C. was sole and unmarried, to wit, &c., administration, &c. [as*
ante, 77,] in due form of law was granted to the said C. To the damage of
the said A. B. and C. his wife, as administratrix as aforesaid, of £—, and
thereupon they bring suit, &c. And they bring, &c. [Add usual profert,
as ante, 77, stating the grant to C.

By baron and *As in the last precedent, except in stating the grant of administration, which*
feme, adminis- *is to be as follows:] And the plaintiffs aver, that after the death of the said*
tratrix after *D., to wit, on &c., administration, &c. [as ante, 77,] in due form of law was*
marriage. *granted to the said C. To the damage of the plaintiffs, as administratrix as*
aforesaid, of £—, and thereupon they bring suit, &c. [Add usual profert,
as ante, 77.

Commencement, ante, 22.] For that whereas the said E. F. in his life-time, to wit, on &c., was indebted, &c. [*laying the promise by the deceased.*] Yet the said E. F. in his life-time, and the defendant, administrator as aforesaid, after the death of the said E. F., have disregarded the said promise of the said E. F. and have not, nor have either of them, paid the said several monies respectively, or any part thereof. [*It may here be expedient to insert counts on promises by the defendant "as" administrator, as in an action against an executor, see ante, 75.*] To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

V. RESPECTING
CHARACTER, &c.

Against an administrator.

If there be no common count to be added, insert breach as in the last form ; but if there was any consideration between the parties for the note, bill or check, after setting forth the count on the note, bill or check, add counts as follows : And whereas also the said E. F. in his life-time, to wit, on &c., was indebted to the plaintiff in £—, for &c. [*stating the consideration for the note, bill or check*], and in £— for money found to be due from the said E. F. to the plaintiff on an account then stated between them. And whereas the said E. F. afterwards, to wit, on the day and year last aforesaid, in consideration of the last-mentioned premises, promised the plaintiff to pay him the said last-mentioned monies respectively on request. Yet &c. [*as in the last form.*]

Conclusion where the declaration contains a count on a note, bill or check.

In an action against an administrator durante minore ætate of an executor or next of kin, the same mode of description is to be adopted as in an action at the suit of such an administrator, see ante, 24.

Against an administrator durante minore ætate, &c.

In an action against a surviving administrator describe him accordingly at the beginning, see ante, 23, and conclude as follows ; but it is not necessary to name the deceased co-administrator at all, unless the writ was also against him.] Yet the said E. F. in his life-time, and the defendant and one G. H. in his life-time, now deceased, and whom the defendant hath survived, and which defendant and G. H. in the life-time of the said G. H. were administrators of all and singular the goods, chattels and credits, which were of the said E. F. deceased at the time of his death, who died intestate after the death of the said E. F., and the defendant surviving administrator as aforesaid, after the death of the said G. H., have disregarded the said several promises of the said E. F., and have not, nor hath either of them, paid the said several monies respectively, or any part thereof, To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Against a surviving administrator.

Commencement, ante, 23.] For that whereas the said E. F. in his life-time, on &c., was indebted, &c. [*laying the promise by the intestate as usual.*] Yet the said E. F. in his life-time, and the said G. H. in his life-time, now deceased, after the death of the said E. F., and which said G. H. in his life-time, and at the time of his death, was executor of the last will and testament of the said E. F. deceased, and the defendant, administrator as aforesaid, after the death of the said G. H., have disregarded the said promise of the said E. F., and have not, nor have nor hath any or either of them, paid the said monies respectively, or any part thereof. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Against an administrator de bonis non, with will annexed.

V. RESPECTING
CHARACTER, &c.

Against hus-
band and wife
administratrix
before marriage.

Commencement, ante, 23.] For that whereas the said G. H. in his life-time, on &c., was indebted &c. [*laying the promise to the intestate as usual.*]

Yet the said G. H. in his life-time, and the said E., administratrix as aforesaid, after the death of the said G. H. and whilst she was sole and unmarried, and the defendant and E. his wife, (which said E. is administratrix as aforesaid,) since their intermarriage, have disregarded the said several promises of the said G. H., and have not, nor have nor hath any or either of them, paid the said several monies respectively, or any part thereof. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Against hus-
band and wife
administratrix
after marriage.

As in the last precedent to the breach, which is to be as follows:] Yet the said G. H. in his life-time, and the said C. D. and E. his wife, (which said E. is administratrix as aforesaid,) since the death of the said G. H. have disregarded the said promise of the said G. H., and have not, nor have nor hath any or either of them, paid the said several monies respectively, or any part thereof. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

SPECIAL COUNTS IN ASSUMPSIT.

INSTRUCTIONS TO PREPARE DECLARATIONS ON PROMISSORY NOTES, CHECKS, AND INLAND AND FOREIGN BILLS.

THE Reg. Gen. Trin. T. 1 W. 4, *ante*, 30 to 34, prescribes the *exact forms* of a few of the declarations on promissory notes and inland bills, and *indebitatus counts* in most common use, and directs that *all counts* on notes and bills, whether inland or foreign, and for *demands of a like nature*, shall be framed in the same *concise* manner, as well in assumpsit as in debt; and that if *any count upon a similar demand shall exceed the length of the prescribed forms*, no costs of the excess shall be allowed to the plaintiff or his attorney, but the defendant shall be paid any extra costs he may thereby incur. It is therefore essential for a practitioner, in framing any declaration on a promissory note, check, or bill of exchange, or indebitatus count, on *all occasions* to omit *every unnecessary word*; but in proceeding upon this suggestion the utmost care must be observed not to omit any sentence or allegation that has in practice heretofore been introduced, *unless* he be *well assured* that it is *certainly unnecessary* in point of law; nor will it be advisable to omit even a *word* that might render the sufficiency of the declaration questionable; because in an action of this nature *for a debt*, a colourable demurrer would probably occasion delay in the recovery of the debt. These observations only apply to each *single count*.

DECLARATIONS
ON PROMISSORY
NOTES, &c.

But moreover the general pleading rule of Hil. T. 4 W. 4, reg. 5, *prohibiting more than one count on the same subject-matter, must be kept in view*; so that after a *special count* on a bill, &c. a common or *more general count* on the *same bill*, &c. must not as heretofore be introduced. That rule however provides that "counts upon a bill of exchange or promissory note, and for the consideration of the bill or note, in goods, money, or otherwise, are to be considered as founded on *distinct subject-matters* of complaint, for (the reason assigned in the rule) the *debt* and the *security* are different contracts, and the addition of such counts is to be allowed." Consequently, when the plaintiff has a claim upon the defendant, independently of a bill or note, or in respect of which either was given, and there be the least doubt as to the *validity* or *proof* of the bill or note, a count should be inserted upon the former.

The same rule also provides "that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each count."

The result is, that, in an action on a bill or note against a party who is debtor on account of a debt independently of the instrument declared on, the plaintiff *may* (and *should*, in case his recovery on the count on the bill be doubtful, but not otherwise,) insert a count for such independent

DECLARATIONS
ON PROMISSORY
NOTES, &c.

debt; and whenever there has been a *distinct account stated*, or acknowledgment to the plaintiff of a sum being due as a balance, a count upon an account stated *may* be added. But unless *evidence* can be adduced to support each and every count, in addition to that on the bill or note, it should not be added, because, if added and not proved, the defendant will be entitled to the costs of each unproved count. The pleader and practitioner should in strictness, therefore, in each particular case, ascertain the *evidence*, and insert no count unless there be at least a probability of supporting it by the proof.

Further, it was formerly the practice where a plaintiff really claimed as a remote indorsee, at least in one count, to state himself to be the *immediate indorsee of the first indorsee*, or of the defendant, if he be sued as an indorser, omitting any notice of *intervening* indorsements, and which is certainly admissible in pleading. See cases, *Chitty on Bills*, 9th edit. 572. But in *Stein and another v. Yglesias and another*, 1 Gale, 98, it was doubted whether, if the declaration be so framed, the plaintiff can avail himself of the title of any intermediate indorsee. In cases therefore where it may be material to rely on the title or right of any intermediate indorser, it will be safer to state his indorsement in the declaration.

I. ON PROMISSORY NOTES.

AGAINST MAKER.

*Payee against
maker on a note
payable gene-
rally.*(a)

AGAINST THE MAKER.

Commencement, ante, 13.] For that whereas the defendant, on the — day of —, A. D. —, (b) made his promissory note in writing, and delivered the same to the plaintiff, (c) and thereby promised to pay to the plaintiff £—— (d) two months after the date thereof, which period had elapsed before the commencement of this suit. And the defendant, in consideration of the premises, then promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof. (e) [*Add a count on the consideration or debt for which the note was given, and a count on an account stated, and conclude as ante*, 36.

(a) If it be made in a foreign language, it may be set out in English. *Attorney-General v. Valabrique*, Wightw. 9.

(b) Date of note, or, if no date, the day it was made or issued. If the note bear date on a day different from that intended, state it, as in the form, *post*, 83. When the count is drawn as above, the date is not material; but if it be alleged that the defendant made his promissory note bearing date, on &c., the date is material; *Anon.* 2 Camp. 308.

Reg. Gen. Hil. T. 4 W. 4, r. 8, prohibits the statement of *venue*, nor was it before necessary to state the place of date, 3 Camp. 304. But if the note be drawn at Dublin in Ireland, or abroad, it should perhaps be so stated; 2 B. & A. 301; 1 Chit. Rep. 28, S. C.; 1 B. & C. 16; 2 D. & R. 15, S. C.

(c) Prescribed in the form, *ante*, 31, but not necessary to state any delivery; see *ante*, 31, in note (b).

(d) If the note be payable in Irish currency, it must be expressly so stated, 2 D. & R. 15; 1 B. & C. 16, S. C.; 4 B. & A. 246. The omission of the word "sterling" is immaterial, 2 B. & A. 301. It is not necessary to state the words "value received" in *assumpsit* or debt; 2 Chit. Rep. 333; 11 A. & E. 702; 3 P. & D. 408.

(e) As the note itself contains a promise, the promise to pay the amount according to the tenor and effect of the note seems unnecessary. This mode of stating the promise is proper, although the plaintiff may rely on a promise after the note was due; 16 East, 420; 3 East, 481.

Commencement, ante, 13.] For that whereas the defendant, on the (1st) day of (January), in the year of our Lord (1841), made his promissory note in writing, bearing date, by mistake, the (1st) day of (January), A. D. (1840), when in truth and in fact the defendant and the plaintiff, at the time of the making thereof, meant and intended the said promissory note to be dated on the (1st) day of (January), A. D. (1841), and the defendant thereby promised to pay to the plaintiff £—— (two) months after the date thereof, that is to say, two months after the (1st) day of (January), A. D. (1841), when the said promissory note was so made and meant and intended to be dated as aforesaid, and which period had elapsed before the commencement of this suit: And the defendant, in consideration of the premises, then promised to pay the amount of the said note to the plaintiff according to the true intent and meaning thereof. [*Add a count on the consideration, and a count on an account stated, and conclude as ante, 36.*]

AGAINST
MAKER.

On a note
wrongly dated.
(f)

Commencement, ante, 13.] For that whereas the defendant, on the — day of —, A. D. —, made his promissory note in writing, and thereby promised to pay to the plaintiff, or his order, at (Messrs. Drummonds and Co.'s, bankers, Charing-cross (g)) [*as in the note*] £100 two months after the date thereof, which period had elapsed before the commencement of this suit. And the defendant then delivered the said note to the plaintiff, and promised him to pay the same according to the tenor and effect thereof; but neither the said (Messrs. Drummonds and Co.) nor the defendant, nor any person or persons on behalf of the defendant, did or would pay the said note, although the same was duly presented at the said (Messrs. D. and Co.) for payment thereof, to wit, on the day it became due, (h) of which the defendant then had notice. (i) [*Add a count on the consideration of the note, and a count on an account stated, and conclude as ante, 36.*]

Payee against
maker of a note
payable at a
particular place.
(g)

Commencement, ante, 13.] For that whereas the defendant, on the — day of —, A. D. —, made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £——

On a note payable
on demand.
(k)

(f) See Chitty on Bills, 9 ed. 563.

(g) When the note is, in the body of it, made payable at a particular place, this count is proper; 3 Campb. 247, 304; 4 Campb. 201; 14 East, 500; 5 Taunt. 30; 3 M. & S. 152; otherwise it is not; 10 B. & C. 2; 5 M. & R. 9, S. C. The statute 1 & 2 G. 4, c. 78, relating to the acceptance of bills, making them payable at a particular place, does not extend to promissory notes.

(h) It need not be stated who made the presentment; 1 Gow, 55. It need not be stated that it was presented to the bankers, &c.; 2 Chit. Rep. 300.

An allegation of non-payment at the particular place seems unnecessary; 3 M. & Sel. 150.

(i) This is usually averred, but it is said need not be proved; 3 Campb. 261.

(k) It is not necessary that any demand should have been made previous to the commencement of the action; *Ramball v. Ball*,

10 Mod. 38; Bayl. 187; Selw. N. P. 3d ed. 321; Ry. & Moo. 363; 2 Crom. & J. 418; *Norton v. Ellam*, 2 M. & W. 461. But it is advisable that a demand should be made, in order to recover interest on the note; for otherwise, unless the note be made payable with interest, the plaintiff can only recover interest from the date of the writ; *Pierce v. Fothergill*, 2 Bing. N. C. 167. A note payable to a person or order on demand, cannot be reissued after payment by the maker; and it seems that the indorsee of an overdue note, payable on demand, cannot be affected by its previous equities, unless he had notice that it was overdue; *Bartrum v. Caddy*, 9 A. & E. 275. A promissory note, payable on demand, cannot be treated as overdue, so as to affect an indorsee with any previous equities, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such indorsement; *Brooks and others v. Mitchell*, 9 M. & W. 15.

AGAINST
MAKER. on demand. [*Add a count on the consideration, and a count on an account stated, and conclude as ante, 36.*]

On a note payable by instalments for the whole sum upon one default. (1)

Commencement, ante, 13.] For that whereas the defendant, on the — of —, in the year of our Lord — [*date of note*], made his promissory note in writing, and thereby promised to pay to the plaintiff [*£100*] in manner following, that is to say, [*£25*] part thereof, on the — day of — the next, [*£25*] other part thereof, on the — day of — then next, a [*£50*] residue thereof, on the — day of — then next; and that in case of default should be made in any or either of the said payments, then the whole of the said sum of *£100* should become due on demand: And the defendant then delivered the said note to the plaintiff, and promised him to pay the same, according to the tenor and effect thereof. And the plaintiff in saith, that afterwards, to wit, on the — day of —, A. D. —, default was made by the defendant in the payment of the said first-mentioned in the said promissory note specified, which had then become due and payable, whereby, and according to the tenor and effect of the said note and said promise, the defendant then became liable to pay to the plaintiff the whole of the said sum of *£100* in the said note specified on request. [*Add a count on original consideration, the account stated, and breach, as ante, 36*]

On a note for one instalment due in which there is no clause that the whole shall be payable on one default.

Commencement, ante, 13.] For that whereas the defendant, on &c. [*date*], made his promissory note in writing, and thereby &c. [*State the sum, according to the tenor and effect of the note, as in the last precedent proceed as follows: **] And the plaintiff in fact saith, that afterwards, on the — day of —, in the year of our Lord aforesaid, (m) a sum, to wit, the sum of *£25*, part of the said sum of *£100* in the said note specified, became and was due and payable from the defendant to the plaintiff, upon and by virtue of the said note, and which said last-mentioned sum of *£25* he the defendant then ought to have paid to the said plaintiff according to the tenor and effect of the said note and of his said promise. [*Add a count on the consideration of the note, and the account stated, and conclude as ante, 36.*]

The like, for several instalments due.

*Proceed as directed in the preceding form, to the * and then as follows.* And the plaintiff saith, that afterwards, to wit, on the — day of —, A. D. —, aforesaid, a large sum of money, to wit, the sum of *£*— divers, to wit, [*three*] of the said instalments payable by the said note in the last elapsed, became and was due and payable from the defendant to the plaintiff upon and by virtue of the said note. [*Add a count on the consideration of the note, the account stated, and breach, as ante, 36.*]

(1) See the Precedent, Plead. A. 11; Bayl. on Bills, 190. If, when the action is commenced, all the instalments are due by effluxion of time, it will suffice to declare generally on the note, setting it out, and without averring any default. If the note be payable by instalments, without any clause as to the whole becoming due on one default, then the next precedent will be proper. The instalments

become due three days after the last day of the payment of each. Debt will lie on a promissory note payable by instalments if the last day of payment be past; Price, 1 H. Bl. 547.

(m) If any one of the days or instalments became due be misstated, the declaration is fatal; 1 Gow, 21; 3 J. B. Moore

Commencement, ante, 13.] For that whereas the defendant, on &c. [*date of note*], in a certain place called [Clifford's Inn,] according to the form of the statute in such case made and provided, made his note in writing, and signed by him, the defendant, in the presence of one A. B., a subscribing witness, who in due manner, and according to the form of the statute in such case made and provided, attested such signature, and the defendant thereby, twenty-one days after the date of the said promissory note, promised to pay to the plaintiff, (by the name of &c., at &c., cabinet-maker, being the then place of abode of the plaintiff, to whom or to whose order the money contained in the said note was to be paid,) or his order, the sum of [£4,] for value received, and then delivered the said note to the plaintiff, and then promised the plaintiff to pay the same according to the tenor and effect thereof. [*Add a count on the consideration of the note, and the account stated, and breach, as ante, 36.*]

AGAINST
MAKER.

On a note for
less than 5*l.* (*n*)

Commencement, ante, 13.] For that whereas the defendant, on &c. in parts beyond the seas, to wit, at [Amsterdam,] made his promissory note in writing, and thereby promised to pay, [nine] months after the date thereof, (which period had elapsed before the commencement of this suit,) to the order of the plaintiff one hundred and one guilders holl, value that day received in cash, and then delivered the said promissory note to the plaintiff, and promised the plaintiff to pay the same according to the tenor and effect thereof. And the plaintiff avers, that the said one hundred and one guilders holl in the said note mentioned, at the time of making the said note, and also at the time the same became due and payable according to the tenor and effect thereof, were and still are of great value, to wit, the value of £— (*p*) of lawful money of Great Britain. (*q*) [*Add a count on the consideration of the note, a count on an account stated, and breach; see ante, 36.*]

On a note made
abroad for the
payment of
guilders. (*o*)

Commencement, ante, 13.] For that whereas the defendant, on &c., made his promissory note in writing, and thereby promised to pay, [six] months after the decease of his father, E. F., to the plaintiff, or order, the sum of £—, for value received, and then delivered the said note to the plaintiff, and promised to pay the same according to the tenor and effect thereof. And the plaintiff in fact saith, that afterwards, to wit, on &c., the said E. F. died. And although six months from that time elapsed before the commencement of this suit, yet the defendant, although he afterwards, and before the commencement of this suit, to wit, on &c., had notice of the premises, and was then requested by the plaintiff so to do, hath not as yet paid the said sum of £—, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do. [*Add a count on the consideration, a count on an account stated, and breach; see ante, 36.*]

By payee
against maker of
a note, payable
six months after
the death of
another.

Commencement, ante, 13.] For that whereas the defendant, on &c., made his promissory note in writing, and thereby promised to pay to one E. F., or

First indorsee
against maker,
payable gene-
rally.

(*n*) See 17 G. 3, c. 30, s. 1, made perpetual by 27 G. 3, c. 16, and 7 Geo. 4, c. 6; 1 Wentw. 368; Chitty on Bills, 9th ed. 128.

(*o*) As to declarations relative to foreign money, see 1 Marsh. 33; 5 Taunt. 228; 2 D. & R. 15; 1 B. & C. 16, S. C.

(*p*) State enough to cover the value in English money.

(*q*) In some of the precedents, this averment is introduced before the statement of the liability and promise to pay.

AGAINST
MAKER.

order, £50, two months after the date thereof, which period had elapsed before the commencement of this suit, and the said E. F. then indorsed the said note to the plaintiff, whereof the defendant then had notice, (r) and then, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, (s) according to the tenor and effect thereof. [*If there be any debt independent of the note between plaintiff and defendant, insert a count for the same, but otherwise, at most, only insert the account stated, and breach, as ante, 36. As there is no privity of contract between indorsee and maker of a note, it is not usual to add any other counts, as in the preceding forms.*]

First indorsee
against maker,
where note pay-
able at a parti-
cular place. (t)

Commencement, ante, 13.] For that whereas the defendant, on &c., made his promissory note in writing, and thereby promised to pay, at [Messrs. Drummonds and Co.'s, bankers, Charing-cross,] £— to E. F., or order, [two] months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said E. F.; and the said E. F. then indorsed and delivered the said note to the plaintiff.* But neither said Messrs. Drummonds and Co. nor the defendant, nor any other person, did pay the said note, although the same was presented for payment thereof at the said Messrs. D. and Co.'s when the same became due, of which premises the defendant then had notice. [*Conclude as ante, 36.*]

Second or remote
indorsee, against
maker. (u)

Commencement, ante, 13.] For that whereas the defendant, on &c., made his promissory note in writing, and thereby promised to pay £— to E. F., or his order, [two] months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said E. F.; and the said E. F. then indorsed and delivered the said note to G. H.; and the said G. H. (x) then indorsed and delivered the said note to the plaintiff; and the defendant then promised the plaintiff to pay him the same, according to the tenor and effect thereof, and of the said indorsements. [*Conclude as ante, 36.*]

First indorse-
ment.
Second indorse-
ment.

Short indorse-
ment. (y)

And the said G. H. [*the payee*] then indorsed and delivered the said promissory note to one J. K. who then indorsed and delivered the same to one L. M. who then indorsed and delivered the same to the plaintiff.

On a note in-
dorsed for resi-

After stating an indorsement to G. H. proceed as follows:] And the defendant, after the said indorsement to the said G. H., to wit, on the day and

(r) It is not necessary to allege a notice of the indorsement, and the allegation cannot be traversed; *Bradbury v. Evans*, 5 M. & W. 595; 7 Dowl. 849; *Reynolds v. Davies*, 1 B. & P. 625.

(s) See *Banks v. Camp*, 2 Moore & Scott, 734.

(t) See the two forms, *ante*, 82, 83, and the notes, which should be observed, 14 East, 500; 4 Camp. 201; 5 Taunt. 30.

(u) It has been held, that a remote indorsee may declare as the immediate indorsee of the first indorser, or of any intermediate indorsee, striking out on the trial the indorsements not stated, 4 Esp. Rep. 211; Bayley

on Bills, 184; Chitty on bills, 9th ed. 572. But from *Stein v. Yglesias*, 1 Gale's Rep. 98 it would seem that if plaintiff wish to take the benefit of any intermediate indorser's title, his indorsement must be stated.

(x) A variance between the real name and what appears on the bill, is immaterial, Stark. 47; as to description and proof of indorsement, by persons trading under a firm &c. see 2 D. & R. 281; 1 Dowl. N. R. 656 892; 9 M. & W. 347, 284.

(y) In 2 Chitty's Plead. 127, 5th edit. this short indorsement was suggested. The Reg. Gen. Trin. T. 1 W. 4, seems in the first form to prescribe it.

year aforesaid, paid to the said G. H. a certain sum of money, to wit, £10, in part payment of the said £50, in the said note specified, and the said G. H. afterwards, and before the payment of the residue of the same £50, or any part thereof, to wit, on the day and year aforesaid, indorsed and delivered the said note to the plaintiff; and the defendant then promised the plaintiff to pay him the said residue of the said sum of money in the note specified according to the tenor and effect of the note and the said indorsements. [*Conclude as ante*, 36.]

AGAINST
MAKER.

due, after part
payment. (z)

Commencement, ante, 20 or 22.] For that whereas the defendant, in the life-time of the said E. F., since deceased, on &c., made his promissory note in writing, and thereby promised to pay to the said E. F., or order, £50, two months after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then promised the said E. F. to pay him the same according to the tenor and effect of the said note. [*Add a count on the consideration of the note, and account stated, laying the promise to the deceased, and conclude with the breach at suit of an executor, and profert, as ante*, 73; or the breach at suit of administrator, and profert, as ante, 77. If it be material to prove a promise since death, frame the declaration accordingly, as in following forms.]

By executor or
administrator of
payee against
maker. (a)

Same as in last precedent, to the end of the count, and then introduce as follows:] And whereas also the defendant, in the life-time of the said E. F., on &c. aforesaid, made his promissory note in writing, and thereby promised to pay to the said E. F., or order, £——, two months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said E. F.; and the said note being and remaining wholly unpaid and unsatisfied, he the defendant, in consideration thereof, afterwards, and after the death of the said E. F., to wit, on &c. (c), promised the plaintiff as executor [*or* “as administrator”] as aforesaid, to pay the said note according to the tenor and effect thereof. [*Conclude as ante*, 73, if at the suit of an executor; or *ante*, 77, if at the suit of an administrator.]

By executor or
administrator on
promise since
the death. (b)

Proceed to the end of the count as in the last form but one, and then as follows:] And the plaintiff in fact says, that after the making of the said note, to wit, on the day and year aforesaid, the said E. F. died, having duly made and published his last will and testament in writing, and thereby constituted and appointed the plaintiff executor thereof, after whose death, to wit, on the day and year aforesaid, the plaintiff duly proved the said last will and testament of the said E. F. and took upon himself the burthen of the execution thereof, of which several premises the defendant then had notice; and thereupon the defendant, in consideration thereof, then promised the plaintiff, as

The like in another
form, stating
the probate.

(z) As to the law, see Chitty on Bills, 9th ed. 224; see precedent, Plead. Assist. 22.

(a) As to actions by and against executors, see *ante*, vol. i.

(b) As to this count, see 3 East, 409; Willes Rep. 29. Some precedents state the

proving the will formally, as in next precedent. This count should not be inserted unless there is evidence of an express promise to the executor since the death.

(c) Some day just before the commencement of the action.

AGAINST
MAKER.

executor as aforesaid, to pay the said sum of money in the said note specified, when he the said defendant should be thereunto afterwards requested. [*Conclude as directed in last precedent.*]

Payee against
the executor or
administrator of
maker.

Commencement, ante, 20 or 22.] For that whereas the said E. F., in his life-time, on &c., made his promissory note in writing, and thereby promised to pay to the said plaintiff, or order, £50, two months after the date thereof, which period had elapsed before the commencement of this suit; and the said E. F. then delivered the said note to the plaintiff, and the said E. F. then promised the plaintiff to pay the said note according to the tenor and effect thereof. [*Add a count on the consideration of the note, account stated, and breach, as ante, 75 or 79. If it be material to give in evidence a promise or admission of defendant since the death, add counts accordingly, and which may be framed nearly as in the last precedent.*]

By indorsee of
an executor
against maker.
(d)

After stating the promissory note payable to E. F., as ante, 87, proceed as follows:] And the said E. F. then indorsed and delivered the said note to G. H., in his life-time, since deceased. And the plaintiff further saith, that afterwards, to wit, on &c. [*date of will or about it*], the said G. H. made his last will and testament in writing, and thereby then made and appointed J. K. executor thereof, and the said G. H. afterwards, to wit, on the day and year last aforesaid, died, and thereupon the said J. K. afterwards, to wit, on the day and year last aforesaid, duly proved the said last will and testament of the said G. H. deceased, and took upon himself the burthen of the execution thereof; and the said J. K., so being executor of the last will and testament of the said G. H., afterwards, to wit, on the day and year last aforesaid, as such executor as aforesaid, indorsed and delivered the said note to the plaintiff; and the defendant then promised the plaintiff to pay the said note according to the tenor and effect thereof and of the said indorsements. [*Conclude as ante, 36.*]

By indorsee of
an administrator
after the death
of the payee,
against the
maker. (e)

Commencement, ante, 13.] For that whereas the defendant, on &c., made his promissory note in writing, and thereby promised to pay E. F., or order, £—, [twelve] months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said E. F.; and the plaintiff in fact saith, that after the making of the said note, to wit, on &c. [*the date of the letters of administration*], the said E. F. died intestate; and that afterwards, to wit, on the day and year last aforesaid, administration of all and singular the goods and chattels, rights and credits, of the said E. F. deceased, at the time of his death, was granted to G. H., and the said G. H., so being such administrator aforesaid, afterwards, to wit, on the day and year last aforesaid, indorsed and delivered the said note to the plaintiff; and the defendant then promised the plaintiff to pay the same according to the tenor and effect thereof and of the said indorsement. [*Conclude as ante, 36.*]

(d) A profert of the probate need not be made, Willes, 359; see precedents, 1 Went. 329, 382, 387, 388.

(e) No profert of the letters of administration is necessary, Willes, 359; 1 Wentw. 388.

Commencement, ante, 13.] For that whereas the defendant, on &c., made his certain promissory note in writing, and thereby promised to pay to E. F., or bearer, £100, two months after the date thereof, which period had elapsed before the commencement of this suit,* and the said E. F. then delivered, transferred and assigned the said note to the plaintiff, and he then became, and was, and is, the lawful bearer thereof; and the defendant, in consideration of the premises, then promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof. [*Conclude as ante, 36.*]

AGAINST
MAKER.

By the bearer of a note, payable to E. F. or bearer against the maker. (f)

Sometimes, and when the plaintiff became the bearer not by the immediate transfer to him from E. F. the payee, the declaration may, from the asterisk in last precedent, run thus :] And the said E. F. then duly assigned and delivered the said note to a certain person, whose name is to the plaintiff unknown; and the plaintiff afterwards, to wit, on &c. [*any day before the date of the writ*], became, and was, and still is the lawful bearer of the said note, and entitled to receive and demand payment of the said money thereby payable, whereof the defendant then had notice. And in consideration &c. [*State promise as in the last precedent, and conclude as ante 36.*]

The like in another form.

Commencement, ante, 13.] For that whereas the defendants, on &c. [*date of note*], at the Brighton Union Bank, at Brighton, made their promissory note in writing, and thereby then promised to pay No. —, or bearer, on demand, £— there, that is to say, at the Brighton Union Bank, or at Messrs. Weston, Sir John Pinhorn and Co.'s, in London; and the plaintiff then became and was the lawful bearer of the said note, whereof the defendant then had notice; and the defendant then promised the plaintiff to pay the said note according to the tenor and effect thereof; but the said Messrs. Weston, Sir John Pinhorn and Co., bankers in London aforesaid, did not, neither did the said Brighton Union Bank, nor the defendants, nor any other person or persons, pay the said note, although payment of the same was duly demanded at the said Messrs. Weston, &c. and at the said Brighton Union Bank, and whereof the defendants then had notice. [*Add a count for the original debt, if any, and the account stated, and conclude as ante, 36.*]

On a country banker's note, payable at London bankers, or in country, averring presentment at both, and at suit of bearer.

Commencement, ante, 18.] For that whereas the defendant, in the life-time of E. F. since deceased, on &c., made his promissory note in writing, and thereby promised to pay to the plaintiff and the said E. F., since deceased, £100, two months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the plaintiff and the said E. F., and then promised the plaintiff and the said E. F. since deceased, in his life-time, to pay the same according to the tenor and effect thereof. [*Add a count on the consideration of the note, and on an account stated, and breach, as ante, 66 and 67.*]

By a surviving payee against maker. (g)

Commencement, ante, 19.] For that whereas the defendant and one E. F., since deceased, on &c., made their promissory note in writing, and thereby promised to pay to the plaintiff £—, two months after the date

Payee against a surviving maker. (h)

(f) The plaintiff must sue as surviving payee; 4 B. & A. 374.

(h) It may be described as the note of the survivor only, 1 B. & Ald. 29.

DECLARATIONS IN ASSUMPSIT.

**AGAINST
MAKER.**

thereof, which period had elapsed before the commencement of this suit, and then delivered the said promissory note to the plaintiff; and promised the plaintiff to pay the same according to the tenor and effect thereof. [*Add count on consideration, account stated, and breach, against surviving partner, as ante, 68.*]

By husband and wife on a note payable to her whilst sole.

Commencement, ante, 19.] For that whereas the defendant, whilst the said E. was sole and unmarried, to wit, on &c., made his promissory note in writing, and thereby promised to pay to the said E. £—, two months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said E.; and the defendant then promised the said E., whilst she was sole and unmarried, to pay the same according to the tenor and effect thereof. [*Add a count on the consideration, and an account stated with the wife before marriage, and breach, as directed, ante, 69.*]

By an executor on a note payable to the wife of the testator before their marriage, she not having indorsed it. (i)

Commencement, ante, 20.] For that whereas the defendant, before the intermarriage of the said C. T. [*the testator*] with one Ann L., as hereinafter mentioned, to wit, on &c. [*date of the note*], made his promissory note in writing, and thereby promised to pay to the said Ann L. or order, on demand, £—, and then delivered the said note to the said Ann L. whilst she was sole and unmarried; and afterwards, to wit, on the day and year aforesaid, the said C. T. intermarried with the said Ann L.; and the defendant after the said intermarriage, then promised the said C. T. to pay the same according to the tenor and effect thereof. [*Conclude as ante, 73.*]

By husband alone, on a note made to wife during coverture. (k)

Commencement, ante, 13.] For that whereas the defendant, on &c., made his promissory note in writing, and then delivered the said note to E. then and still being the wife of the plaintiff, and for the use and benefit of the plaintiff; by which said note the defendant then promised to pay to the said E., so then being the wife of the plaintiff, £50, two months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then promised the plaintiff to pay the said note according to the tenor and effect thereof. [*Conclude as ante, 36.*]

Against husband and wife, on her note before marriage.

Commencement, ante, 19.] For that whereas the said E., and whilst she was sole and unmarried, on &c., made her promissory note in writing, and thereby promised to pay to the plaintiff £100, two months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the plaintiff, and then promised the plaintiff to pay the same according to the tenor and effect thereof. [*See Lil. Ent. 27. A count on a promise after marriage cannot be added, 1 Taunt. 212. Conclude as ante, 69.*]

By assignees of a bankrupt, against maker of a note, payable to bankrupt.

Commencement, ante, 19.] For that whereas the defendant, before the said E. F. became bankrupt, on &c. [*date of note*], made his promissory note in

(i) That this action lies and in this form, 1 B. & Ald. 218.

(k) The husband and wife may join; 2 M. & Sel. 393. If the husband sue alone, on a

note given to the wife during coverture, the note may be described as given to the husband, without noticing the wife; 4 T. R. 616; see 1 B. & A. 218.

writing, and thereby promised to pay to the said E. F., or order, £—, [twelve] months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said E. F., and then promised the said E. F. to pay the same according to the tenor and effect thereof. [*Add a count on the consideration of the note and the account stated with the bankrupt, and breach, as ante, 70. If it be material to give in evidence any debt, promise, or acknowledgment, since the bankruptcy, the declaration may be framed accordingly. See ante, 71.*]

AGAINST
MAKER.

Commencement, ante, 20. For that whereas the defendant, heretofore and before the granting of any order by the Court for Relief of Insolvent Debtors for vesting the estate and effects of the said C. D. according to the form of the statute in such case made and provided, and before the estate and effects of the said C. D. became vested in the plaintiff as such assignee as aforesaid, to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promise note in writing, and then delivered the same to the said C. D., and thereby promised to pay the said C. D. £—, — days, [“weeks,” or “months,”] after the date thereof, which period had elapsed before the commencement of this suit. [*Add a count on the consideration and an account stated, and breach, as ante, 72.*]

By assignee of payee an insolvent debtor, against maker of a note payable to the insolvent.

Commencement, ante, 18. For that whereas the defendant, on the — of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [“weeks” or “months”] after the date thereof, which period had elapsed before the commencement of this suit; and the said A. B. then indorsed the same to the plaintiff and the said E. F., in his life-time, whereof the defendant then had notice, and then, in consideration of the premises, promised to pay the amount of the said note to the plaintiff and the said E. F., since deceased, according to the tenor and effect thereof. [*Add a count on an account stated, and breach, as ante, 66 and 67.*]

Surviving indorsee against surviving maker of a note payable generally.

Commencement, ante, 19. For that whereas the defendant and the said E. F., in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of note*], made their promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [“weeks” or “months”] after the date thereof, which period had elapsed before the commencement of this suit; and the said A. B. then indorsed the same to the plaintiff, whereof the defendant and the said E. F. then had notice, and then, in consideration of the premises, promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof. [*Add a count on an account stated, and breach, as ante, 68.*]

Indorsee against surviving maker of a note payable generally.

Commencement, ante, 19. For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and then delivered the same to one L. M., and thereby promised to pay to the said L. M., or order, £—, — days [“weeks,” or “months,”] after the date thereof, which period had elapsed

By husband and wife on note indorsed to wife before marriage, against maker of a note payable generally.

AGAINST
MAKER.

before the commencement of this suit; and the said L. M. then, and whilst the said C. was sole and unmarried, indorsed the same to the said C., whereof the defendant then had notice, and in consideration of the premises, then and whilst the said C. was sole and unmarried, promised to pay the amount of the said note to the said C. according to the tenor and effect thereof. [*Add a count on an account stated and breach, as ante, 69.*]

Indorsee against husband and wife on note made by the wife before marriage, and payable generally.

Commencement, ante, 19.] For that whereas the said E. whilst she was sole and unmarried, to wit, on the — day of —, in the year of our Lord — [*date of the note*], made her promissory note in writing, and then delivered the same to one L. M., and thereby promised to pay to the said L. M., or order, £—, — days [“weeks,” or “months,”] after the date thereof, which period had elapsed before the commencement of this suit; and the said L. M. then indorsed the same to the said plaintiff, whereof the said E. then had notice, and then, and whilst she was sole and unmarried, in consideration of the premises, promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof. [*Add a count on an account stated and breach, as ante, 69.*]

Executor or administrator of indorsee against maker of a note payable generally.

Commencement, ante 20 or 22.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of note*], made his promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [“weeks” or “months”] after the date thereof, which period had elapsed before the commencement of this suit, and the said A. B. then indorsed the same to the said G. H. in his life-time, whereof the defendant then had notice, and then in consideration of the premises promised to pay the amount of the said note to the said G. H., since deceased, according to the tenor and effect thereof. [*Add a count on an account stated and breach, as ante, 73 or 77.*]

Indorsee against executor or administrator of maker of a note payable generally.

Commencement, ante, 20 or 22.] For that whereas the said G. H. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [“weeks,” or “months,”] after the date thereof, which period had elapsed before the commencement of this suit, and the said A. B. then indorsed the same to the plaintiff, whereof the said G. H., since deceased, then had notice, and then in consideration of the premises promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof. [*Add a count on an account stated and breach, as ante, 75 or 79.*]

Executor or administrator of indorsee against executor or administrator of maker of a note payable generally.

Commencement, ante, 21.] For that whereas the said G. H. heretofore in his life-time and in the life-time of the said E. F., to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [“weeks,” or “months,”] after the date thereof, which period had elapsed before the commencement of this suit, and the said A. B. then indorsed the same to the said E. F., whereof the said G. H. then had notice, and then in consideration of the premises promised to pay the amount of the said note to the said

E. F. according to the tenor and effect thereof. [*Add breach, as ante, 75, and conclude to the damage of the plaintiff as executor or administrator, and add profert accordingly, ante, 73 and 77.*]

AGAINST
MAKER.

Commencement, ante, 19.] For that whereas the defendant, on the — day of — in the year of our Lord — [*date of the note*], made his promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [*"weeks," or "months,"*] after the date thereof, which period had elapsed before the commencement of this suit, and the said A. B. then and before the said E. F. became bankrupt indorsed the same to the said E. F., whereof the defendant then had notice, and then in consideration of the premises promised to pay the amount of the said note to the said E. F. according to the tenor and effect thereof. [*Add a count on an account stated and breach, as ante, 70.*]

Assignee of indorsee, a bankrupt, against maker of a note payable generally.

Commencement, ante, 20.] For that whereas the defendant, on the — day of —, A. D. — [*date of the note*], made his promissory note in writing, and then delivered the same to one A. B., and thereby promised to pay to the said A. B., or order, £—, — days [*"weeks," or "months,"*] after the date thereof, which period had elapsed before the commencement of this suit; and the said A. B. then and before the granting of any order by the Court for Relief of Insolvent Debtors for vesting the estate and effects of the said C. D. according to the form of the statute in such case made and provided, and before the estate and effects of the said C. D. became vested in the plaintiff as such assignee as aforesaid, indorsed the same to the said C. D., whereof the said defendant then had notice, and then in consideration of the premises promised to pay the amount of the said note to the said C. D. according to the tenor and effect thereof. [*Add a count on an account stated and breach, as ante, 72.*]

Assignee of indorsee, an insolvent debtor, against maker.

Commencement, ante, 27.] For that whereas the said society was and is a society established according to a certain act of parliament made and passed in the 10th year of the reign of his late Majesty King George the Fourth, intituled "An Act to consolidate and amend the Laws relating to Friendly Societies;" and that before the making the promises and undertakings hereinafter mentioned, to wit, on &c., all the rules, orders and regulations under which the said society was thereafter to be governed, were duly, and according to the form of the statute in such case made and provided, exhibited, confirmed and filed at the general quarter sessions of the peace, holden at &c., on &c. (o) And whereas also, on &c. [*date of note*],

By the trustees of a friendly society against the maker of a note. (n)

(n) The statutes now in force relative to these societies are the 10 Geo. 4, c. 56, and the 3 & 4 Vict. c. 73. The prior acts were the 33 Geo. 3, c. 54, s. 10; 35 Geo. 3, c. 111; 49 Geo. 3, c. 125; 59 Geo. 3, c. 128, s. 7. See 15 Ves. 280; 6 Ves. 441; 802, 698; Burn, J. tit. Friendly Societies. As to loan societies, see 5 & 6 Will. 4, c. 23, and 3 & 4 Vict. c. 110; and as to the remedy against members of a benefit society, either individually or as members, see *Tyrrell v. Woolley*, 1 M. & Gr. 809; and as to what are usurious

contracts or not, see *Silver v. Barnes*, 6 Bing. N. C. 180. The proper remedy to recover money lent by a loan society is by application to justices, and not by action; *Timms v. Williams*, 11 L. J. R. (N.S.) Q. B. 210. But see *Albin and others v. Pyke*, *ibid.* C. P. 266.

(o) Care must be taken that this corresponds with the caption or style of the sessions. When the action is sustainable, though the rules of the society have not been confirmed at the Quarter Sessions, see 5 B. & Ald. 769, *post*, *Debt*.

DECLARATIONS IN ASSUMPSIT.

**AGAINST
MAKER.**

Second count,
for money lent
by the society.

the defendant made his promissory note in writing, and thereby promised to pay to one — and the rest of the society held at &c. [*as in note*] £—, and on one month's notice to pay the principal, or any part thereof; which said note was so made for the use and benefit of the said society, and then belonged to the same; and by force of the statute in such case made and provided became and still is vested in the plaintiffs, as such stewards and trustees as aforesaid, for the use and benefit of the said society; and the defendants then promised the plaintiffs, so then and still being stewards and trustees of the said society as aforesaid, as such stewards and trustees, to pay them the said sum of money in the said note specified, and interest thereon, according to the tenor and effect of the said note; and the plaintiffs aver, that afterwards, to wit, on the day and year last aforesaid, the plaintiffs, so being such stewards and trustees as aforesaid, gave one month's notice to the said defendant to pay the said principal money of &c. and then requested the said defendant to pay to them the plaintiffs, as such trustees as aforesaid, for the use and benefit of the said society, the said sum of money in the said note specified, and interest thereon, according to the tenor and effect of the said note. And whereas also the said defendant afterwards, to wit, on &c., was indebted to the said society in £— for money by the said society then lent to the defendant at his request; and in &c. And thereupon the defendant afterwards, on the day and year last aforesaid, in consideration of the premises respectively then promised the plaintiffs, as such stewards and trustees as aforesaid, to pay them as such stewards and trustees the said several monies respectively on request. Yet the defendant hath disregarded his promises and hath not paid the said several monies respectively, or any part thereof. To the damage of the plaintiffs, as such stewards and trustees as aforesaid, of £—, and thereupon they bring suit, &c.

By one of the
officers of a
banking com-
pany, under 7
G. 4, c. 46,
against the
maker of a note.

Commencement, ante, 27. State the note to have been payable "to the said copartnership," and lay the debt and promise "to the said copartnership" in the common count, and conclude:] To the damage of the said copartnership of £—, and thereupon the plaintiff, as such officer as aforesaid, for and on the behalf of the said copartnership, by virtue of the said statute, brings suit, &c.

Against one of
the public offi-
cers of a bank-
ing company.

Commencement, ante, 28. State the copartnership to have made their note and lay the debt and promise by them, and conclude:] To the damage of the plaintiff of £—, and thereupon he, by virtue of the said statute, brings his suit against the defendant as such public officer as aforesaid.

AGAINST INDORSER.

Indorsee against
indorser of a
note payable
generally.

Commencement, ante, 13.] For that whereas one A. B., on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then indorsed the same to the plaintiff [*or "and the defendant then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff"*], and the said A. B. did not pay the amount thereof, although the same

was presented to him on the day when it became due, of all which the defendant then had due notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said note on request. [*Conclude as ante*, 36.]

AGAINST
INDORSER.

Commencement, ante, 13.] For that whereas one A. B., on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the defendant or order, at [*the place mentioned in the note*] £——, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then indorsed the same to the plaintiff [or "and the defendant then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff"], and the said A. B. did not, nor did any other person or persons, pay the amount thereof, although the same was presented at [*the place mentioned in the note*] on the day when it became due; of all which the defendant then had due notice, (p) and in consideration of the premises the promised the plaintiff to pay him the amount of the said note on request. [*Conclude as ante*, 36.]

The like, payable at a particular place.

Commencement, ante, 13.] For that whereas one E. F., on &c., made his promissory note in writing, and then delivered the said note to one G. H., and thereby then promised to pay to the said G. H., or bearer, £——, thirty days after sight thereof, which said note afterwards, to wit, on the day and year aforesaid, had been and was delivered to the defendant, who was then and there the bearer thereof; and the defendant then indorsed and delivered the said note to the plaintiff; and the said E. F. afterwards, to wit, on the day and year aforesaid, had sight of the said note, and thirty days from that period had elapsed before the commencement of this suit, and the said E. F. did not pay the said note, although the same was duly presented to the said E. F. for payment thereof, to wit, on the day when it became due: of which the defendant then had notice. [*Conclude as ante*, 36.]

By indorsee of a note against indorser, payable to bearer thirty days after sight, delivered over by the payee to the defendant, who indorsed it to plaintiff.

State the making, indorsing and presenting, and then proceed as follows:] And the plaintiff avers, that at the time of making the said note, and from thence, until, and at, and continually after the time when the same was so presented for payment thereof as aforesaid, the said E. F. [*the maker*] had not in his hands any effects of the defendant, nor was there any consideration for the said E. F.'s making or paying the said note, but, on the contrary, the said E. F. made the said note for the accommodation and at the request of the defendant; and the defendant hath not sustained any damage from or in consequence of his not having had notice of the nonpayment by the said E. F. of the said sum of money in the said note specified, of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice. [*Conclude as ante*, 36.]

First indorsee against first indorser, with averment of want of effects, to excuse notice of non-payment. (q)

(p) Under this averment the plaintiff may show that the defendant could not be found to as to give him the notice in the usual time; see *Fritch v. Thrush*, 8 B. & C. 387. See express averment, *post*, 96.

(q) See 15 East, 216; 12 East, 171. When

the defendant could not be found to give him the notice in the usual time, it was held not necessary to aver that fact, 8 B. & C. 387. See a form 6 A. & E. 502; see also *Kemble v. Mills*, 1 M. & Gr. 757.

DECLARATIONS IN ASSUMPSIT.

**AGAINST
MAKER.**

Second count,
for money lent
by the society.

the defendant made his promissory note in writing, and thereby promised to pay to one — and the rest of the society held at &c. [*as in note*] £—, and on one month's notice to pay the principal, or any part thereof; which said note was so made for the use and benefit of the said society, and then belonged to the same; and by force of the statute in such case made and provided became and still is vested in the plaintiffs, as such stewards and trustees as aforesaid, for the use and benefit of the said society; and the defendants then promised the plaintiffs, so then and still being stewards and trustees of the said society as aforesaid, as such stewards and trustees, to pay them the said sum of money in the said note specified, and interest thereon, according to the tenor and effect of the said note; and the plaintiffs aver, that afterwards, to wit, on the day and year last aforesaid, the plaintiffs, so being such stewards and trustees as aforesaid, gave one month's notice to the said defendant to pay the said principal money of &c. and then requested the said defendant to pay to them the plaintiffs, as such trustees as aforesaid, for the use and benefit of the said society, the said sum of money in the said note specified, and interest thereon, according to the tenor and effect of the said note. And whereas also the said defendant afterwards, to wit, on &c., was indebted to the said society in £— for money by the said society then lent to the defendant at his request; and in &c. And thereupon the defendant afterwards, on the day and year last aforesaid, in consideration of the premises respectively then promised the plaintiffs, as such stewards and trustees as aforesaid, to pay them as such stewards and trustees the said several monies respectively on request. Yet the defendant hath disregarded his promises and hath not paid the said several monies respectively, or any part thereof. To the damage of the plaintiffs, as such stewards and trustees as aforesaid, of £—, and thereupon they bring suit, &c.

By one of the
officers of a
banking com-
pany, under 7
G. 4, c. 46,
against the
maker of a note.

Commencement, ante, 27. State the note to have been payable "to the said copartnership," and lay the debt and promise "to the said copartnership" in the common count, and conclude:] To the damage of the said copartnership of £—, and thereupon the plaintiff, as such officer as aforesaid, for and on the behalf of the said copartnership, by virtue of the said statute, brings suit, &c.

Against one of
the public offi-
cers of a bank-
ing company.

Commencement, ante, 28. State the copartnership to have made their note and lay the debt and promise by them, and conclude:] To the damage of the plaintiff of £—, and thereupon he, by virtue of the said statute, brings his suit against the defendant as such public officer as aforesaid.

AGAINST INDORSER.

Indorsee against
indorser of a
note payable
generally.

Commencement, ante, 13.] For that whereas one A. B., on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then indorsed the same to the plaintiff [*or "and the defendant then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff"*], and the said A. B. did not pay the amount thereof, although the same

was presented to him on the day when it became due, of all which the defendant then had due notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said note on request. [Conclude as ante, 36.]

AGAINST
INDORSER.

Commencement, ante, 13.] For that whereas one A. B., on the — day of —, in the year of our Lord — [date of the note], made his promissory note in writing, and thereby promised to pay the defendant or order, at [the place mentioned in the note] £—, — days [“weeks,” or “months,”] after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then indorsed the same to the plaintiff [or “and the defendant then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff”], and the said A. B. did not, nor did any other person or persons, pay the amount thereof, although the same was presented at [the place mentioned in the note] on the day when it became due; of all which the defendant then had due notice, (p) and in consideration of the premises the promised the plaintiff to pay him the amount of the said note on request. [Conclude as ante, 36.]

The like, payable at a particular place.

Commencement, ante, 13.] For that whereas one E. F., on &c., made his promissory note in writing, and then delivered the said note to one G. H., and thereby then promised to pay to the said G. H., or bearer, £—, thirty days after sight thereof, which said note afterwards, to wit, on the day and year aforesaid, had been and was delivered to the defendant, who was then and there the bearer thereof; and the defendant then indorsed and delivered the said note to the plaintiff; and the said E. F. afterwards, to wit, on the day and year aforesaid, had sight of the said note, and thirty days from that period had elapsed before the commencement of this suit, and the said E. F. did not pay the said note, although the same was duly presented to the said E. F. for payment thereof, to wit, on the day when it became due: of which the defendant then had notice. [Conclude as ante, 36.]

By indorsee of a note against indorser, payable to bearer thirty days after sight, delivered over by the payee to the defendant, who indorsed it to plaintiff.

State the making, indorsing and presenting, and then proceed as follows:] And the plaintiff avers, that at the time of making the said note, and from thence, until, and at, and continually after the time when the same was so presented for payment thereof as aforesaid, the said E. F. [the maker] had not in his hands any effects of the defendant, nor was there any consideration for the said E. F.'s making or paying the said note, but, on the contrary, the said E. F. made the said note for the accommodation and at the request of the defendant; and the defendant hath not sustained any damage from or in consequence of his not having had notice of the nonpayment by the said E. F. of the said sum of money in the said note specified, of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice. [Conclude as ante, 36.]

First indorsee against first indorser, with averment of want of effects, to excuse notice of non-payment. (q)

(p) Under this averment the plaintiff may show that the defendant could not be found so as to give him the notice in the usual time; see *Frisk v. Thrush*, 8 B. & C. 387. See express averment, *post*, 96.

(q) See 15 East, 216; 12 East, 171. When

the defendant could not be found to give him the notice in the usual time, it was held not necessary to aver that fact, 8 B. & C. 387. See a form 6 A. & E. 502; see also *Kemble v. Mills*, 1 M. & Gr. 757.

AGAINST
INDORSER.

Against in-
dorser, where
maker of note
could not be
found (r).

To the end of the indorsement to the plaintiff, as ante, 95.] And the plaintiff avers, that afterwards, when the said note became due and payable according to the tenor and effect thereof, to wit, on &c. [*day when it became due*], diligent search and inquiry was made after the said E. F. at &c. aforesaid, (s) and elsewhere, in order that the said note might be presented and shown to the said E. F. for payment thereof, but the said E. F. could not on search and inquiry be found, nor did the said E. F. then, or at any time before or since, pay, or cause to be paid, the said sum of money in the said note specified, or any part thereof, but hath wholly neglected so to do, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice. [*Conclude as ante, 36.*]

Against an in-
dorser, where
maker dead at
time note be-
came due, and
no executor or
administrator.

Commencement, ante, 13.] For that whereas one E. F. (by the description of E. F., merchant, Commercial Road), on &c., made his promissory note in writing, and thereby promised to pay one X. Y., or order, £——, — days [*“weeks,” or “months,”*] after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said note to the said X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff, and the plaintiff avers that after the making the said note and before the same became due, to wit, on &c., the said E. F. died, and that at the time when the said bill became due, [*and at the commencement of this suit, according to the fact,*] no person or persons had proved the last will and testament of the said E. F. (if any) or become executor or executors thereof, nor had any letters of administration of the estate and effects which were of the said E. F. at the time of his death been granted to any person or persons, nor had any person or persons administered thereto; and the plaintiff further saith, that the said note, when the same became due, to wit, on &c., was duly presented at &c., being the place mentioned in the said note as the place where the said E. F. resided or was to be found, and being a place where the said E. F. before and until his death was to be met with, but that no person or persons did or would on such presentment pay the same, and the said E. F. did not in his lifetime pay the same or any part thereof, of all which premises the defendant then had due notice, and in consideration thereof then promised the plaintiff to pay him the amount of the said note on request. [*Conclude as ante, 36.*]

Against in-
dorser, who dis-
penssed with
presentment for
payment.

After stating the making of the note, and indorsement to the plaintiff, proceed as follows:] And the plaintiff saith, that afterwards, when the said note became due, to wit, on &c., he was ready and willing, in due manner, to present and show the said bill to the said G. H. for payment thereof, and to demand of the said G. H. payment of the same, and would accordingly have duly presented the same to the said G. H. and demanded payment thereof, whereof the defendant then had notice; but the defendant then requested the plaintiff not to present the said note to the said G. H. for payment thereof, and then wholly dispensed with and discharged the plaintiff from such presentment to the said G. H. for payment, and the said G. H. did not pay the

(r) See 5 Taunt. 30; 1 Wentw. 322, 331. if payable at a particular place; but, if not,
(s) The place where the note is payable, then omit any averment of place.

same when it became due ; of all which the defendant then had due notice.
[*Conclude as ante*, 36.]

AGAINST
INDORSER.

Commencement, ante, 18.] For that whereas one A. B., on the — day of —, in the year of our Lord — [*date of note*], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit ; and the defendant then indorsed the same to the plaintiff and the said E. F. since deceased, [or "and the defendant then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff and the said E. F., since deceased ;"] and the said A. B. did not pay the amount thereof, although the same was presented for payment on the day when it became due, of all which the defendant then had due notice, and in consideration of the premises then promised the plaintiff and the said E. F., since deceased, to pay them the amount of the said note on request. [*Conclude as ante*, 66.]

Surviving in-
dorsee against
indorser.

Commencement, ante, 19.] For that whereas one A. B. heretofore, in the life-time of the said E. F., to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the defendant and the said E. F., or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit ; and the defendant and the said E. F. then indorsed the same to the plaintiff, [or "and the defendant and the said E. F. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff ;"] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant and the said E. F., since deceased, then had due notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said note on request. [*Conclude as ante*, 68.]

Indorsee against
surviving in-
dorser.

Commencement, ante, 19.] For that whereas one A. B., on the — day of —, in the year of our Lord — [*date of the note*] made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit ; and the defendant then, and whilst the said C. was sole and unmarried, indorsed the same to the said C. [or "and the defendant then indorsed the same to one X. Y., and the said X. Y. then, and whilst the said C. was sole and unmarried, indorsed the same to the said C. ;"] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant then had due notice, and in consideration of the premises then, and whilst the said C. was sole and unmarried, promised the said C. to pay her the amount of the said note on request. [*Conclude as ante*, 69.]

Husband and
wife on note
indorsed to the
wife before mar-
riage against
indorser.

Commencement, ante, 19.] For that whereas one A. B. heretofore, and whilst the said C. was sole and unmarried, to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the said C., or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed

Indorsee against
husband and
wife on note
payable to the
wife before mar-
riage and in-
dorsed by her.

AGAINST
INDORSER.

before the commencement of this suit ; and the said C. then, and whilst she was sole and unmarried, indorsed the same to the plaintiff, [or “ and the said C., whilst she was sole and unmarried, indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff ;”] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the said C. then, and whilst she was sole and unmarried, had due notice, and in consideration of the premises then, and whilst she was sole and unmarried, promised the plaintiff to pay him the amount of the said note on request. [*Conclude as ante*, 69.

Executor or
administrator of
indorsee against
indorser.

Commencement, ante, 20 or 22.] For that whereas one A. B., on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days [“ weeks,” or “ months,”] after the date thereof, which period had elapsed before the commencement of this suit ; and the defendant then, and in the life-time of the said G. H., indorsed the same to the said G. H. [or “ and the defendant then indorsed the same to one X. Y., and the said X. Y. then, and in the life-time of the said G. H., indorsed the same to the said G. H. ;”] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant then had due notice, and in consideration of the premises then, and in the life-time of the said G. H., promised the said G. H. to pay him the amount of the said note on request. [*Conclude as ante*, 73 or 77.

Indorsee against
executor or
administrator
of indorser.

Commencement, ante, 20 or 22.] For that whereas one A. B. heretofore, and in the life-time of the said G. H., to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the said G. H., or order, £—, — days [“ weeks,” or “ months,”] after the date thereof, which period had elapsed before the commencement of this suit ; and the said G. H. then indorsed the same to the plaintiff, [or “ and the said G. H. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the plaintiff ;”] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the said G. H., since deceased, then had due notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said note on request. [*Conclude as ante*, 75 or 79.

Executor or ad-
ministrator of
indorsee against
executor or ad-
ministrator of
indorser.

Commencement, ante, 21 or 22.] For that whereas one A. B. heretofore, and in the lifetime of the said E. F. and G. H., to wit, on the — day of —, in the year of our Lord — [*date of the note*], made his promissory note in writing, and thereby promised to pay the said G. H., or order, £—, — days [“ weeks,” or “ months,”] after the date thereof, which period had elapsed before the commencement of this suit ; and the said G. H. then indorsed the same to the said E. F. [or “ and the said G. H. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the said E. F. ;”] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the said G. H., since deceased, then had due notice ; and in consideration of the premises then promised the said E. F., since deceased, to pay him the amount of the said note on request. [*Add breach, as ante*, 75, and conclude

to the damage of the plaintiff as executor or administrator, and add *proferat accordingly*; see *ante*, 73 and 77.

AGAINST
INDORSER.

Commencement, ante, 19.] For that whereas one A. B., on the — day of —, in the year of our Lord — [date of the note], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then, and before the said E. F. became bankrupt, indorsed the same to the said E. F. [or, "and the defendant then indorsed the same to one X. Y., and the said X. Y. then, and before the said E. F. became bankrupt, indorsed the same to the said E. F.;"] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant then had due notice; and in consideration of the premises then, and before the said E. F. became bankrupt as aforesaid, promised the said E. F. to pay him the amount of the said note on request. [Conclude as *ante*, 70.

Assignees of indorsee, a bankrupt, against indorser.

Commencement, ante, 20.] For that whereas one A. B., on the — day of —, in the year of our Lord — [date of the note], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days ["weeks," or "months,"] after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then, and before the granting of any order by the Court for Relief of Insolvent Debtors for vesting the estate and effects of the said C. D. according to the form of the statute in such case made and provided, and before the estate and effects of the said C. D. became vested in the said A. B. as such assignee as aforesaid, indorsed the same to the said C. D. [or, "and the defendant then indorsed the same to one X. Y., and the said X. Y. then, and before the granting of any order &c., indorsed the same to the said C. D.;"] and the said A. B. did not pay the amount thereof, although the same was presented to him on the day when it became due, of all which the defendant then had due notice; and in consideration of the premises then, and before the granting of the order for the vesting of the said estate and effects as aforesaid, promised the said C. D. to pay him the amount of the said note on request. [Conclude as *ante*, 72.

Assignee of indorsee, an insolvent debtor, against payee of a note payable generally.

II. ON CHECKS.

II. ON CHECKS.

Commencement, ante, 13.] For that whereas the defendant, on &c. [date of check], made his draft or order in writing for the payment of money, called a check, on a banker, and directed the same to Messrs. E. F. and G. H. [as in check], and thereby required the said Messrs. E. F. and G. H. to pay to the plaintiff, or bearer, £50, and then delivered the same to the plaintiff: * And the said Messrs. E. F. and G. H. did not pay the said draft or order, although the same was then presented to them for payment thereof, whereof the said defendant then had notice; (u) and, in consideration of the premises, then promised the plaintiff to pay him the amount of the said check on request. [Conclude as *ante*, 36.

By payee of a check against drawer. (t)

(t) See a form in *Mills v. Oddy*, 3 Dowl. 722; and as to the law relating to bankers' checks, see *Chitty on Bills*, 9th edit.

(u) Want of notice of the dishonour of a

check on a banker is sufficiently excused *prima facie* by alleging that the banker had no effects of the drawer; see *Kemble v. Mills*, 1 M. & Gr. 757.

ON CHECKS.

By bearer of a
check against
drawer.

Commencement, ante, 13.] For that whereas the defendant, on &c. [*date of check*], made his draft or order in writing for the payment of money, called a check, on a banker, and directed the said draft or order to Messrs. &c. [*as in check*], and thereby requested the said Messrs. &c. to pay to one E. F. or bearer £50, and then delivered the said draft or order to the said E. F.; and the said E. F. then duly transferred, assigned and delivered the said draft or order to the plaintiff, who thereby then became and was, and still is, the lawful bearer thereof. (u) [*As in the last precedent, from the asterisk to the end.*]

III. ON INLAND BILLS OF EXCHANGE.

III. ON INLAND
BILLS OF
EXCHANGE.

Observations on the structure of counts upon inland bills; supposing the bill to have been drawn, indorsed or accepted in the usual form, with but few variations.]

Whenever the bill, or indorsement, or acceptance, is in a *peculiar* form, care must be observed to describe each accordingly, so as to avoid a variance. Moreover, in every case one of the forms prescribed by Reg. Gen. Trin. Term, 1 W. 4, *ante*, 31 to 33, should be adhered to, or as nearly so as practicable. With respect to *several counts*, the Reg. Gen. Hil. Term, 4 Wm. 4, reg. 5, prohibits more than one count on the same transaction, but yet allows the addition of a count on the *debt or consideration* of the bill, if there were any between the plaintiff and the defendant, *and also the account stated*; but, at all events, unless there be evidence to prove such additional counts, neither should be added, and if there be certainty of proving the first count, it is better not to add any other. A count upon a supposed account stated is rarely of any utility.

It will be observed, that the prescribed forms only apply to cases of ordinary occurrence, and there is not any prescribed form of averment of excuse for non-presentment, or for delay in presentment, for acceptance or payment, or for the neglect to give immediate notice of the dishonour. The following forms in those cases have for some years been adopted, but the pleader should well consider whether they are perfect. The *want of effects* in the hands of the drawee has been considered to be an excuse for want of notice of dishonour; but the form of averment, it is suggested, requires consideration whether it is sufficiently full so as to wholly exclude *other grounds* of liability: and see the cases referred to in the note to the form.

First—DRAWER AND PAYEE AGAINST ACCEPTOR.

Drawer of a
bill payable to
himself or order,
against acceptor,
on his, or his
agent's, *general*
acceptance. (z)

Commencement, ante, 13.] For that whereas the plaintiff, on &c. [*date of bill*], (y) made his bill of exchange in writing, and directed the same to the defendant, (z) and thereby required the defendant to pay to the plaintiff £50, two months after the date [*or "sight"*] thereof; which period had

(u) According to the form and observations in *Mills v. Oddy*, 3 Dowl. 722 and 726, it suffices to state a *delivery* to the plaintiff, without averring that he is the bearer; and see the forms prescribed by Reg. Gen. Trin. T. 1 W. 4, *ante*, 32, No. 4, 5.

(z) See this form prescribed by Reg. Gen. Trin. T. 1 W. 4, *ante*, 32.

(y) It is not necessary, in case of an inland bill, to state the date or place where the bill was drawn; 3 Campb. 304. But if the bill was drawn at Dublin in Ireland, it may be as

well so to describe it; 2 B. & A. 301; 1 B. & C. 16; 2 D. & R. 15, S. C.

(z) Before Reg. Gen. Trin. T. 1 W. 4, though usual, it was not necessary to state the address of the bill in an action against the acceptor, unless he was misdescribed therein, 3 J. B. Moore, 91; and the direction to the defendant need not be noticed; 3 J. B. Moore, 91; 8 Taunt. 739, S. C. It was held that the statement of the *delivery* to the *acceptor* was untechnical in an action against him, but not demurrable; 5 East, 476.

elapsed before the commencement of this suit;* and the defendant then accepted the said bill, (a) and promised the plaintiff to pay him the same according to the tenor and effect thereof, and of his acceptance thereof, but did not pay the same when due, or at any time before or since. [Add a count on the consideration, a count on an account stated, and conclude as ante, 36.

DRAWER AND
PAYER AGAINST
ACCEPTOR.

Commencement, ante, 13.] For that whereas the plaintiff, on &c., (b) made his bill of exchange in writing, bearing date by mistake the — day of —, A. D. —, but then meant and intended by the plaintiff and the defendant to be dated on the said &c., (c) and directed the same to the defendant, and thereby required &c. [*Proceed as in last form.*

The like, on a bill with a wrong date.

*State the drawing of the bill as in the last precedent but one to the *, and then proceed as follows:]* And the defendant then accepted the said bill, payable at [Sir James Esdaile and Co.'s, bankers, London,] only, and not otherwise, or elsewhere; (e) and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance. But neither the said Sir James Esdaile and Co., (f) nor the defendant, nor any other person, did or would pay the said bill, although the same was duly presented at the said Sir James Esdaile and Co.'s, in London aforesaid, for payment thereof, to wit, on the day when it became due, of which premises the plaintiff then had notice. [*Add a count on the consideration, a count on an account stated, and conclude as ante, 36.*

Drawer against acceptor of a bill payable at a particular place, and not elsewhere or otherwise. (d)

Commencement, ante, 13.] For that whereas the plaintiffs, on &c. [*date of bill*], made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay to [Messrs. James Atkins and Co., as in bill,] or order, £50, two months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said bill to the said [Messrs. James Atkins and Co.], which said bill the defendants then accepted, and then promised the plaintiffs to pay the same according to the tenor and effect thereof, and their acceptance thereof. Yet the defendants did not pay the amount thereof, although the said bill was duly presented to them, to wit, on the day when it became due. And thereupon the said bill was then returned to the plaintiffs [for non-payment thereof; (g) and the plaintiffs, as drawers of the said bill of exchange, were

On a bill payable to a third person and returned to drawer. (g)

(a) An acceptance by agent may be described as made by the party himself; 2 Campb. 604. By the 1 & 2 G. 4, c. 78, an inland bill must be accepted by writing the acceptance on the face of the bill; but there is no necessity for stating in the declaration that it was so accepted; 6 Bing. 529.

(b) This is to be the real day.

(c) The first-mentioned day.

(d) Since the 1 & 2 Geo. 4, c. 78, an acceptance payable at a banker's, or other particular place, is a *general* acceptance, unless the acceptor express in his acceptance that the bill is payable there only, and not otherwise, or elsewhere. But the words "and not elsewhere," without the word "only," are sufficient to make it a special acceptance; *Higgins v. Nichols*, 7 Dowl. 551. If a bill be accepted in the terms of the act, then it is essential to aver a presentment accordingly; *Gibb v. Mather*, 1 Moore & Scott, 387. Where,

in an action on a bill by the indorsee against the acceptor, the declaration stated the bill to be payable at Messrs. W. & Co.'s, and alleged presentment there, and at the trial the bill appeared to bear a general acceptance, (under 1 & 2 Geo. 4, c. 78,) with a memorandum making it payable at Messrs. W. and Co.'s, it was held that there was no material variance between the allegation and the proof; for that, although the bill was not payable at Messrs. W. and Co.'s *only*, yet, as the acceptance pointed out their house as a place of payment, it was not competent to the defendant to raise the objection that the instrument was misdescribed; *Blake v. Beaumont*, 1 Dowl. N. R. 697.

(e) The exact words of the acceptance should be stated.

(f) There is no necessity for denying a non-payment by the bankers; 3 M. & S. 73.

(g) See the prescribed form, No. 5, ante,

**DRAWER AND
PAYEE AGAINST
ACCEPTOR.**

then called upon and forced and obliged to pay, and did then pay, to the said Messrs. James Atkins and Co. (*h*) the said sum of money in the said bill of exchange specified,] of which the defendants then had notice. [*Add a count on the consideration, a count on an account stated, and breach, as ante, 36.*

Against ac-
ceptor, on his
acceptance
varying as to
time from the
bill. (*i*)

After stating the bill payable at one month, proceed as follows :] And the defendant then accepted the same, payable two months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then promised the plaintiff to pay the same according to the tenor and effect of his said acceptance thereof. [*Add a count on the consideration, a count on an account stated, and breach as ante, 36.*

*Drawer against
acceptor, on an
acceptance pay-
able on a con-
tingency. (k)*

State the drawing of the bill as ante, 106, and then proceed as follows :] And the defendant then accepted the said bill, payable when he, the defendant, should have received the second payment of the prize-money payable to one G. H. as an officer and part of the crew of a certain ship or vessel called the Gypsy, [*as in the bill.*] And the plaintiff saith, that the defendant did afterwards, and before the commencement of this suit, to wit, on &c., receive the second payment of the prize-money aforesaid, amounting in the whole to a large sum of money, to wit, the sum of £—, [*state the amount, or at least a sum more than sufficient to cover the bill, and conclude as directed ante, 36.*

*Payee against
acceptor on a
general accept-
ance. (l)*

Commencement, ante, 13.] For that whereas one E. F., on &c. [*date of bill*], made his bill of exchange in writing, and thereby required the defendant to pay to the plaintiff £—, [*two*] months after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and his said acceptance thereof. [*Conclude as directed ante, 36.*

*By a payee on a
bill drawn by an
agent.*

Commencement, ante, 13.] For that whereas one E. F. [*or "the defendant"*], on &c., by one G. H., his agent in that behalf, made his bill of exchange in writing, &c. [*It is not, however, necessary to notice the agency; it may be stated that the party himself drew; 2 Campb. 604; 12 Mod. 346; 1 H. Bl. 313; 6 T. R. 659.*

*Payee against
acceptor of a
bill payable at a
particular place,
but not accord-
ing to 1 & 2 G. 4,
c. 78. (m)*

Commencement, ante, 13.] For that whereas one E. F., on &c., made his bill of exchange in writing, and thereby required the defendant to pay to the plaintiff, £—, two months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the

32, and an older form in 1 Wentw. 292, 293. When the drawer sues on a bill, payable to a third person, in order to show that his interest therein has reverted, so as to enable him to sue, it is necessary to state that it was dishonoured, and it was formerly supposed to be necessary to aver that he had paid the bill, but the concise form, No. 5, *ante*, 32, supposes that the averment of such payment is unnecessary.

(*h*) It seems that since the prescribed form, No. 5, *ante*, 32, it suffices to state that the bill was returned to the plaintiff, without averring that he paid the same.

(*i*) See a precedent, 1 Wentw. 249.

(*k*) It is necessary to declare specially on a conditional acceptance, showing that the event had occurred; 4 Campb. 176; 1 Marsh. 176.

(*l*) See this form prescribed by Reg. Gen. Trin. T. 1 W. 4, No. 7, *ante*, 32.

(*m*) See *ante*, 101, note (*d*). This form appears useless, since a presentment is unnecessary where the bill is accepted payable at a particular place, but not according to the 1 & 2 Geo. 4, c. 78; Chitty on Bills, 9th ed., 364.

same, payable at Sir James Esdaile and Co.'s, bankers, Lombard-street, London [*as in the bill*], and then promised the plaintiff to pay the same according to the tenor and effect thereof, and his said acceptance thereof; but neither the said Sir James Esdaile and Co. nor the defendant, nor any other person, did or would pay the said bill, although the same was duly presented at the said Sir James Esdaile and Co.'s for payment thereof: of which the defendant had due notice. [*Conclude as directed ante, 36.*]

DRAWER AND
PAYEE AGAINST
ACCEPTOR.

Commencement, ante, 13.] For that whereas the plaintiff and the said E. F. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made their bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff and the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and promised the plaintiff and the said E. F. in his life-time to pay the same according to the tenor and effect thereof, and of his said acceptance thereof. [*Add a count on the consideration, a count on an account stated, and conclude as ante, 66.*]

Surviving
drawer against
acceptor.

Commencement, ante, 19.] For that whereas the plaintiff, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant and the said E. F., since deceased, and thereby required the defendant and the said E. F., since deceased, to pay to the plaintiff £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit; and the defendant and the said E. F., since deceased, then accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of their said acceptance thereof. [*Add a count on the consideration, a count on an account stated, and conclude as ante, 68.*]

Drawer against
surviving ac-
ceptor. (p)

Commencement, ante, 19.] For that whereas the said C., whilst she was sole and unmarried, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made her bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said C. £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and promised the said C., whilst she was sole and unmarried, to pay the same according to the tenor and effect thereof, and of his said acceptance thereof. [*Add a count on the consideration, a count on an account stated, and conclude as ante, 69.*]

Husband and
wife, on bill
drawn by wife
before marriage,
against ac-
ceptor.

Commencement, ante, 19.] For that whereas the plaintiff, on the — day of, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the said G., whilst she was sole and unmarried, and thereby required the said G. to pay the plaintiff £—,

Drawer against
husband and
wife, on a bill
accepted by the
wife before
marriage.

(p) There is no occasion to sue the defendant as surviving acceptor, or in any way to notice the deceased; 1 B. & Ald. 224, 229.

**DRAWER AND
PAYEE AGAINST
ACCEPTOR.**

— days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit; and the said G. then, and whilst she was sole and unmarried, accepted the said bill, and then promised the plaintiff to pay the same according to the tenor and effect thereof, and of her said acceptance thereof. [*Add a count on the consideration, a count on an account stated, and conclude as ante, 69. (q)*]

**By husband
alone against
acceptor, where
he married be-
fore the bill be-
came due. (r)**

Commencement, ante, 13. For that whereas one S. B., before the intermarriage of the plaintiff with A. J., on &c., made her bill of exchange, and directed the same to defendant, and thereby required defendant to pay to the said A. J., or her order, £—, three months after the date thereof, which period had elapsed before the commencement of this suit, and then delivered the said bill to the said A. J.; and the defendant then accepted the said bill, and promised the said A. J. to pay her the same, according to the tenor and effect thereof, and of his said acceptance thereof; and the plaintiff avers, that before the said bill became due, to wit, on &c., the plaintiff intermarried with the said A. J.; and the defendant afterwards, and after the intermarriage of the plaintiff with the said A. J., to wit, on the day and year last aforesaid, had notice of the premises, and then promised the plaintiff to pay him the said bill according to the tenor and effect thereof, and of his, the defendant's, acceptance thereof. [*Conclude as ante, 36.*]

**Executor or ad-
ministrator of
drawer against
acceptor.**

Commencement, ante 20 or 22. For that whereas the said E. F. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and then promised the said E. F., since deceased, to pay the same according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as directed ante, 73 or 77.*]

**Drawer against
executor or ad-
ministrator of
acceptor.**

Commencement, ante, 20 or 22. For that whereas the plaintiff, on the — day of —, in the year of our Lord [*date of the bill*], made his bill of exchange in writing, and directed the same to the said G. H. in his life-time, and thereby required the said G. H. to pay to the plaintiff £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit; and the said G. H., since deceased, then accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as directed ante, 75 or 79.*]

**Executor or ad-
ministrator of
drawer against
executor or ad-
ministrator of
acceptor.**

Commencement as ante, 21 or 22. For that whereas the said E. F. in his life-time, and in the life-time of the said G. H., since deceased, to wit, on the — day of —, in the year of our Lord [*date of the bill*], made his bill of exchange in writing, and directed the same to the said G. H., and

(q) It seems that a count cannot be added on a promise by husband and wife after marriage; *Morris and Wife v. Norfolk and another*,

1 Taunt. 212.

(r) See 1 B. & Ald. 218, showing the correctness of this form.

thereby required the said G. H. to pay to the said E. F. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit; and the said G. H. then accepted the same, and then promised the said E. F. to pay the same according to the tenor and effect thereof, and of his said acceptance thereof. [Add breach as ante, 75, and conclude to the damage of the plaintiff as executor or administrator, and add profert accordingly; see ante, 73 and 77.

DRAWER AND
PAYEE AGAINST
ACCEPTOR.

Commencement, ante, 19.] For that whereas the said E. F., before he became bankrupt, to wit, on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and promised the said E. F., before he became bankrupt, to pay the same according to the tenor and effect thereof, and of his said acceptance thereof. [Conclude as directed ante, 70.

Assignee of
drawer, a bank-
rupt, against
acceptor.

Commencement, ante, 20.] For that whereas the said C. D., before the granting of any order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said C. D., according to the form of the statute in such case made and provided, and before the estate and effects of the said C. D. became vested in the plaintiff as such assignee as aforesaid, to wit, on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said C. D. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the same, and promised the said C. D., before the granting of the said order and vesting of the said estate and effects in the plaintiff as such assignee as aforesaid, to pay the same according to the tenor and effect thereof, and of his acceptance thereof. [Conclude as directed ante, 72.

Assignee of
drawer, an in-
solvent debtor,
against acceptor.

INDORSEE AGAINST ACCEPTOR.

Commencement, ante, 13.] For that whereas one E. F., on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F., [or "H. G."] or order, £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and the said F. F. [or "the said H. G."] then indorsed the same to the plaintiff [or "and the said E. F. (or 'the said H. G.') then indorsed the same to K. J., and the said K. J. then indorsed the same to the plaintiff,"] of all which the defendant then

Indorsee against
acceptor of a bill
accepted gene-
rally. (s)

(s) See the form prescribed by Reg. Gen. Trin. T. 1 W. 4, ante, 32; all the indorsements that can be proved should be stated, and the plaintiff should not declare as immediate indorsee of the first indorser, when it may be material to make title through or

from an intermediate indorsee. A declaration alleging a bill to have been delivered by the drawer to the plaintiff without alleging an indorsement is bad; *Cunliffe v. Whitehead*, 6 Dowl. 63.

DECLARATIONS IN ASSUMPSIT.

INDORSE
AGAINST
ACCEPTOR.

had due notice, and then promised the plaintiff to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as ante*, 36.]

The like, payable at a particular place only, and not otherwise or elsewhere.

Commencement, ante, 13.] For that whereas one E. F., on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. [or “to H. G.”] or order, £—, — days [“weeks,” or “months,”] after the date [or “sight”] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, payable at [as in the bill] only, and not otherwise or elsewhere; and the said E. F. [or “the said H. G.”] then indorsed the same to the plaintiff [or “and the said E. F. (or ‘the said H. G.’) then indorsed the same to K. J., and the said K. J. then indorsed the same to the plaintiff,”] of all which the defendant then had due notice, and then promised the plaintiff to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof; but neither the defendant, nor any other person or persons, did or would pay the said bill, although the same was duly presented at [the place mentioned in the bill] aforesaid, for payment on the day when it became due, of all which the defendant then had notice. [*Conclude as ante*, 36.]

Indorsement by a firm. (t)

And the said persons so using the name, style and firm of G. H. and Co. [or “and the said G. H. and Co.”] then indorsed the said bill to the plaintiff.

Indorsement by an agent. (u)

And the said E. F. then by one G. H., his agent in that behalf, indorsed the said bill to the plaintiff.

Surviving indorsee against acceptor.

Commencement, ante, 13.] For that whereas one G. H., on the — day of — in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. [or “to H. G.”], or order, £—, — days [“weeks,” or “months,”] after the date [or “sight”] thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and the said G. H. [or “H. G.”] then indorsed the same to the plaintiff, and the said E. F. in his life-time [or “and the said G. H. (or “the said H. G.’) then indorsed the same to one K. J., and the said K. J. then indorsed the same to the plaintiff and the said E. F. in his life-time,”] of all which the defendant then had due notice, and then promised the plaintiff and the said E. F. to pay the amount

(t) It is not necessary to state that one partner indorsed for himself and co-partners; it may be stated that all indorsed; 4 Camp. 78; 2 Camp. 604. As to statement and proof of indorsement being made by persons suing a firm, 2 Dowl. & Ry. 281; 1 B. & C. 146. A variance in the description of indorsers named is sometimes immaterial; 1 Stack. 47. According to the decision in *Ball v. Gordon*, 1 Dowl. N. R. 656, the declaration should allege the indorsement to

have been made in the name of the firm; but see *Tigan and another v. Gordon and others*, 9 M. & W. 347; 1 Dowl. N. R. 892. A firm is not bound by the indorsement of one partner, except it be in the name of the firm; *Kirk v. Blanton and another*, 9 M. & W. 284.

(u) This form, though sometimes adopted, is not necessary. It may be stated that the principal indorsed, without noticing the agent; 2 Camp. 604; 4 Camp. 78.

thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as directed ante*, 66.]

INDORSEE
AGAINST
ACCEPTOR.

Commencement, ante, 19.] For that whereas one G. H., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant and the said E. F., in his life-time, and thereby required defendant and the said E. F. to pay to the said G. H., [*or* “to H. G.”] or order, £—, — days [“weeks,” or “months,”] after the date [*or* “sight”] thereof, which period had elapsed before the commencement of this suit, and the defendant and the said E. F. then, and in the life-time of the said E. F., accepted the said bill, and the said G. H. [*or* “the said H. G.”] then indorsed the same to the plaintiff [*or* “and the said G. H. (*or* ‘the said H. G.’) then indorsed the same to K. J., and the said K. J. then indorsed the same to the plaintiff”], of all which the defendant and the said E. F. then, and in the life-time of the said E. F., had due notice, and then promised the plaintiff to pay the amount thereof according to the tenor and effect thereof, and of their said acceptance thereof. [*Conclude as directed ante*, 68.]

Indorsee against
surviving ac-
ceptor of a bill.

Commencement, ante, 19.] For that whereas one E. F., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. [*or* “to H. G.”] or order, £—, — days [“weeks,” or “months,”] after the date [*or* “sight”] thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and the said E. F. [*or* “the said H. G.”] then, and whilst the said C. was sole and unmarried, indorsed the same to the said C. [*or* “and the said E. F. (*or* ‘the said H. G.’) then indorsed the same to one K. J., and the said K. J. then, and whilst the said C. was sole and unmarried, indorsed the same to the said C.”], of all which the defendant then had due notice, and then, and whilst the said C. was sole and unmarried, promised to pay her the amount thereof, according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as directed ante*, 69.]

Husband and
wife, on a bill
indorsed to wife
before marriage,
against acceptor.

Commencement, ante, 19.] For that whereas one E. F., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the said E. whilst she was sole and unmarried, and thereby required the said E. to pay to the said E. F. [*or* “H. G.”], or order, £—, — days [“weeks,” or “months,”] after the date [*or* “sight”] thereof, which period had elapsed before the commencement of this suit, and the said E. then, and whilst she was sole and unmarried, accepted the said bill, and the said E. F. [*or* “H. G.”] then indorsed the same to the plaintiff [*or* “and the said E. F. (*or* ‘H. G.’) then indorsed the same to one K. J., and the said K. J. then indorsed the same to the plaintiff”], of all which the said E. then had due notice, and then, and whilst she was sole and unmarried, promised the plaintiff to pay him the amount thereof according to the tenor and effect thereof, and of her said acceptance thereof. [*Conclude as directed ante*, 69.]

Indorsee against
husband and
wife, on a bill
accepted by the
wife before
marriage.

DECLARATIONS IN ASSUMPSIT.

INDORSEE
AGAINST
ACCEPTOR.

Executor or ad-
ministratoꝛ of
indorsee against
acceptor.

Commencement, ante, 20 or 22.] For that whereas one G. H., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said G. H. [*or "H. G."*], or order, £—, — days [*"weeks," or "months,"*] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and the said G. H. [*or "H. G."*] then, and in the life-time of the said E. F., indorsed the same to the said E. F. [*or "and the said G. H. (or 'the said H. G.')*] then indorsed the same to one K. J., and the said K. J. then, and in the life-time of the said E. F., indorsed the same to the said E. F.], of all which the defendant then had due notice, and then, and in the life-time of the said E. F., promised the said E. F. to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as ante, 73 or 77.*]

Indorsee against
executor or ad-
ministratoꝛ of
acceptor.

Commencement, ante, 20 or 22.] For that whereas one E. F. heretofore, and in the life-time of the said G. H., to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the said G. H., and thereby required the said G. H. to pay to the said E. F. [*or "H. G."*] or order, £—, — days [*"weeks," or "months,"*] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit, and the said G. H. then accepted the said bill, and the said E. F. [*or "H. G."*] then indorsed the same to the plaintiff, [*or "and the said E. F. (or 'the said H. G.')*] then indorsed the same to one K. J., and the said K. J. then indorsed the same to the plaintiff,] of all which the said G. H. then had due notice, and then and in his life-time promised the plaintiff to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as ante, 75 or 79.*]

Executor or ad-
ministratoꝛ of
indorsee against
executor or ad-
ministratoꝛ of
acceptor.

Commencement, ante, 21 or 22.] For that whereas one H. G. heretofore, and in the life-time of the said E. F. and G. H., to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the said G. H., and thereby required the said G. H. to pay the said H. G. [*or "L. M."*], or order, £—, — days [*"weeks," or "months,"*] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit, and the said G. H. then accepted the said bill, and the said H. G. [*or "the said L. M."*] then, and in the life-time of the said E. F., indorsed the same to the said E. F., [*or "and the said H. G. (or 'the said L. M.')*] then indorsed the same to one K. J., and the said K. J. then, and in the life-time of the said E. F., indorsed the same to the said E. F.], of all which the said G. H. then and in his life-time had due notice, and then promised the said E. F. to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Add breach as ante, 75, and conclude to the damage of the plaintiff as executor or administrator, and add profert accordingly; see ante, 73 and 77.*]

Executor or ad-
ministratoꝛ
against accep-

Commencement, ante, 20 or 22.] For that whereas one G. H., in the life-time of the said A. B., since deceased, to wit, on &c. [*describe the*

making, delivery, defendant's acceptance, and the indorsement to A. B. as ante, 107, and then proceed as follows :] And the said bill being and remaining wholly unpaid after the death of the said A. B., to wit, on &c., the defendant, in consideration of the premises, promised the plaintiff, as executor aforesaid, to pay him, as such executor, the said bill, when he, the said defendant, should be thereunto afterwards requested. [*As this count is in general inserted with other counts, the usual breach at the suit of an executor or administrator, ante, 73 or 77, will apply.*]

INDORSE
AGAINST
ACCEPTOR.

tor on promise
to plaintiff to
take the case
out of the Stat.
of Limitations.

(x)

Commencement, ante, 19.] For that whereas one G. H., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay the said G. H., [*or "H. G."*] or order, £—, — days [*"weeks," or "months,"*] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and the said G. H. [*or "the said H. G."*] then, and before the said E. F. became bankrupt, indorsed the same to the said E. F. [*or "and the said G. H. (or 'the said H. G.')*] then indorsed the same to one K. J., and the said K. J. then, and before the said E. F. became bankrupt, indorsed the same to the said E. F.], of all which the defendant then had due notice, and then, and before the said E. F. became bankrupt, promised him to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as ante, 70.*]

Assignees of
indorsee, a
bankrupt,
against ac-
ceptor.

Commencement, ante, 20.] For that whereas one G. H., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said G. H. [*or "H. G."*], or order, £—, — days [*"weeks," or "months,"*] after the date [*or "sight"*] thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill; and the said G. H. [*or "the said H. G."*] then, and before the granting of any order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said E. F. according to the form of the statute in such case made and provided, and before the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, indorsed the same to the said E. F. [*or "and the said G. H. (or 'the said H. G.')*] then indorsed the same to one K. J., and the said K. J. then, and before the granting of any order &c., indorsed the same to the said E. F.], of all which the defendant then had due notice, and then, and before the granting of any such order as aforesaid, and before the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, promised the said E. F. to pay the amount thereof according to the tenor and effect thereof, and of his said acceptance thereof. [*Conclude as ante, 72.*]

Assignee of
indorsee, an in-
solvent debtor,
against ac-
ceptor.

PAYEE AGAINST DRAWER.

Commencement, ante, 36.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of

Payee against
drawer.

(x) As to the use of this count, see 3 East, 409; Willes, 29.

**PAYEE
AGAINST
DRAWER.**

exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the plaintiff £——, —— days ["weeks," or "months,"] after the date [or "sight"] thereof, and then delivered the same to the plaintiff, and the said J. K. then accepted (y) [or, if payable after sight, "saw and accepted"] the same, and the said period had elapsed before the commencement of this suit; but the said J. K. did not pay the said bill, although the same was duly presented to him on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the plaintiff to pay him the amount of the said bill on request. [Conclude as directed ante, 36.]

The like, payable at a particular place.

Commencement, ante, 13. For that whereas the defendant, on the —— day of ——, in the year of our Lord —— [date of the bill], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the plaintiff £——, —— days ["weeks," or "months,"] after the date [or "sight"] thereof, and then delivered the same to the plaintiff, and the said J. K. then accepted [or, if payable after sight, "saw and accepted"] the same payable at [as in the bill], and the said period had elapsed before the commencement of this suit; but the said J. K. did not, nor did any other person or persons, pay the said bill, although the same was presented at [the place mentioned in the bill] aforesaid for payment on the day when it became due, of which the defendant then had notice, and then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill on request. [Conclude as directed ante, 36.]

Payee against drawer on default of payment where defendant had no effects in hands of drawee. (s).

State the drawing, indorsing, and presentment, and then proceed as follows: And the plaintiff avers, that at the time of the making of the said bill, and from thence until and at the time when the same was so presented to the said E. F. as aforesaid, the said E. F. had not in his hands any effects of the defendant, nor had he received any value or consideration for the acceptance or payment by the said E. F. of the said bill; but the said bill was so drawn for the accommodation of the defendant; nor hath the defendant sustained any damage by reason of his not having had notice of the nonpayment by the said E. F. of the said bill; of all which the defendant afterwards, to wit, on the —— day of ——, A. D. ——, had due notice, and, in consideration of the premises, then promised the plaintiff to pay him the amount of the said bill on request. [Conclude as ante, 36.]

(y) If the bill be payable after date, and payable generally, the acceptance need not be stated, and should be omitted if it cannot be proved; *Harris v. Packer*, 3 Tyrw. 370; *Parkes v. Edge*, id. 364. But in case of an acceptance payable at a particular place, the acceptance and presentment at such place should be stated; *Gibb v. Mather*, 2 Tyrw. 189.

(s) See Chitty on Bills, 9th edit. 272. If the drawer of a bill have no effects in the hands of the drawee at the time of drawing the bill and of its maturity, and have no ground to expect that it will be paid, it is not necessary to present the bill at maturity, and if it be presented two days after, and payment

be refused, the drawer is liable; *Terry and others v. Parker*, 6 A. & E. 502, where see form of declaration in such a case. Where, in an action against the drawer of a bill of exchange, the plaintiff, by way of excuse for not giving notice of dishonour, averred that the defendant had no funds in the hands of the acceptor, nor had he sustained any damage for want of notice, and the defendant pleaded that he had sustained damage because the acceptor had promised him to provide for the bill, it was held that it was not incumbent on the plaintiff to prove that the defendant had not sustained damage; *Fitzgerald v. Williams*, 6 Bing. N. C. 68.

Describe the bill as having been directed to A. B. at &c. as in the bill, and proceed as in the precedent, ante, 109, to the delivery of the bill to the plaintiff, and then as follows:] And the plaintiff avers, that afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the time when the said bill became due, and also at the time when the said bill did so become due, to wit, on &c. [*day when it fell due*], diligent search and inquiries were made after the said E. F. at No. 1, near the Chapel, Knightsbridge [*place of his direction in bill*] aforesaid, and elsewhere, in order that the said bill might be presented to the said E. F. for his acceptance and payment thereof; but that the said E. F. could not, on such search or inquiries, or either of them, be found, nor hath he at any time since the making of the said bill hitherto accepted or paid the same; of all which the defendant afterwards, to wit, on the said days and times when such search and inquiries were made as aforesaid, had due notice, and then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante, 36.*]

PAYER
AGAINST
DRAWER.

Payee against
drawer or in-
dorsor when
drawee could not
be found to ac-
cept or pay (a).

Commencement as ante, 13.] For that whereas the defendant, on &c., made his bill of exchange in writing, and directed the same to E. F. [by the description of E. F., merchant, Commercial Road,] and thereby required the said E. F. to pay to the defendant, or order, £100, two months after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then indorsed the same [*to one G. H. who then indorsed and delivered the same*] to the plaintiff;* and the plaintiff avers that after the making of the said bill, and before the same became due, to wit, on &c., the said E. F. died, and that at the time when the said bill became due ["and at the time this action was commenced," *according to the facts,*] no person or persons had proved the last will or testament of the said E. F. (if any), or become executor or executors thereof, nor had any letters of administration of the estate and effects which were of the said E. F. at the time of his death been granted to any person or persons, nor had any person or persons administered thereto. And the plaintiff further saith, that the said bill, when the same became due, to wit, on &c., was duly presented in the Commercial Road aforesaid, being the place mentioned in the said bill as the place where the said E. F. resided or was to be found, and being a place where the said E. F. before and until his death was to be met with, but that no person or persons did or would, on such presentment, pay the same, and the said E. F. did not in his life-time pay the same or any part thereof; of all which premises the defendant then had due notice, and, in consideration of the premises, then promised the plaintiff to pay him the amount of the said bill on request. [*Before the Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibiting a second count for the same debt, it was usual to add a count not noticing the death of the drawee, and averring a presentment and nonpayment generally, as if the drawee was living; but now a second count on the same bill is inadmissible. However a count on the consideration and account stated may be added, as ante, 36, where see proper form of conclusion.*]

Payee against
drawer or in-
dorsor where
drawee dead,
and no executor
or administrator
appointed at the
time the bill
became due.

(a) When this count is advisable, see Chitty on Bills, 9th edit. 36; also 1 Went. 322, 331. If the bill has been accepted, the alle-

gation as to presentment for acceptance will of course be omitted.

**PAYEE
AGAINST
DRAWER.**

then in consideration of the premises promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 69.]

Executor or administrator of payee against drawer.

Commencement as ante, 20 or 22.] For that whereas the defendant heretofore, and in the life-time of the said E. F., to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the said E. F. £—, — days [“weeks,” or “months,”] after the date [*or* “sight”] thereof, and then delivered the same to the said E. F., and the said J. K. then accepted [*or, if payable after sight, “saw and accepted”*] the same, and the said period had elapsed before the commencement of this suit; but the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the said E. F., since deceased, to pay him the amount of the said bill on request. [*Conclude as ante*, 73.]

Payee against executor or administrator of drawer.

Commencement as ante, 20 or 22.] For that whereas the said G. H. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the plaintiff £—, — days [“weeks,” or “months,”] after the date [*or* “sight”] thereof, and then delivered the same to the plaintiff, and the said J. K. then accepted [*or, if payable after sight, “saw and accepted”*] the same, and the said period had elapsed before the commencement of this suit; but the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the said G. H., since deceased, then had notice, and then in consideration of the premises promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 75.]

Executor or administrator of payee against executor or administrator of drawer.

Commencement as ante, 21 or 22.] For that whereas the said G. H. in his life-time, and in the the life-time of the said E. F. since deceased, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the said E. F. £—, — days [“weeks,” or “months,”] after the date [*or* “sight”] thereof, and then delivered the same to the said E. F., and the said J. K. then accepted [*or, if payable after sight, “saw and accepted”*] the same, and the said period had elapsed before the commencement of this suit; but the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the said G. H. then had notice, and then in consideration of the premises promised the said E. F., since deceased, to pay him the amount of the said bill on request. [*Add breach as ante*, 75, and conclude to the damage of the plaintiff as executor or administrator, and add profert accordingly, as ante, 73 or 77.]

Assignees of payee, a bank-

Commencement as ante, 19.] For that whereas the defendant, before the said E. F. became bankrupt as aforesaid, to wit, on the — day of —,

in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the said E. F. £—, — days ["weeks," or "months"], after the date [or "sight"] thereof, and then delivered the same to the said E. F., and the said J. K. then accepted [or, if payable after sight, "saw and accepted"] the same, and the said period had elapsed before the commencement of this suit; but the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the said E. F., before he became bankrupt as aforesaid, to pay him the amount of the said bill on request. [Conclude as ante, 70.]

PAYEE
AGAINST
DRAWER.
rupt, against
drawer.

Commencement as ante, 20.] For that whereas the defendant heretofore, and before the granting of any order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said C. D. according to the form of the statute in such case made and provided, and before the estate and effects of the said C. D. became vested in the plaintiff as such assignee as aforesaid, to wit, on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the said C. D. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and then delivered the same to the said C. D., and the said J. K. then accepted, [or, if payable after sight, "saw and accepted"] the same, and the said period had elapsed before the commencement of this suit; but the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the said C. D., before the granting of the said order and vesting of the estate and effects of the said C. D. in the plaintiff as such assignee as aforesaid, to pay him the amount of the said bill on request. [Conclude as ante, 72.]

Assignee of
payee, an insol-
vent debtor,
against drawer,
on default of
payment.

INDORSEE AGAINST DRAWER.

Commencement as ante, 13.] For that whereas the defendant, on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [and if payable after sight add, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit, and the defendant then indorsed the same to the plaintiff [or, "and the defendant then indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff"], and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the plaintiff to pay him the amount of the said bill on request. [Conclude as ante, 36.]

Indorsee against
drawer, on de-
fault of payment
of a bill payable
generally.

Commencement as ante, 12.] For that whereas the defendant, on the — day of —, in the year of our Lord — [date of the bill], made his bill of

The like, pay-
able at a parti-

INDORSEE
AGAINST
DRAWER.
icular place. (e)

exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and the said J. K. then accepted [or, *if payable after sight*, "saw and accepted"] the same payable at [*as in the bill*], and which period had elapsed before the commencement of this suit; and the defendant then indorsed the same to the plaintiff [or, "and the defendant then indorsed the same to L. M., and the said L. M. then indorsed the same to the plaintiff"]; and the said J. K. did not, nor did any other person or persons, pay the said bill, although the same was duly presented at [*the place mentioned in the bill*] aforesaid for payment on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36.

Surviving in-
dorsees against
drawer.

Commencement as ante, 18.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the defendant then, and in the life-time of the said E. F., indorsed the same to the plaintiff and the said E. F., [or "and the defendant then indorsed the same to L. M., and the said L. M. then, and in the life-time of the said E. F., indorsed the same to the plaintiff and the said E. F.,"] and the said J. K. did not pay the said bill, although the same was duly presented to him on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and in the life-time of the said E. F., promised the plaintiff and the said E. F. to pay them the amount of the said bill on request. [*Conclude as ante*, 66.

Indorsee against
surviving
drawer.

Commencement as ante, 19.] For that whereas the defendant and the said E. F. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made their bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant and the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the defendant and the said E. F., since deceased, then indorsed the same to the plaintiff, [or "and the defendant and the said E. F., since deceased, then indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff;"]* and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant and the said E. F., since deceased, then had notice, and in consideration of the premises then pro-

(e) Where a bill is made payable at a particular place, in order to charge the drawer, presentment at that place must be proved;

Gibb v. Mather, 8 Bing. 214; *Shelton v. Braithwaite*, 8 M. & W. 252; 1 Dowl. N. R. 254, S. C.

mised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 68.]

INDORSEE
AGAINST
DRAWER.

Same as the last to the asterisk, and then as follows:] And the plaintiff avers that the said E. F. died before the said bill became due, and that the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36, if no common count, or *ante* 68, if common counts added.]

The like, where the bill became due after the death of the deceased partner.

This count is to be framed like that at the suit of payee, ante, 110, stating that the defendant drew the bill, and showing the indorsement to the plaintiff, and that the defendant had no effects in the hands of the drawee, see *ante*, 110, and the cases cited in the note.

Indorsee against drawer on default of payment, where defendant had no effects in the hands of drawee.

Commencement as ante, 19.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [*or* "sight"] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the defendant then, and whilst the said C. was sole and unmarried, indorsed the same to the said C., [*or* "and the defendant then indorsed the same to one L. M., and the said L. M. then, and whilst the said C. was sole and unmarried, indorsed the same to the said C.;"* and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and whilst the said C. was sole and unmarried, promised the said C. to pay her the amount of the said bill on request. [*Conclude as ante*, 69.]

Husband and wife, on bill indorsed to the wife before marriage, against drawer.

Same as last form to the asterisk.] And the plaintiff avers that the said C. intermarried with the said A. B. before the said bill became due, and that the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then promised the said plaintiffs, in right of the said C., to pay them the amount of the said bill on request. [*Conclude as ante*, 69.]

The like, where the bill became due after marriage.

Commencement as ante, 19.] For that whereas the said E., whilst she was sole and unmarried, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made her bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the said E. £—, — days ["weeks," or "months,"] after date [*or* "sight"] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the said E. then, and whilst she was sole and unmarried, indorsed the same to the plaintiff, [*or* "and the

Indorsee against husband and wife, on default of payment of a bill drawn by the wife before marriage.

INDORSEE
AGAINST
DRAWER.

said E. then, and whilst she was sole and unmarried, indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff;"] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the said E. then, and whilst she was sole and unmarried, had notice, and in consideration of the premises then, and whilst she was sole and unmarried, promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 69.

Executor or administrator of indorsee against drawer.

Commencement as ante, 20 or 22.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the defendant then, and in the life-time of the said E. F., indorsed the same to the said E. F., [*or "and the defendant then indorsed the same to one L. M., and the said L. M. then, and in the life-time of the said E. F., indorsed the same to the said E. F.;"*] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice; and in consideration of the premises then, and in the life-time of the said E. F., promised the said E. F. to pay him the amount of the said bill on request. [*Conclude as ante*, 73 or 77.

Indorsee against executor or administrator of drawer.

Commencement as ante, 20 or 22.] For that whereas the said E. F. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the said E. F. then, and in his life-time, indorsed the same to the plaintiff, [*or "and the said E. F. then, and in his life-time, indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff;"*] and the said J. K. did not pay the said bill, although the same was duly presented to him on the day when it became due, of which the said E. F., since deceased, then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 75 or 79.

Executor or administrator of indorsee against executor or administrator of drawer.

Commencement as ante 21 or 22] For that whereas the said G. H. in his life-time and in the life-time of the said E. F., to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this

mised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 68.

INDORSEE
AGAINST
DRAWER.

Same as the last to the asterisk, and then as follows:] And the plaintiff avers that the said E. F. died before the said bill became due, and that the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36, if no common count, or ante 68, if common counts added.

The like, where the bill became due after the death of the deceased partner.

This count is to be framed like that at the suit of payee, ante, 110, stating that the defendant drew the bill, and showing the indorsement to the plaintiff, and that the defendant had no effects in the hands of the drawee, see ante, 110, and the cases cited in the note.

Indorsee against drawer on default of payment, where defendant had no effects in the hands of drawee.

Commencement as ante, 19.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days [*“weeks,” or “months,”*] after the date [*or “sight”*] thereof, [*and if payable after sight add*, “and the said J. K. then saw and accepted the same, and”] which period had elapsed before the commencement of this suit; and the defendant then, and whilst the said C. was sole and unmarried, indorsed the same to the said C., [*or “and the defendant then indorsed the same to one L. M., and the said L. M. then, and whilst the said C. was sole and unmarried, indorsed the same to the said C.;”*]* and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and whilst the said C. was sole and unmarried, promised the said C. to pay her the amount of the said bill on request. [*Conclude as ante*, 69.

Husband and wife, on bill indorsed to the wife before marriage, against drawer.

Same as last form to the asterisk.] And the plaintiff avers that the said C. intermarried with the said A. B. before the said bill became due, and that the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then promised the said plaintiffs, in right of the said C., to pay them the amount of the said bill on request. [*Conclude as ante*, 69.

The like, where the bill became due after marriage.

Commencement as ante, 19.] For that whereas the said E., whilst she was sole and unmarried, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made her bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the said E. £—, — days [*“weeks,” or “months,”*] after date [*or “sight”*] thereof, [*and if payable after sight add*, “and the said J. K. then saw and accepted the same, and”] which period had elapsed before the commencement of this suit; and the said E. then, and whilst she was sole and unmarried, indorsed the same to the plaintiff, [*or “and the*

Indorsee against husband and wife, on default of payment of a bill drawn by the wife before marriage.

INDORSEE
AGAINST
DRAWER.

said E. then, and whilst she was sole and unmarried, indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff;"] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the said E. then, and whilst she was sole and unmarried, had notice, and in consideration of the premises then, and whilst she was sole and unmarried, promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 69.

Executor or administrator of indorsee against drawer.

Commencement as ante, 20 or 22.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the defendant then, and in the life-time of the said E. F., indorsed the same to the said E. F., [*or "and the defendant then indorsed the same to one L. M., and the said L. M. then, and in the life-time of the said E. F., indorsed the same to the said E. F.;"*] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice; and in consideration of the premises then, and in the life-time of the said E. F., promised the said E. F. to pay him the amount of the said bill on request. [*Conclude as ante*, 73 or 77.

Indorsee against executor or administrator of drawer.

Commencement as ante, 20 or 22.] For that whereas the said E. F. in his life-time, to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the said E. F. then, and in his life-time, indorsed the same to the plaintiff, [*or "and the said E. F. then, and in his life-time, indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff;"*] and the said J. K. did not pay the said bill, although the same was duly presented to him on the day when it became due, of which the said E. F., since deceased, then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 75 or 79.

Executor or administrator of indorsee against executor or administrator of drawer.

Commencement as ante 21 or 22] For that whereas the said G. H. in his life-time and in the life-time of the said E. F., to wit, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the said E. F., since deceased, £—, — days ["weeks," or "months,"] after the date [*or "sight"*] thereof, [*and if payable after sight add*, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this

suit; and the said G. H. then indorsed the same to the said E. F., since deceased, [or "the said G. H. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the said E. F., since deceased;"] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the said G. H., since deceased, then had notice, and in consideration of the premises then promised the said E. F. in his life-time to pay him the amount of the said bill on request. [*Add breach as ante, 75, and conclude to the damage of the plaintiff as executor or administrator, and add profert accordingly, ante, 73 or 77.*]

INDORSE
AGAINST
DRAWER.

Commencement as ante, 19.] For that whereas the defendant, on the — day of — in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [*and if payable after sight add, "and the said J. K. then saw and accepted the same, and"*] which period had elapsed before the commencement of this suit; and the defendant then, and before the said E. F. became bankrupt, indorsed the same to the said E. F., [or "and the defendant then indorsed the same to one L. M., and the said L. M. then, and before the said E. F. became bankrupt as aforesaid, indorsed the same to the said E. F.;"] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and before the said E. F. became bankrupt as aforesaid, promised the said E. F. to pay him the amount of the said bill on request. [*Conclude as ante, 70.*]

Assignee of indorsee, a bankrupt, against drawer.

Commencement as ante, 19.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and the said J. K. then accepted [or, *if payable after sight, "saw and accepted"*] the same payable at [*as in the bill*], and which period had elapsed before the commencement of this suit; and the defendant then, and before the said E. F. became bankrupt as aforesaid, indorsed the same to the said E. F. [or "and the defendant then indorsed the same to one L. M., and the said L. M. then, and before the said E. F. became bankrupt as aforesaid, indorsed the same to the said E. F.;"] And the plaintiff avers that the said E. F. became bankrupt before the said bill became due, and that the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when the same became due, of which the defendant then had notice, and in consideration of the premises then promised the plaintiffs, as such assignees as aforesaid, to pay them the amount of the said bill on request. [*Conclude as ante, 70.*]

The like, where bill dishonoured after bankruptcy.

Commencement as ante, 20.] For that whereas the defendant, on the — day of —, in the year of our Lord — [*date of the bill*], made his bill

Assignee of indorsee, an insolvent debtor, against drawer.

INDORSEE
AGAINST
DRAWER.

of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [and if payable after sight add, "and the said J. K. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit; and the defendant then, and before the granting of any order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said E. F. according to the form of the statute in such case made and provided, and before the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, indorsed the same to the said E. F., [or "and the defendant then indorsed the same to one L. M., and the said L. M. then, and before the granting of any order &c., indorsed the same to the said E. F.;"] and the said J. K. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and before the granting of the said order, and before the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, promised the said E. F. to pay him the amount of the said bill on request. [Conclude as ante, 72.]

By indorsee or holder of a bill, payable to the order of a fictitious payee, against drawer or acceptor privy to the fact.

The cases on this subject are collected in Bayley on Bills, 22, 23, n. (b); Chitty on Bills, 8th edit, 178 to 180, 252, 584; Selw. N. P. 287; 1 Campb. 130, 180. The result of the decisions seems to be, that the holder may recover against the drawer and acceptor, or other party aware at the time that the payee was fictitious, upon a count on the bill stating it to have been payable to bearer, or if the holder's money has got into the acceptor's hands, the holder may recover it on the count for money had and received. See *Vere v. Lewis*, 3 T. R. 183; *Minet v. Gibson*, 3 T. R. 481; 1 Hen. Bla. 659; *Collis v. Emmet*, 1 Hen. Bla. 313; *Bennett v. Farnell*, 1 Campb. 130, 180, where see the form of other special counts; and see other forms, 1 Wentw. 267, 270; see also Byles on Bills, 4th edit. 57.

INDORSEE AGAINST INDORSER, NOT BEING DRAWER.

Indorsee against indorser, not being drawer, on a bill payable generally.

Commencement as ante, 13.] For that whereas one J. K., on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [and if payable after sight add, "and the said O. P. then saw and accepted the same, and"] which period had elapsed before the commencement of this suit, and the said J. K. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff; [or "and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff;"] and the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and then in consideration of the premises promised the plaintiff to pay him the amount of the said bill on request. [Conclude as ante, 36.]

Commencement as ante, 13.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days [*“weeks,” or “months,”*] after the date [*or “sight”*] thereof, and the said O. P. then accepted [*or, if payable after sight, “saw and accepted”*] the same payable at [*as in the bill*], and the said period had elapsed before the commencement of this suit, and the said J. K. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff, [*or “and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then indorsed the same to the plaintiff;” according to the fact,*] and the said O. P. did not, nor did any other person or persons, pay the said bill, although the same was duly presented at [*the place mentioned in the bill*] aforesaid for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante, 36.*]

INDORSEE
AGAINST
INDORSER,
NOT BEING
DRAWER.

The like, payable at a particular place.

The mode of stating a partial indorsement of a bill will be the same as that on a promissory note, *ante*, 86, 87.

Partial indorsement.

Commencement as ante, 18.] For that whereas one J. K., on the — day of —, in the year our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days [*“weeks,” or “months,”*] after the date [*or “sight”*] thereof, [*and if payable after sight add, “and the said O. P. then saw and accepted the same,”*] and which period had elapsed before the commencement of this suit, and the said O. P. then indorsed the same to the defendant, and the defendant then, and in the life-time of the said E. F., indorsed the same to the plaintiff and the said E. F., since deceased, [*or “and the said O. P. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and in the life-time of the said E. F., indorsed the same to the plaintiff and the said E. F., since deceased;”*] and the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and in the life-time of the said E. F., promised the plaintiff and the said E. F. to pay them the amount of the said bill on request. [*Conclude as ante, 66.*]

Surviving indorsee against indorser, not being drawer.

Commencement as ante, 19.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days [*“weeks,” or “months,”*] after the date [*or “sight”*] thereof, [*and if payable after sight add, “and the said O. P. then saw and accepted the same,”*] and which period had elapsed before the commencement of this suit, and the said J. K. then, and in the life-time of the said E. F., indorsed the same to the defendant and the said E. F., since deceased, and the defendant and the said E. F., since deceased, then indorsed the same to the plaintiff, [*or “and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then, and*

Indorsee against surviving indorser, not being drawer.

DECLARATIONS IN ASSUMPSIT.

INDORSEE
AGAINST
INDORSER,
NOT BEING
DRAWER.

in the life-time of the said E. F., since deceased, indorsed the same to the defendant and the said E. F., since deceased, and the defendant and the said E. F., since deceased, then indorsed the same to the plaintiff;"] and the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant and the said E. F., since deceased, then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 68.

Husband and
wife, on bill in-
dorsed to the
wife before mar-
riage, against
indorser, not
being drawer.

Commencement as ante, 19.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [*and if payable after sight, add* "and the said O. P. then saw and accepted the same,"] and which period had elapsed before the commencement of this suit, and the said J. K. then indorsed the same to the defendant, and the defendant then, and whilst the said C. was sole and unmarried, indorsed the same to the said C., [or "and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and whilst the said C. was sole and unmarried, indorsed the same to the said C.;"] and the said O. P. did not pay the said bill, although the same was duly presented to him on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and whilst the said C. was sole and unmarried, promised the said C. to pay her the amount of the said bill on request. [*Conclude as ante*, 69.

Indorsee against
husband and
wife, on default
of payment of a
bill indorsed by
the wife before
marriage, she
not being the
drawer.

Commencement as ante, 19.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [*and if payable after sight add*, "and the said O. P. then saw and accepted the same,"] and which period had elapsed before the commencement of this suit, and the said J. K. then, and whilst the said E. was sole and unmarried, indorsed the same to the said E., and the said E. then, and whilst she was sole and unmarried, indorsed the same to the plaintiff, [or "and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then, and whilst the said E. was sole and unmarried, indorsed the same to the said E., and the said E. then, and whilst she was sole and unmarried, indorsed the same to the plaintiff;"] and the said O. P. did not pay the said bill, although the same was duly presented to him on the day when it became due, of which the said E. then, and whilst she was sole and unmarried, had notice, and in consideration of the premises then, and whilst she was sole and unmarried, promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 69.

Executor or ad-
ministrator of
indorsee against
indorser.

Commencement as ante, 20 or 22.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby re-

quired the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [and if payable after sight add, "and the said O. P. then saw and accepted the same,"] and which period had elapsed before the commencement of this suit, and the said J. K. then indorsed the same to the defendant, and the defendant then, and in the life-time of the said E. F., indorsed the same to the said E. F., [or "and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and in the life-time of the said E. F., indorsed the same to the said E. F.,"] and the said O. P. did not pay the said bill, although the same was presented to him for payment on the day when it became due, of which the defendant then had notice, and in consideration of the premises then, and in the life-time of the said E. F., promised the said E. F. to pay him the amount of the said bill on request. [Conclude as ante, 73 or 77.

INDORSEE
AGAINST
INDORSER,
NOT BEING
DRAWER.

Commencement as ante, 20 or 22.] For that whereas one J. K., on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and the said O. P. then accepted, [or, if payable after sight, "saw and accepted"] the same, and which period had elapsed before the commencement of this suit, and the said J. K. then indorsed the same to the defendant, and the defendant then, and in the life-time of the said E. F., indorsed the same to the said E. F. [or, "and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and in the life-time of the said E. F., indorsed the same to the said E. F."] And the plaintiff avers that the said E. F. died before the said bill became due, and that the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when the same became due, of which the defendant then had notice, and in consideration of the premises then promised the plaintiff, as such executor [or "administrator"] as aforesaid, to pay him the amount of the said bill on request. [Conclude as ante, 73 or 77.

The like, where
bill became due
after death.

Commencement as ante, 20 or 22.] For that whereas one J. K., on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [and if payable after sight, add "and the said O. P. then saw and accepted the same,"] and which period had elapsed before the commencement of this suit, and the said J. K. then, and in the life-time of the said E. F., indorsed the same to the said E. F., and the said E. F. then indorsed the same to the plaintiff, [or, "and the said J. K. indorsed the same to one X. Y., and the said X. Y. then, and in the life-time of the said E. F., indorsed the same to the said E. F., and the said E. F. then indorsed the same to the plaintiff,"] and the said O. P. did not pay the said bill, although the same was presented to him for payment on the day when it became due, of which the said E. F. then and in his life-time had due notice, and in consideration of the premises

Indorsee against
executor or ad-
ministrator of
indorser.

DECLARATIONS IN ASSUMPSIT.

INDORSEE
AGAINST
INDORSER,
NOT BEING
DRAWER.

Executor or
administrator
of indorsee
against executor
or administrator
of indorser.

then promised the plaintiff to pay him the amount of the said bill on request.
[*Conclude as ante, 75 or 79.*]

Commencement as ante, 21 or 22.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K., £—, — days [“weeks,” or “months,”] after the date [*or “sight”*] thereof, [*and if payable after sight, add “and the said O. P. then saw and accepted the same,”*] and which period had elapsed before the commencement of this suit, and the said J. K. then, and in the life-time of the said G. H., indorsed the same to the said G. H., and the said G. H. then, and in the life-time of the said E. F., indorsed the same to the said E. F., [*or, “and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then, and in the life-time of the said G. H., indorsed the same to the said G. H., and the said G. H. then, and in the life-time of the said E. F., indorsed the same to the said E. F.”*]; and the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the said G. H. then and in his life-time had due notice, and in consideration of the premises then, and in the life-time of the said E. F., promised the said E. F. to pay him the amount of the said bill on request. [*Add breach as ante, 75, and conclude to the damage of the plaintiff as executor or administrator, and add profert accordingly, ante, 73 or 77.*]

By indorsee of
executor or ad-
ministrator.

The modes of declaring at the suit of an indorsee of an executor or administrator, may be collected from the precedents on promissory notes, *ante, 88.*

Assignees of in-
dorsee, a bank-
rupt, against in-
dorser.

Commencement as ante, 19.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days [“weeks,” or “months,”] after the date [*or “sight”*] thereof, [*and if payable after sight add, “and the said O. P. then saw and accepted the same,”*] and which period had elapsed before the commencement of this suit; and the said J. K. then indorsed the said bill to the defendant, and the defendant then, and before the said E. F. became bankrupt, indorsed the same to the said E. F., [*or “and the said J. K. then indorsed the same to X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and before the said E. F. became bankrupt, indorsed the same to the said E. F.”*]; and the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had due notice, and in consideration of the premises then, and before the said E. F. became bankrupt, promised the said E. F. to pay him the amount of the said bill on request. [*Conclude as ante, 70.*]

The like, where
the bill became
due after the
bankruptcy.

Commencement as ante, 19.] For that whereas one J. K., on the — day of —, in the year of our Lord — [*date of the bill*], made his bill of exchange in writing, and directed the same to one O. P., and thereby required

the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and the said O. P. then accepted [or, if payable after sight, "saw and accepted"] the same, and which period had elapsed before the commencement of this suit; and the said J. K. then indorsed the said bill to the defendant, and the defendant then, and before the said E. F. became bankrupt, indorsed the same to the said E. F., [or "and the said J. K. then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and before the said E. F. became bankrupt, indorsed the same to the said E. F. ;"] And the plaintiff avers that the said E. F. became bankrupt before the said bill became due, and that the said O. P. did not pay the said bill, although the same was duly presented to him for payment on the day when it became due, of which the defendant then had due notice, and in consideration of the premises then promised the plaintiffs, as assignees as aforesaid, to pay them the amount of the said bill on request. [Conclude as ante, 70.

• INDORSEE
AGAINST
INDORSER
NOT BEING
DRAWER.

Commencement as ante, 20.] For that whereas one J. K., on the — day of —, in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one O. P., and thereby required the said O. P. to pay to the order of the said J. K. £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, [and if payable after sight add, "and the said O. P. then saw and accepted the same,"] and which period had elapsed before the commencement of this suit; and the said J. K. then indorsed the same to the defendant, and the defendant then, and before the granting of any order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said E. F. according to the form of the statute in such case made and provided, and before the same became vested in the plaintiff as such assignee as aforesaid, indorsed the same to the said E. F. [or "and the defendant then indorsed the same to one X. Y., and the said X. Y. then indorsed the same to the defendant, and the defendant then, and before the granting of any order, &c., indorsed the same to the said E. F.,"] and the said O. P. did not pay the said bill, although the same was presented to him for payment on the day when it became due, of which the defendant then had due notice, and in consideration of the premises then, and before the granting of the said order, and the vesting of the said estate and effects of the said E. F. in the plaintiff as such assignee as aforesaid, promised the said E. F. to pay him the amount of the said bill on request. [Conclude as ante, 72.

Assignee of indorsee, an insolvent debtor, against indorser.

ON NON-ACCEPTANCE OF BILLS.

Commencement as ante, 13.] For that whereas the defendant, on &c., made his bill of exchange in writing, and directed the same to E. F., and thereby required the said E. F. to pay to the plaintiff — days ["weeks,"

Payee against drawer, on default of acceptance. (f)

(f) See the form prescribed by Reg. Gen. Trin. T. 1 W. 4, No. 7, ante, 31. As to this count see Chitty on Bills, 8th edit. 370 to 373; 3 East, 481. It is no plea that a

reasonable time between the dishonour and the action had not elapsed; *Siggers v. Lewis*, 1 Crompt. M. & Ros. 370, overruling *Walker v. Barnes*, 1 Marsh. Rep. 36; 5 Taunt. 240.

ON NON-
ACCEPTANCE OF
BILLS.

or "months,"] after the date [or "sight"] thereof, (g) and then delivered the same to the plaintiff, and the same was then presented to the said E. F. for acceptance, and the said E. F. then refused to accept the same,* of all which the defendant then had due notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the bill on request. (h) [If the drawer had no effects in hands of drawee, and notice of non-acceptance cannot be proved, then the declaration may be as in the next precedent. Conclude as ante, 36.

The like, against
drawer, with
averment, that
defendant had
no effects in
drawee's hands.
(i)

Same as the precedent against drawer, supra, to the asterisk, and then proceed as follows:] And the plaintiff avers, that at the time of the making of the said bill, and from thence until and at the time when the same was so presented to the said E. F. for his acceptance thereof as aforesaid, the said E. F. had not in his hands any effects of the defendant, nor had he received any, nor was he to receive any, value or consideration from the defendant, or otherwise, for the acceptance or payment by the said E. F. of the said bill, but on the contrary, the said bill was drawn by the defendant upon the said E. F. for the sole accommodation of the defendant, and on the terms that the defendant should provide money for and pay the said bill when due, and the defendant had no right to draw or require the said drawee to accept or pay the said bill, nor hath the defendant sustained any damage by reason of his not having had notice of the non-acceptance by the said E. F. of the said bill; of all which the defendant then had due notice. [Conclude as ante, 36.

Indorsee against
drawer of a bill,
on non-accept-
ance.

Commencement as ante, 13.] For that whereas the defendant, on the — day of — in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one J. K., and thereby required the said J. K. to pay to the order of the defendant £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and the defendant then indorsed the same to the plaintiff, [or "and the defendant then indorsed the same to one L. M., and the said L. M. then indorsed the same to the plaintiff;"] and the same was then presented to the said J. K. for acceptance, and the said J. K. then refused to accept the same, of all which the defendant then had due notice, and then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill on request. [Conclude as ante, 36.

Indorsee against
indorser of a
bill, on non-
acceptance.

Commencement as ante, 13.] For that whereas one N. O., on the — day of — in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one P. Q., and thereby required the said P. Q. to pay to his order £—, — days ["weeks," or "months,"] after the date [or "sight"] thereof, and the said N. O. then indorsed the said bill to the defendant [or "and the said N. O. then indorsed the said bill to one R. S., and the said R. S. then indorsed the same to the

(g) It will be observed that in this and the prescribed form, No. 8, ante, 31, the words "which period hath now elapsed," are omitted, because the right of action immediately accrues on the drawee's refusal to accept, although the time of payment has not expired by effluxion of time; 9 M. & W. 506.

(h) Under this averment plaintiff may show defendant could not be found to give him the notice in the usual time; 8 B. & C. 387.

(i) As to this count see Chitty on Bills, 9th edit. 273, 327, &c.; 16 East, 43; 6 A. & E. 502; 1 M. & Gr. 757.

defendant,"] and the defendant then indorsed the same to the plaintiff, and the same was then presented to the said P. Q. for acceptance, and the said P. Q. then refused to accept the same, of all which the defendant then had due notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36.

ON NON-
ACCEPTANCE OF
BILLS.

Commencement as ante, 13.] For that whereas one N. O., on the — day of — in the year of our Lord — [date of the bill], made his bill of exchange in writing, and directed the same to one P. Q., and thereby required the said P. Q. to pay to the defendant, or order, £—, days ["weeks," or "months,"] after the date thereof, and then delivered the same to the defendant, and the defendant then indorsed the said bill to the plaintiff [or "and the said defendant then indorsed the same to one R. S., and the said R. S. then indorsed the same to the plaintiff,"] and the same was then presented to the said P. Q. for acceptance, and the said P. Q. then refused to accept the same, of all which the defendant then had notice, and in consideration of the premises then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36.

Indorsee against
payee of a bill
of exchange, on
non-acceptance.

IV. ON FOREIGN BILLS OF EXCHANGE.

IV. ON Fo-
REIGN BILLS OF
EXCHANGE.
Observations.

It will be observed, that the Reg. Gen. Trin. T. 1 W. 4, *ante*, p. 32, prescribes no form of declaration on a foreign bill, but merely says "declarations on foreign bills may be drawn according to the principle of the forms relating to notes and inland bills, with the necessary variations." The following forms are, therefore, the same as in the fifth edition, with the exception of having been rendered more concise in observance of the above rule.

Commencement as ante, 13.] For that whereas the plaintiff, on &c., in parts beyond the seas, to wit, at [*Amsterdam*, (*l*)] made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant, at [*two*] usances, that is to say, at [*two*] calendar months after the date of the said bill, (*m*) and which period had elapsed before the commencement of this suit, to pay that his second of exchange, [first and third of the same tenor and date not paid, (*n*)] to the plaintiff; (*o*) the sum of 700 ducats; (*p*) and the defendant then accepted the said bill, and then promised the plaintiff to pay him the same, according to the tenor and effect of the said bill, and of his the defendant's acceptance thereof. And the plaintiff

Drawer against
acceptor of a bill
drawn abroad,
for foreign coin,
payable at
usances. (*k*)

(*k*) Though the bill be in a foreign language, it may be stated in English; 1 Wightw. 9.

(*l*) As to the place, see Chitty on Bills, 7th edit. 355; Bayl. 175; 3 Campb. 304. This need only be inserted when the bill is drawn abroad.

(*m*) When a bill is payable at usance, the length of such usance must be stated in the declaration; see Chitty on Bills, 9th edit. 371, 564. It may be described concisely as above or more formally as in n. (*q*) next page; and

it may be better to adopt the latter. As to usances in general, see Chitty on Bills, 9th edit. 370 to 373; and as to forms of averment, 1 Wightw. 294, 296, 319; Chitty on Bills, 9th edit. 371, 564.

(*n*) As to this allegation, see Chitty on Bills, 9th edit. 154.

(*o*) It is not in general necessary to state the addition of the drawer or payee.

(*p*) In an action by the drawer, the delivery of the bill is not to be stated; 6 East, 476.

ON FOREIGN
BILLS OF
EXCHANGE.

avers, that the said sum of 700 ducats, in the said bill mentioned, at the time of the making of the said bill, and when the said became due, was and still is of great value, to wit, of £—— of lawful money of Great Britain. (q) [*Conclude as ante*, 36.

The like in another form, averring more fully the duration of an usance at the end. (r)

This precedent may be the same as the last to the end, and then proceed with the following averment :] And the plaintiff in fact saith, that an usance mentioned in any bill of exchange, drawn at London and payable at Venice, is, and at the several times aforesaid was, three months from the date of the said bill.

Drawer against acceptor, where bill paid *supra* protest by a third person, and drawer obliged to pay him the principal money, and charges. (s)

Statement of protest for non-payment.

Payment *supra* protest for honour of drawer.

Plaintiffs obliged to repay such party. (u)

After stating the drawing of the bill, acceptance, delivery to payee, and his indorsement to G. H. proceed as follows :] And the defendant did not pay the said bill, although the same was duly presented to him on the day when it became due, whereupon the said bill was then duly protested for the said non-payment thereof. And afterwards, to wit, on &c., Messrs. B. B. and Co. appeared before J. B., then being a notary public, duly and by lawful authority admitted and sworn, dwelling in [London], and being the same notary public by whom the said bill had been so protested, and declared before the said notary that they would pay the said bill under the said protest, for honour and on account of the plaintiffs, the drawers of the said bill, holding them the said drawers and the acceptors, their executors and administrators, and all others whom it might concern, always obliged unto them the said Messrs. B. B. and Co. for their reimbursement; and thereupon the said Messrs. B. B. and Co. then, according to their said declaration and the said custom, paid the said bill under the said protest as aforesaid, together with five shillings and three pence for the charges of the said protest, (t) and afterwards, to wit, on &c., returned the said bill so protested to the plaintiffs. And the plaintiffs were then obliged to pay and did pay to the said Messrs. B. B. and Co. for the said bill, and for the exchange and re-exchange of the money therein contained, and the charge of protest, commission, and other charges attending the said non-payment of the said bill, a large sum of money, to wit, the sum of £——, according to the said custom; (u) of all which the defendant then had notice, and in consideration of the premises then promised the plaintiff to pay him the said last-mentioned sum of money on request. [*Conclude as ante*, 36.

By indorsee against acceptor of bill at usance, in two parts, one accepted, the other indorsed.

For that whereas ["Messrs. A. and B." *as in bill*], on &c., in parts beyond the seas, to wit, at Memel, in the kingdom of Prussia, made their bill of exchange in writing, in divers, to wit, two parts, and directed the same to the defendant, and by the first part of the said bill requested the defendant, at one usance, that is to say, at one month after the date thereof, (x) to pay

(q) When a bill is payable in *foreign* money, it is usual, if not necessary, to aver its value; 1 Wils. 185; 1 Bro. Parl. Cas. 604; Chitty on Bills, 8th edit. 583, *sed quare*; 2 Bar. & Ald. 301; 2 Dowl. & Ry. 15; 1 Bar. & Cres. 16, 8. C.; 1 Went. 302, 312, 314.

(r) As to this averment, *ante*, 127, n. (m). It should seem sufficient to state, "which period hath since elapsed," as in the forms, *ante*, 32.

(s) See precedent, 1 Wentw. 294, 295.

(t) In an action on a bill, where there are several indorsements, it is sufficient to state that the plaintiff paid the bill according to the custom of merchants, without stating he paid it to the last indorsee; 3 B. & A. 430. See 16 East, 391.

(u) *Semble*, that since the prescribed form, No. 5, in Reg. Gen. Trin. T. 1 W. 4, *ante*, 32, this averment is unnecessary.

(x) See next precedent.

that their first of exchange to the order of themselves, £100 sterling, and by the second part requested the defendant, at one usance, that is to say, at one month after the date thereof, to pay that their second of exchange, (the first not being paid,) to the order of themselves, £100 sterling value, with them, which said several periods had elapsed before the commencement of this suit, which said first part of the said bill the defendant then accepted. And the said Messrs. A. and B. delivered the said first part of said bill undorsed to the plaintiff, and then indorsed the said second part of the said bill of exchange to the plaintiff; whereof the defendant then had notice, and the defendant then promised the plaintiff to pay him the amount of the said bill, according to the tenor and effect of the same bill and of his said acceptance thereof and the said indorsement. [*Conclude as ante*, 36.]

ON FOREIGN
BILLS OF
EXCHANGE.

And the said Messrs. E. F. and Co. afterwards, to wit, on &c., in parts beyond the seas, to wit, at Memel, indorsed the said second part of the said bill to Messrs. G. H. and Co. value in account, and then delivered the same second part of the said bill so indorsed, and the said first part of the said bill so accepted as aforesaid, to the said Messrs. G. H. and Co.

Special indorsement in full of one part of a bill, stating time and place.

For that whereas the said E. F., on &c., in parts beyond the seas, to wit, at Jamaica, made his bill of exchange in writing, and directed the said bill to G. H., and thereby requested the said G. H. — months after the date of that his the said E. F.'s second bill of exchange, first and third of the same tenor and date not paid, and which period had elapsed before the commencement of this suit, to pay to I. K., or order, £—, and the said I. K. then indorsed the said bill to the plaintiff, and the said bill was afterwards, to wit, on (z) &c., presented to the said G. H. for his acceptance thereof; but the said G. H. then refused to accept the same, nor did, nor would he then, or at any other time, accept or pay the said first and third of exchange in the said bill mentioned, or either of them, whereupon the said bill was then duly protested for non-acceptance thereof; of all which the defendant then had due notice, and then promised the plaintiff to pay him the amount of the said bill on request. [*If defendant had no effects in hands of drawee, and no sufficient notice can be proved, then it may be advisable to frame the declaration as ante*, 110 : *conclude as ante*, 36.]

Payee or indorsee against drawer or indorser, on refusal of drawee to accept, stating protest.

State the drawing of the bill on G. H., delivery to payee, his indorsement to defendant, his indorsement to plaintiff, and the latter's indorsement to another party, A. B., and then state presentment for acceptance, &c. as follows :] And the said bill was afterwards, to wit, on &c., at Cadiz aforesaid, presented and shown to the said G. H. for his acceptance thereof; but the said G. H. then refused to accept or pay the same : and thereupon the said bill was then duly protested for non-acceptance thereof; by means of which premises the plaintiff was then, as such indorser of the said bill as aforesaid, called upon and forced and obliged to pay, and did then and there necessarily pay to the said A. B. the said sum in the said bill specified, together with re-exchange, interest, and charges thereon, amounting to a large sum

Second indorsee against first indorser of a bill protested for non-acceptance (a) by drawee, and plaintiff having been obliged to pay principal, re-exchange, interest, and charges, to a remote indorsee.

(t) The day of presentment, and date of the protest for non-acceptance.

(s) See prescribed form in case of an inland bill, No. 8, *ante*, 32. The holder of a

bill of exchange on nonacceptance and protest and notice thereon, has an immediate right of action against the drawer; *Whitehead v. Walker*, 9 M. & W. 606.

**ON FOREIGN
BILLS OF
EXCHANGE.**

of money, to wit, the sum of £—; (b) of all which the defendant then had due notice, and then promised the plaintiff to pay him the said last-mentioned sum of money on request. [*Conclude as ante*, 36.]

Payee or indorsee against drawer or indorser, on refusal of acceptor to pay and protest for non-payment.

For that whereas the defendant [or "E. F."], on &c., in parts beyond the seas, to wit, at Jamaica, made his bill of exchange in writing, and directed the same to G. H., and thereby required the said G. H., two months after the date of that his second of exchange, first and third of the same tenor and date not paid, and which period had elapsed before the commencement of this suit, to pay to I. K., or order, the sum of £—, and then delivered the said bill to the said I. K., which said bill the said G. H. then accepted; (c) and the said I. K. then indorsed the said bill to the plaintiff. And the said G. H. did not pay the said bill, although the same was duly presented to him on the day when it became due; and thereupon the said bill was then duly protested for non-payment thereof; of all which the defendant then had due notice, and then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36.]

Payee against drawer, on a bill protested abroad for non-acceptance, as well as non-payment.

State the drawing the bill to the order of the plaintiff, payee, as ante, 129, *and then proceed as follows*:] And the said bill was afterwards, to wit, on &c., at Rouen aforesaid, presented and shown to the said Messrs. E. F. and Co. for their acceptance thereof, but the said Messrs. E. F. and Co. then refused to accept the same; and thereupon the said bill was then duly protested for non-acceptance thereof, whereof the defendant then had due notice; and the said Messrs. E. F. and Co. did not nor would pay the said bill, although the same was presented to them on the day when it became due; and thereupon the said bill was afterwards, to wit, on &c., at Rouen aforesaid, duly protested for non-payment thereof; whereof the defendant then had due notice, and then promised the plaintiff to pay him the amount of the said bill on request. [*Conclude as ante*, 36.]

By indorsee against an acceptor *supra* protest. (d)

After stating the drawing of the bill by A. B. and Co. on C. D., the indorsement of the payee to plaintiff, and presentment, and refusal of C. D. to accept, and protest for non-acceptance, as ante, 129, *proceed as follows*:] Of all which the defendant then had due notice; and thereupon the defendant afterwards, to wit, on the day and year last aforesaid, in order to prevent the said bill from being sent back and returned to the said A. B. and Co., did, under the said protest, accept the said bill in writing, and subscribe the said acceptance on the said bill, and then promised the plaintiff to pay the said bill according to the tenor and effect of his said acceptance thereof; and the said C. D. [*the original drawee*] did not pay the said bill, although the same was duly presented to him for payment on the day when the said bill became due; and whereupon the said bill was then duly protested for non-payment thereof; of all which the defendant then had notice. [*Conclude as ante*, 36.]

(b) *Seem*, it would be sufficient to aver that the bill was returned to the plaintiff, as in the case of an inland bill, No. 5, *ante*, 32, without averring that the plaintiff had paid the bill.

(c) The acceptance need not be stated when the bill is payable after date; but if payable after sight, such acceptance and the date thereof should be stated, so as to show that the bill is overdue.

(d) See form, 1 Wentw. 316. As to the rights and liabilities of an acceptor *supra* protest, see Chitty on Bills, 9th edit. 344 to 364. See a form, 7 B. & Cress. 468; 1 Moo. & Ryl. 394, 403, S. C.; and see a full form, 4 Car. & P. 35, *not* S. C. An averment of a presentment to the drawee for payment must be inserted, or the declaration will be bad in arrest of judgment; *Id.*

After stating the drawing of the bill on E. F., delivery to payee, and indorsement to plaintiff, the acceptance of the defendant was stated as follows:] Which said bill, so indorsed, the defendant afterwards, to wit, on &c. aforesaid, upon sight thereof, accepted for the honour of the said A. B. [*the drawer,*] [*then state the presentment for payment to the drawee, as directed in last form ;*] and the defendant then promised the plaintiff to pay the said bill according to the tenor of his said acceptance thereof and of the said indorsement. [*Conclude as ante, 36.*

ON FOREIGN
BILLS OF
EXCHANGE.

The like by indorsee, in another form. (e)

After stating that A. B. drew the bill on plaintiff, and the delivery to defendant as payee, and his indorsement to E. F., who indorsed to G. H., proceed as follows:] And the plaintiff did not nor would pay the said bill, although the same was there presented to him on the day when it became due, nor did nor would the said I. K. pay the said bill, although the same was also then duly presented to him for payment thereof; and the said bill was afterwards, to wit, on &c., duly protested for the non-payment thereof; (f) and thereupon the plaintiff afterwards, to wit, on &c., last aforesaid, upon the said protest, and for the honour of the said E. F., paid to the said G. H. the said bill, together with a large sum of money, to wit, £—, for the costs of the protest and charges attending the non-payment of the said bill and noting the same; nevertheless, the said E. F., the preceding indorser of the said bill of exchange, the drawer and all others whom it might or may concern always obliged unto the plaintiff for his reimbursement in due form of law; and of all which the defendant then had due notice, and then promised the plaintiff to pay him the said sum of money in the said bill specified and also the said costs and charges on request. [*It should seem that the plaintiff might recover on the count for money paid, 1 T. R. 269. Conclude as ante, 36.*

By drawee, who accepted *supra* protest for non-acceptance for honour of second indorser, against first indorser.

V. ON SEA POLICIES ON SHIP, GOODS, &c.

Instructions, &c.] The pleading rules, Hilary term, 4 Will. 4, reg. 5, were designed to render declarations on policies of insurance, as well as all others, more concise, and especially by prohibiting more than one count on the same policy, as thus:—

ON SEA POLICIES ON SHIP, GOODS, &c.

Instructions to frame declarations on policies of insurance more concisely.

“Two counts upon the same policy of insurance are not to be allowed.”

“But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.”

“The account stated may be joined, and there may be several breaches of the same contract.”

“In actions on policies of assurance the interest of the assured may be averred thus: ‘That A., B., C. and D., or some or one of them, were or

(e) An eminent pleader suggested, that, before the statement of the acceptance, there should be a statement of the presentment for acceptance to the drawee, and of the protest, and that it should be shown that the defendant accepted *supra* protest; and this may be advisable, as in the above precedent; but as an acceptance of a bill for the honour of the

drawer will bind him, though there has been no protest, it is apprehended that this precedent may suffice; but see 2 Campb. 447; 7 B. & C. 468; 1 Man. & Ryl. 394, 403, S. C.; and see fully 4 Car. & Payne, 35.

(f) As to this, see 16 East, 391; 3 B. & Ald. 430.

ON SEA POLICIES ON SHIP, GOODS, &c.

"was interested, &c." And it may also be averred, "that the insurance was made for the use and benefit and on the account of the person or persons so interested."

By stat. 3 & 4 Will. 4, c. 42, s. 19, *interest* is recoverable.

The permission to adopt this alternative allegation in pleading was entirely new, but avoided the necessity for several counts.

On a sea policy of insurance, (g) on goods lost by capture.

For that whereas the plaintiff, (h) heretofore, to wit, on &c., (i) according to the usage and custom of merchants, (k) caused to be made a certain policy of insurance, (l) purporting thereby and containing therein, that the plaintiff [or if effected by an agent for the plaintiff, say, "that the said E. F." (m)] as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, might or should appertain in part, or in all, did make insurance and cause, &c. [Here set out the policy in the past tense to the words "in witness, &c." which are to be omitted, and, after observing the note (n) *infra*, proceed as follows:]

(g) For the law on insurances, see Park on Ins.; Marsh. on Ins.; Hughes on Ins.; 3 Chit. Com. L. 445. The remedy against an under-writer of a policy not under seal is in general an action of *assumpsit*; 2 Nev. & Man. 562; 4 M. & Sel. 503; 6 Geo. 1, c. 18, s. 4; or debt or covenant when under seal; see forms in Debt and Covenant, *post*. The above precedent is given, with notes, as in general applicable to all declarations on policies. See a form on a *valued* policy, *Rickman v. Carstairs*, 2 Nev. & Man. 562; Hughes, 523; on a time policy, effected on a ship by a member of a mutual insurance company, Hughes, 527.

(h) The 28 Geo. 3, c. 56, enacts, "That it shall not be lawful for any person to make or effect any policy of insurance on any ship, goods or other property, without first inserting the name or names, or usual style and firm of one or more of the persons interested in such insurance, or of the consignor or consignors, consignee or consignees of the property so insured, or of the person or persons residing in Great Britain, who shall receive the order for and effect such policy; or of the person or persons who shall give the order to the agent immediately employed to effect such policy." The action may be brought in the name of the person interested, or of the person in whose name the policy was effected; Park, 403; Marsh. 589; Hughes, 463; *ante*, vol. i. chap. i. Though the person whose name is used in the policy is interested in the property insured jointly with another, the action may be brought in his separate name, the joint interest being stated in the declaration; *ante*, vol. i. chap. i. If the policy be effected in the names of two persons, when only one of them is interested, the action may be brought in the name of that one; 4 Esp. 98. If brought in the name of the party interested on a policy effected in the name of an agent, the declaration states that the plaintiff, "by one E. F. his agent in that behalf, made &c." and sometimes shows that the requisites of the statute 28 Geo. 3, c. 56, have been complied with, as in *Bell v. Gibson*, 1 B. & P. 345; Marsh.

on Ins. 212; but *semble*, that this is not necessary; see note (m), *infra*. If the policy be effected in the name of a firm, it is usual to aver, that "the plaintiffs, by the name, firm and description of Messrs. A. and B. and Co. &c." as in the policy; see *Woolf v. Horncastle*, 1 B. & P. 317; and *Bell v. Gibson*, *id.* 345.

(i) This is usually to be the date of the policy in the margin; Park, 27; Marsh. 241.

(k) When the policy is in a form different from that usually adopted, the words "according to the usage of merchants, &c." are to be omitted; indeed, though usual, they might always be omitted.

(l) The stat. 35 Geo. 3, c. 63, s. 11, directs that the instrument shall be called a "policy of insurance." The instrument in common use has always been considered ill-framed; 4 T. R. 210; Burr. 348, 1555; 3 East, 578.

(m) The word "agent" need not be inserted in the policy; *Bell v. Gibson*, 1 B. & P. 346; see observations on the statutes, *Mellish v. Bell*, 15 East, 6. Where the persons interested were denominated "the trustees of Messrs. K., F. and Co." it was held that this might be considered their usual style and firm of dealing within the meaning of the statute 28 Geo. 3, c. 56, s. 1; *Hibbert v. Martin*, 1 Camp. 538. If the plaintiff alleges that he is within one particular description of persons mentioned in the act, he will be bound to prove it, although without such averment the judge at the trial might have been bound only to see that he answered to any one of the descriptions specified in the act; *Bell v. Janson*, 1 M. & S. 204. But an allegation that the policy was effected for the plaintiffs by A., B. and C., is satisfied by proof that it was effected by the firm, A. and B., there being in fact two firms, which had two members in common; *Dickson v. Lodge*, 1 Stark. 226.

(n) The legal effect, or literal words, of the policy must be stated. The qualifications introduced into the policy by means of warranties or exceptive stipulations should be stated; 3 Bing. 316; 11 East, 633; 4 Campb.

And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour and seed, were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides and skins, were warranted free from average under £5 per cent. and all other goods; also the ship and freight were warranted free from average under £3 per cent. unless general or the ship should be stranded. (o) And by a certain other memorandum thereunder written, it was declared that the said insurance was on goods. (p) And the plaintiff saith that the said policy of insurance and memoranda were so made by the plaintiff as aforesaid as the agent of one E. F. and for his use and benefit, and that the plaintiff did receive the order for and effect the said policy of insurance as such agent as aforesaid. (q) Of all which said premises the defendant afterwards, to wit, on &c., (r) had notice. And thereupon, in consideration that the plaintiff, at the request of the defendant, had then paid to the defendant a certain sum of money, to wit, the sum of [£5 : 5s.], as a premium or reward for the insurance of [£100] of and upon the said goods in the said ship or vessel in the said voyage, [or, "on the premises,"] in the said policy of insurance mentioned, (s) and had then promised the defendant to perform and fulfil all

ON SEA POLICIES ON SHIP, GOODS, &c.

Common memorandum.

Insurance on goods.

Policy made by plaintiff as agent.

Notice to defendant.

Mutual promises.

20; 7 Taunt. 385; 2 Barn & Cres. 20. In a case where the regulations of an association of shipowners, combined for the mutual assurance of each other's ships, were indorsed on the back, and were declared to form part of a policy of insurance to which the shipowners were subscribers, it was held that the declaration ought to set out the regulations as well as the policy; 3 Bing. 315. But clauses which do not in any way bear upon the cause of action, and are unnecessary to a just comprehension of it, need not nor ought to be detailed; such as the enumeration of all the perils insured against, when the loss is plainly attributable to only one of them; see 4 Taunt. 285.

The policy is usually set forth with the blanks therein; 1 Wentw. 409.

In an action on a valued policy, where the goods had been estimated at too low a sum, and the mistake was corrected by the insertion of an increased sum in the margin, the declaration stated the policy according to its altered state, without noticing the original value, and was held sufficient; for at the time of the alteration all was *in fieri*; 1 Stark. Rep. 336. But when an alteration has been made after the execution of the instrument, that fact should in general be stated, and when several counts were permitted, it was considered prudent to state both the original and altered forms in different counts; Hughes, 464; and see a form on an altered policy, *post*, 139.

(o) This is the common memorandum at the foot of the policy; see Park, 20, 21, 101; Marsh. 240; and protects the underwriter from making good any partial loss whatever upon the class of articles first specified, and any loss under £5 per cent. on the class secondly specified, unless in either case the loss were incurred in consequence of a general average, or the ship be stranded; but according to the case of *Wells v. Hopwood*, 3 B. & Adol. 34, every average or partial

loss becomes a charge upon the underwriters where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or not. As the memorandum is part of the policy, its contents may be so stated, without adopting the word "memorandum."

(p) The general terms of the insurance, in the printed part of the policy, are qualified by the insertion, either in the body or at the foot of the policy, of the words "*on ship*," or "*on goods*," or "*on freight, &c.*" and when inserted at the foot, such memorandum is described as in the above precedent. In some policies on goods, &c., the particular goods insured are enumerated in the margin of the policy, in which case the averment of the insurance thereon may be as follows:—"And the said insurance was on divers, to wit, twenty bales and twenty tresses of goods and merchandises, in the margin of the said policy enumerated, and separately valued, and the total value of the said goods and merchandises was thereby declared to be £—."

(q) When the declaration is at the suit of the principal, this averment is to be omitted. As to this averment, see 28 Geo. 3, c. 56; 1 B. & P. 315, 317. If the policy be effected in the name of a firm, it was formerly considered to be expedient to aver that it was the usual firm of the plaintiffs, as in 1 B. & P. 317, 345. As, however, at common law, these requisites did not exist, it should seem that they were not necessary to be averred in pleading; 1 Saund. 276 a. n. 2; Sir T. Raym. 450; 1 M. & S. 204; 15 East, 1, 6, 7; but when the averment was inserted, care was essential that it corresponded with the evidence; 1 M. & S. 201; see 1 Chit. Rep. 94.

(r) The date of the defendant's subscription at the foot of the policy.

(s) It should seem the words between brackets are not necessary, when as usual the receipt of the premium is confessed in the policy.

ON SEA POLICIES ON SHIP, GOODS, &c.

Defendant's subscription of the policy.

Goods shipped.

Interest of insured.

things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled, the defendant then promised the plaintiff that he the defendant would become and be an insurer to the plaintiff of the said sum of [£100] upon the said goods (t) in the said ship or vessel, in the said voyage in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned on his part and behalf, as such insurer of the said sum of [£100], to be performed and fulfilled. And the defendant then became and was an insurer to the plaintiff, and then duly subscribed [*or, if by agent, "by one G. H., his agent in that behalf, duly subscribed,"*] the said policy of insurance as such insurer of the said sum of [£100], upon the said goods in the said ship or vessel, in the said voyage, [*or, "upon the premises in the said policy in that behalf mentioned."*] And the plaintiff further saith, that heretofore, to wit, on &c. (u) aforesaid, divers goods (x) of great value had been and were shipped and loaded, to wit, at [London] aforesaid, (y) in and on board of the said ship or vessel in the said policy of insurance mentioned, (z) to be carried and conveyed therein on the said voyage. And that the said E. F. [*or, if at the suit of the principal, that "he the plaintiff," (a)*] was then and from thence continually afterwards, until and at the time of the loss hereafter mentioned, (b) interested in the said goods [*or if it be uncertain whether all or some only of several persons were interested, then say, "that A. B., C. D., E. F., G. H., and I. K., or some or one of them were or was then interested in &c."*] in the said policy of insurance and memoranda mentioned, and so shipped on board the said ship as aforesaid, to a large value and amount, to wit, to the value and amount of all the monies by him ever insured or caused to be insured thereon. (c) And the plaintiff further saith,

(t) Or "*freight of the said ship or vessel in the said voyage.*" It is sufficient to say, "*upon the premises in the said policy of insurance mentioned;*" 4 Campb. 89.

(u) The day of shipping the goods or about it. This averment is omitted when the insurance is on the ship. Sometimes it is stated that the goods were put on board after the making of the policy, which allegation need not be proved as laid; 5 T. R. 496; but the averment in the above precedent seems preferable.

(x) When the insurance is on particular goods, it seems more proper to show that such goods were put on board; 2 New Rep. 77; 2 B. & P. 153. But if a declaration state that the policy was on indigo and bale goods, that divers goods were shipped of great value, that the insured was interested in them, and that the policy was made on the said goods, for the use and benefit and on the account of the insured, the above statement would be sufficient, though specially demurred to; see *id.*

(y) Or any other port from which the insurance was to take effect. If by the terms of the policy the loading is to take place at a particular port, the declaration should state the loading at that port, or it would, it seems, be bad on special demurrer; 2 B. & P. 153.

(z) If the insurance were on freight, here say, "*to be carried and conveyed on freight in and on board the said ship or vessel in the said voyage.*"

(a) As to the mode of describing the parties interested, see note *infra*.

(b) The only material averment is "at the time of the risk insured against," 2 Taunt. 237; *infra*, note.

(c) By 19 Geo. 2, c. 37, s. 1, it is enacted, that no insurance shall be made by any person, or persons, bodies corporate or politic, on any ship belonging to his Majesty, or any of his subjects, or any goods, merchandizes, or effects, laden or to be laden on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurers, and that every such insurance shall be void. But by section 2, it is enacted, that assurance on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against his Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer. And by section 3, it is also enacted, that any merchandizes or effects from any ports or places in Europe or America, in possession of the crowns of Spain or Portugal, may be assured in such way and manner as if that act had not been made.

Some averment of interest was, in general, absolutely necessary, and being a material averment must have been proved as stated; Marsh. 587; Hughes, 466. The averment is necessary even in an action on a policy on a foreign ship, unless the policy contained a clause denoting the proof of interest to be

that heretofore, to wit, on &c., (d) the said ship or vessel, with the said goods on board thereof, departed and set sail from — (e) aforesaid on her said voyage towards — aforesaid. (f) And that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, (g) and before her arrival at — aforesaid, to wit, on &c. [*day of loss or about it*], the said ship or vessel, with the said goods on board thereof as aforesaid, was on the high seas, (h) with force and arms and in an hostile manner, captured, seized and taken by certain enemies of our lady the now queen. (i) And thereby the said goods then became and were wholly lost to the said

ON SEA POLICIES ON SHIP, GOODS, &c.

Ship sails.

Her capture.

The total loss.

unnecessary, as the words "interest or no interest," "without further proof of interest than the policy," or other words of the like effect; 3 Taunt. 513. By the rules of Reg. Gen. Hil. T. 4 W. 4, reg. 5, it was ordered, that in actions on policies of insurance, the interest of the assured may be averred thus:—"That A., B., C. and D., or some or one of them, was or was interested, &c." and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

An averment of interest at the time of effecting the policy is immaterial, and if alleged and not be proved, it suffices to aver and prove that the interest was vested during the period of the risk; 2 Taunt. 237.

Before the above rule the persons in whom the interest was vested must have been described with great accuracy, so that the insurers might know from the declaration who were the interested persons. Where two persons were jointly interested, a declaration, stating in one count that one of the parties was interested, and in another count that the other was interested, was held bad, on the ground of a variance, and that plaintiff could not recover on either count; 5 Taunt. 101; 16 East, 141. But an averment, that A. B., C. D., and certain persons trading under the firm of E. and Co. were interested, was held sufficient after verdict; 1 Chit. Rep. 49; and see 15 East, 4; and it would suffice, under such an averment, to prove that there was such a firm as E. and Co., without proving the component members thereof; *id.* But it was not deemed necessary to aver the proportions of interest each party interested might have, though sometimes it might be as well to do so in one count; 6 Taunt. 14; 1 Marsh. 416, S. C.; see form, post, 137.

The mode in which the interest was created need not be stated. But when the interest is alleged to be created by certain special circumstances, the averment, if not made out in proof, cannot be regarded as surplusage; 2 New Rep. 309. Prefatory matter, however unnecessarily introduced into the declaration, unconnected with the averment of interest, and not referred to by it, may be rejected as surplusage; *id.*

When it was uncertain as to who were the parties interested, formerly it was the practice to add different counts to meet the doubts; see 2 New Rep. 290. But since the Reg. Gen. Hil. T. 4 Will. 4, reg. 5, prohibiting more than one count on the same debt, there can only be one count, and the power of de-

claring as above in the alternative has now avoided all risk.

Any person who has an interest in the subject matter of insurance may be insured to the extent of that interest. But the interest must be such as the law can take notice of, and therefore though the profits likely to be made on an expected cargo may be insured, yet no insurance can be effected on the expected profits of a cargo to which the claim of the party insuring is founded on a contract void by the Statute of Frauds; *Stockdale v. Dunlop*, 6 M. & W. 224.

(d) The day of sailing, or about it. This seems preferable to the allegation, that after the making, &c.; 5 T. R. 496. But whether the ship sailed before or after the making of the policy is immaterial—for every policy contains the words "lost or not lost," and protects the insured against the perils that have or shall come to the detriment of the property. An averment, therefore, that the ship sailed after the making of the policy is sustained, though it appears in evidence that the ship had sailed before the policy was made; 5 T. R. 496; 2 New Rep. 308; 6 Taunt. 465; 2 Marsh. Rep. 160, S. C.

(e) The place from which the voyage was to commence; 2 B. & P. 153, *supra*.

(f) The place of final destination. If there were any warranty the compliance with it should here be shown; Marsh. 588. If the policy were on freight, here insert, "and that the freight of the said goods, in case of her arrival there, would have amounted to a large sum of money, to wit, the sum of £—." The amount of the value would, it seems, be unnecessary, even on a valued policy.

(g) If the voyage was not to any particular port, then say, "during the continuance of the risk in the said writing or policy of insurance mentioned, to wit, on &c." If the loss was while the ship was at her moorings, the allegation must be framed accordingly; 2 Marsh. Rep. 157.

(h) 2 B. & P. 153.

(i) As to the statement of the loss, see Marsh. 588; Hughes, 215, 217, &c. In stating the loss, the protest usually made on the occasion should be consulted, and such loss should be stated precisely as it can be proved, and it must appear to be within the terms of the policy; see 2 Saund. 201 f. n. 18; Park, 398 to 403; Marsh. 591 to 596; Hughes, 469; 3 B. & P. 23. The proximate and not the remote cause should be regarded; Hughes, 246; see the descriptions of several losses, post, 136 to 153.

ON SEA POLICIES ON SHIP, GOODS, &c.
Notice to defendant.

E. F. (k) and never did arrive at &c. aforesaid. (l) Of all which said several premises the defendant, afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of [£100] so by him insured as aforesaid, and which said sum of [£100] he the defendant then ought to have paid, according to the form and effect of the said policy of insurance and his said promise and undertaking so by him made as aforesaid. [*If there was any doubt as to the interest, it was usual before the pleading rules of Hilary Term, 4 Will. 4, to add other varying counts, see 2 Burr. 1188. An adjustment may be given in evidence as an admission under the above form, or under the account stated; Park, 118; Marsh. 544, 588, 589; Hughes, 472, accord.; sed vide 1 J. B. Moore, 563; 7 Taunt. 306; 3 Barn. & Cress. 9, sembl. contra. Add the count for money had and received for the premium, and the account stated, and conclude as ante, 36.*]

PARTS OF DECLARATIONS ON A POLICY.

VARYING STATEMENTS OF PROPERTY, OR OF INTEREST THEREIN.

Insurance on freight, and averment of interest and loss thereon (m).

Set out the policy and memoranda, and proceed as directed in the precedent ante, 132; and after stating defendant's subscription of the policy, state the shipment of the goods on freight, as follows:] And the plaintiff further saith, that heretofore, to wit, on &c., divers goods of great value had been and were shipped and loaded at — aforesaid, in and on board of the said ship or vessel in the said policy of insurance mentioned, to be carried and conveyed therein on and for freight in and during the said voyage, and that he (n) was then from thence until and at the time of the loss hereafter mentioned interested in the freight of the said goods, so shipped and loaded as aforesaid, to a large value and amount, to wit, to the value and amount of all the monies by him ever insured or caused to be insured thereon. [*State sailing of the ship and loss of the goods as ante, 135; 1 Wentw. 395, 396; and then add*] And the plaintiff thereby then lost and was deprived of the freight of the said goods and merchandizes so on board of the said ship on freight as aforesaid.

On an insurance on profits expected to arise on sale of goods, with averment of interest. (o)

Set out the policy and common memorandum as directed ante, 132 and 133, and proceed as follows:] And by a certain other memorandum thereunder written, the said insurance was declared to be on profit, valued at £——." [*Then refer to the policy, and state notice, and defendant's subscription and shipment of goods, and sailing of vessel, as ante, 135, and then aver the interest as follows:]* And that the plaintiff (p) was interested in the profits to arise and be made from the sale and disposal of the said cargo of goods and mer-

(k) The person interested. A partial loss may be given in evidence under a count for a total loss; see Park, 399; Marsh. 629; Hughes, 471. The damages are severable, and a plaintiff may recover less, though he cannot recover more than those alleged in the declaration; so the plaintiff may give in evidence any damage that is within the cause of action as stated, without its being specially averred: thus, when some of the goods had been spoiled and some saved, and the declaration alleged that the ship sprung a leak and

sunk in the river, evidence of the salvage was admissible; Hardwick, 304; Hughes, 471.

(l) If on freight; here insert, "*and the said E. F. thereby lost and was deprived of the freight of the said goods and merchandises, so on board the said ship on freight as aforesaid.*"

(m) See notes to form, ante, 132 to 136; and see form, 1 Wentw. 393.

(n) See ante, 134, note (c).

(o) 2 East, 544; 3 Chit. Com. Law, 452.

(p) Ante, 134, note (c).

chandize to a large value and amount, to wit, to the value and amount of all the money by him insured or caused to be insured thereon. [*Then proceed as usual.*]

PARTS OF
DECLARATIONS
ON A POLICY.

Set out the policy and common memorandum, and proceed as directed in the precedent ante, 132 and 133, to the statement of the mutual promises, and then describe the matter insured as follows:] For the insurance of £100, of and upon one half or moiety of the said ship or vessel in the said policy of insurance mentioned, and had &c. (r) [*Then state defendant's subscription, and aver the interest as follows:*] And the plaintiffs further say, that at the time of the making of the said policy of insurance, and from thenceforth until and at the time of the loss hereinafter mentioned, one E. F., G. H., and I. K., or some or one of them, were interested in the said moiety of the said ship or vessel to a large value and amount, to wit, to the value and amount of all the money ever insured by or for them thereupon, and that the said insurance was so made as aforesaid by the plaintiffs in trust for and for the use and benefit of the said person or persons so interested.

Insurance on moiety of ship, and averment of interest thereon in several persons for whom plaintiff insured. (q)

State policy and memoranda and other allegations before the averment of interest, as ante, 132, and then proceed as follows:] And the plaintiff further saith, that he, the plaintiff, and one E. F. and one G. H. at the time of the making of the said policy of insurance, and from thence continually, until and at the time of the loss hereinafter mentioned, were interested in the said ship or vessel to a great value and amount, that is to say, to the value and amount of the monies by them, or either of them, ever insured or caused to be insured thereon, in the proportions and in the manner hereafter mentioned; and that the said policy of insurance so made as aforesaid for the use and benefit of the plaintiff and the said E. F. and the said G. H., that is to say, as to two-third parts of the value of the said ship or vessel, for and on the behalf of and for the use and benefit of the plaintiff; and as to the remaining third part thereof, for and on behalf of and for the use and benefit of the said E. F. and G. H.

Plaintiff interested in two-thirds, and other persons in residue. (s)

For that whereas the plaintiff, before and at the time of the making of the policy of insurance hereinafter mentioned, was interested, to wit, in two-third parts or shares of and in a certain ship or vessel called the —, and remained so interested therein until and at the time of the loss hereafter mentioned; and the plaintiff, being so interested, heretofore, to wit, on &c., according to the usage and custom of merchants, caused, &c.

The like, in another form, on a policy where plaintiff interested in two-thirds of the ship. (t)

And the plaintiff further saith, that the said insurance was so made to and for the use and on the account of and in trust for one E. F. and one G. H.,

The like, where some persons

(q) See other precedents, 1 Wentw. 403, 413, 439, 450, 451, and notes, *ante*, 134 and 135.

(r) See *ante*, 133 and 135.

(s) See precedent, 1 Wentw. 402, 410, 450. It was till lately a disputed point whether the declaration must aver the interest, but it is now settled that it *must be averred*, and correctly so, according to the facts; see *ante*, 134 and 135. It was not however deemed

necessary to specify in what proportions several persons were interested; 6 Taunt. 14; 1 Marsh. 416, n. See *ante*, 134 and 135, n. (e). The new rule of Hil. T. 4 W. 4, reg. 6, allowing the interest to be stated to have been in "several or one of them," renders any distinct averment of the above nature unnecessary.

(t) See precedent, 1 Wentw. 445. This form is sometimes, though but rarely, adopted; see *id. ibid.*

PARTS OF
DECLARATIONS
ON A POLICY.

were interested
in the ship, and
others in the
goods. (u)

Averment that
no British sub-
ject was inte-
rested. (x)

On an insurance
of money lent
on *respondentia*
on ship and
goods. (y)

one I. K., one L. M., and one N. O., or some or one of them; and that before and until and at the time of the loss hereafter next mentioned, the said E. F. was interested in the said ship, and the said G. H., I. K., L. M., and N. O., or some or one of them, were interested in the said goods and merchandize so on board thereof as aforesaid, to a large amount, to wit, to the amount of all the money ever insured or caused to be insured thereon.

Set out the policy and memoranda verbatim, the reference thereto, and defendant's subscription, as ante, 132, and then proceed as follows:] And the plaintiff saith, that the said ship or vessel was not, at the time of the making, effecting, or subscribing of the said policy of insurance, nor of the happening of the loss hereinafter mentioned, the property of or belonging to our sovereign lady the queen, or any of her subjects.

For that whereas one E. F. heretofore, to wit, on &c., by his certain writing obligatory, sealed with his seal, (and now shown to the court here, the date whereof is the day and year aforesaid,) acknowledged himself to be held and firmly bound unto the plaintiff in the sum of £2000, to be paid to the plaintiff, or his certain attorney, executors, administrators, or assigns, whenever he the said E. F. should be thereunto afterwards requested, with and under a certain condition thereunder written. [*Here set out the condition of the respondentia bond, with the recitals verbatim, and then proceed as follows:]* And the plaintiff further saith, that after the making of the said writing obligatory, and the said condition thereof, and after the lending of the said £1000 as aforesaid, to wit, on &c., the plaintiff, according to the usage and custom of merchants from time immemorial used and approved of, caused to be made a certain policy of insurance, purporting thereby, and containing therein, that &c. [*Here set out the policy, as in the usual form, ante, 132, the notice to the defendant, and his subscription, and the mutual promises, and then proceed as follows:]* And the plaintiff further saith, that the ship called the —, in the said condition of the said writing obligatory mentioned, and the said ship called the —, in the said policy of insurance mentioned, were one and the same ship, and not different ships; and that the voyage in the condition of the said writing obligatory mentioned, and the voyage in the said policy of insurance mentioned, were one and the same voyage, and not other or different voyages; and that the merchandize and effects in the said condition and writing obligatory mentioned, and the goods and merchandize in the said policy of insurance mentioned, were the same goods, wares, merchandize and effects; and that the said sum of £1000, in the said writing obligatory mentioned, was and is the money insured, and intended to be insured, in and by the said policy of insurance, and not other or different money. And the plaintiff further saith, (z) that the said ship, with all convenient speed after the making of the said writing obligatory, did proceed and sail on her said voyage from and out of [the said river Thames] to a

(u) See precedents, 1 Wentw. 392, 410, 439.

(z) See precedents, 2 Saund. 202, n. 17. The declaration must aver an interest; as to how to aver it, see ante, 134, note (c).

(y) See precedent, 1 Wentw. 431; 2 Burr.

1394. Declarations on a policy of insurance on a *bottomry bond* and law; *Simonds v. Hodgson*, 3 Bar. & Adol. 50. See 19 Geo. 3, c. 37, s. 5.

(s) These averments will depend on the condition of the bond.

certain place called — [in the East Indies], in the said condition of the said writing obligatory mentioned, without deviation, and afterwards, in the said voyage, to wit, on &c., did arrive in safety at the said place called —, in the East Indies aforesaid, and that the said E. F. afterwards, to wit, on &c., did cause to be laden on board the said ship, at the said place called &c., in the East Indies, divers merchandize and effects, to be brought from thence by the said ship in the said voyage back to the river Thames aforesaid, and to London aforesaid; and that the said ship afterwards, to wit, on &c., did sail, proceed and return with the said merchandize and effects so laden on board the said ship, without deviation in the said voyage, from the said place called —, in the East Indies, and towards the river Thames and London aforesaid; and that afterwards, &c. [*Then state the loss of the ship and goods according to the fact, and the defendant's consequent liability to pay as usual.* See ante, 135 and 136.

PARTS OF
DECLARATIONS
ON A POLICY.

And the plaintiff in fact saith, that the said policy of insurance was so made as aforesaid for the purpose of effecting an insurance on the said goods and merchandize so as aforesaid intended to be shipped and loaded in and on board of a certain ship or vessel called the [George], whereof the said E. F. was master, and that the said last-mentioned ship or vessel was and is called in and by the said policy of insurance by the name of the [Digby] by mistake, and that there was not, at the time of making the said policy of insurance, any ship or vessel in the port of London aforesaid, whereof the said E. F. was master, other than and except the said ship or vessel called the [George], on board whereof the said plaintiff so as aforesaid intended to ship and load the said goods and merchandize.

Averment where the name of the ship had been mis-stated in the policy.

After stating defendant's subscription as usual, proceed as follows:] And the plaintiff in fact saith, that after the making of the said policy of insurance, the said plaintiff was desirous to withdraw the mark of the hemp in the said policy of insurance mentioned, and the warranty of sailing before or at the time in the said policy of insurance mentioned, whereof the said defendant then had notice. And thereupon, afterwards, to wit, on &c., by a certain memorandum indorsed on the said policy of insurance, and subscribed by the said defendant by one E. F. his agent, then duly authorized in that behalf, it was agreed by and between the said plaintiff and the said defendant, for and in consideration of the sum of four guineas additional and allowing 5 per cent. less return than was in the said policy of insurance mentioned, to withdraw the mark of the hemp in the said policy of insurance mentioned, and the said warranty of sailing therein also mentioned.

On a policy varied after effected, but not as to subject-matter. (a)

After the statement of defendant's subscription of the policy as usual, insert the following averment:] And the plaintiff further saith, that after the said policy of insurance was so underwritten on the behalf of the defendant as aforesaid, and before notice of the determination of the risks thereby insured, and whilst the things thereby insured were and remained the property of the plaintiff as hereinafter next mentioned, to wit, on &c., the defendant,

Statement of alteration of some of the terms of the policy after the commencement of the risks. (b)

(a) See 4 Taunt. 169; 8 East, 273, 373; 25 Geo. 3, c. 63, s. 13. See another precedent, 1 Wentw. 444.

(b) See the last precedent and notes; 36

Geo. 3, c. 63, s. 13; 1 Wentw. 444. When not necessary to state alteration, ante, 133, note.

**PARTS OF
DECLARATIONS
ON A POLICY.**

by a certain indorsement then made on the said policy, and signed for him by the said I. K., his agent in that behalf, agreed that the said vessel therein mentioned might sail from Martinique and Antigua, or Antigua and Martinique, both or either, and from all or any of the West India Islands (Jamaica and St. Domingo excepted) to Liverpool, without being a deviation and without prejudice to the said insurance. [*Then state the sailing of the ship and averment of interest, &c., as ante, 134 and 135.*]

**Averment that
ship sailed with
convoy, &c. (c)**

And the plaintiff further saith, that afterwards, to wit, on &c., the said ship, with the said goods and merchandize so laden on board her as aforesaid, departed and set sail with convoy from — aforesaid, on her said intended voyage towards — aforesaid, and that afterwards, and whilst, &c.

**LOSSES BY
PERILS OF SEA.
Loss of ship and
goods by stormy
weather and per-
ils of sea. (d)**

After stating the sailing on the voyage, proceed as follows:] And the plaintiff further saith, that the said ship in the said policy of insurance mentioned, with the said goods and merchandize so on board thereof as aforesaid, whilst she was proceeding on her said voyage, and before her arrival at any of her port or ports of destination, sale or final delivery, in the said writing or policy of insurance mentioned, to wit, on &c., was, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, damaged, spoiled and destroyed, and the said ship, with the said goods and merchandize so on board thereof as aforesaid, thereby then became and were wholly lost to the plaintiff, [*or if he was agent for some other person, say, "to the said E. F.,"*] of all which said premises, &c. [*State the notice as ante, 136.*]

**More general
statement of loss
by perils of sea.**

Was by the perils and dangers of the seas wholly lost to the said plaintiff, and never did arrive at — aforesaid; of all which, &c. [*State notice of loss, and conclude as ante, 136.*]

**Loss by ship-
wreck. (e)**

And before her arrival at — aforesaid, by the perils of the seas, was wrecked and totally lost, whereby the said ship and the said goods and mer-

(c) See precedents, 1 Wentw. 399, 414, 444; 2 B. & B. 111; Marsh. 269. Sailing sheathed with copper; 1 Wentw. 411.

(d) See precedent, 1 Wentw. 392, 448. The circumstances occasioning the loss are to be stated according to the facts, and usually in one count; the description is taken from the protest, when correct. It may suffice to describe the loss by the perils of the sea more generally as in the next precedent, when the facts will allow. Losses by peril of the sea mean losses occasioned strictly by *sea-damage*, as by stress of weather, winds and waves, lightning and tempest, rocks, sands, &c. A loss occasioned by the ship insured being run down, is one by perils of the sea; *Smith v. Scott*, 4 Taunt. 126. So is a loss of animals killed by the agitation of the ship in a storm; *Lawrence v. Aberdeen*, 2 B. & A. 107. So is a loss by her taking the ground on the uneven bed of a dry harbour; *Fletcher v. Inglis*, 2 B. & A. 315; *Hahn v. Cubitt*, 2 Bing. 205. And an assured may recover for

a loss by *perils of the sea*, if the ship be not heard of within a reasonable time after her sailing, as it is presumed she has foundered; *Kosta v. Reed*, 6 B. & C. 19; *Green v. Brown*, Str. 1199; *Cohen v. Hinckley*, 2 Campb. 51; *Koster v. Innes*, R. & M. 333; *Hensman v. Thornton*, 1 Holt, 242. But if a vessel be hove down on the beach, within the tideway, to repair, and thereby bilged, this is not a loss by the perils of the sea; *Thompson v. Whitmore*, 3 Taunt. 227; nor if the ship be worm-eaten, or rat-eaten; *Park*, 105; *Rohl v. Parr*, 1 Esp. 445; *Hunter v. Potts*, 4 Campb. 203. See further as to what is a loss by perils of the sea, 3 Chitty's Com. Law, 490; *Hughes*, 214, &c., and cases there collected. See precedent of loss by perils of the sea, where the ship was by the winds blown over on her side in a graving dock, *Phillips and another v. Parber*, 5 B. & A. 161; see also *Rayner v. Godmond*, *id.* 225.

(e) See another precedent in 1 Wentw. 438, 445, 460.

chandise so being on board thereof as aforesaid, and all other things in the same and thereto belonging, were wholly destroyed, perished and lost, and became of no use or value to the said plaintiff; of all which, &c. [*State notice of loss, and conclude as ante*, 136.

PARTS OF
DECLARATIONS
ON A POLICY.

By and through the force of certain hurricanes of winds, stormy and tempestuous weather, and by and through the perils and dangers of the seas, was on the high seas wrecked, sunk and lost; of all which said premises, &c. [*State notice of loss, and conclude as ante*, 136.

The like in another form. (f)

That whilst the said ship, with the said goods and merchandizes so laden on board thereof as aforesaid, was sailing and proceeding on her said voyage, and before her arrival at &c. aforesaid, to wit, on &c., upon the high seas, by the perils and dangers of the seas, and the force and violence of storms and tempests there, was beat and broken to pieces, sunk and totally lost in the sea; of all which, &c. [*State notice of loss, and conclude as ante*, 136.

Loss by the sinking of the ship. (g)

And that afterwards, and whilst the said ship or vessel was sailing and proceeding on her said voyage, and before her arrival at &c. aforesaid, to wit, on &c., and on divers other days and times between that day and the — day of —, the said ship or vessel, by stormy winds and tempestuous weather, became and was leaky, and greatly broken and damaged, insomuch that by means thereof it then and there became, and was expedient and necessary, for the preservation of the said ship or vessel, for the said ship or vessel to sail and proceed to the nearest port; and the said ship or vessel did then and there accordingly sail and proceed towards and for the nearest port, to wit, for — in America; and that afterwards, and whilst the said ship or vessel was endeavouring to sail and proceed to a port of safety there, to wit, on &c., the said ship or vessel, by the perils and dangers of the seas, and by the violence of the winds and waves, became and was wholly lost to the plaintiff, and never did arrive at &c. aforesaid; of all which, &c. [*State notice of loss, and conclude as ante*, 136.

Ship being leaky, it became necessary to sail towards the nearest port, in doing which ship was lost.

Upon the high seas, struck against certain rocks, and did thereby then and there founder, and the same ship, with her tackle, apparel, ordnance, munition, artillery, and other furniture, was then totally lost and destroyed, and sunk in the sea aforesaid; of all which, &c. [*State notice of loss, and conclude as ante*, 136.

Loss by the sinking of the ship among destructive rocks.

Was by the perils and dangers of the seas, and by stormy and tempestuous weather, and the force and violence of the winds and waves, wrecked, foundered and sunk, whereby the said ship or vessel, and the said goods and merchandize so on board the same ship as aforesaid, then became and were wholly lost to the plaintiff; of all which, &c. [*State notice of loss, and conclude as ante*, 136.

Loss by ship foundering at sea. (h)

And the said plaintiffs further say, that the said ship, after the making of

Loss by ship

(f) See precedents, 1 Wentw. 434, 446, 448, 464.

(g) See precedents, 1 Wentw. 438, 458.

(h) 1 Wentw. 399, 438, 464.

**PARTS OF
DECLARATIONS
ON A POLICY.**

being cast on a
rock and the
goods damaged,
and afterwards
lost in a river
by tempest.

the said policy of insurance, and within eighteen months after the day of her arrival in the said river Gambia, and during her stay and trade there, to wit, on &c., was forced and cast upon a rock in the said river Gambia, and was then and there, broke, shattered and bulged, and the said goods and merchandizes, so loaden in and on board the said ship as aforesaid, were thereby then wetted, damaged and wholly spoiled; and the said ship afterwards, and within the space of eighteen months from the day of her arrival in the said river Gambia, and during her stay and trade there, to wit, on &c., by force of the winds and tempests, was wholly lost in the said river Gambia; of all which, &c. [*State notice of loss, and conclude as ante*, 136.]

Ship lost by
storms and ice,
and foundered.

Whilst the said ship was sailing and proceeding in the Greenland Seas, to wit, on &c., on the high seas, by the force and violence of storms and tempests, and by and through misfortunes and accidents arising and happening from the bodies of ice and snow floating and being in the same seas, and by and through the perils and dangers of the seas, the said ship or vessel bulged and went to pieces, sunk and foundered, and all the body, stores, tackle, apparel, ordnance, artillery, boat and other furniture of the said ship or vessel, were totally lost to the said plaintiff; of all which, &c. [*State notice of loss, and conclude as ante*, 136.]

Loss of ship and
freight by
stranding. (i)

After stating the sailing of the ship, proceed as follows:] And the plaintiff further saith, that afterwards, and whilst the said goods and merchandize remained and continued on board the said ship as aforesaid, and whilst she was proceeding on her said voyage, to wit, on &c., at &c., aforesaid, the said ship, by and through the perils and dangers of the seas, and by the force and violence of the winds and waves, was *stranded*, bulged and wholly lost; and the plaintiff thereby then lost and was deprived of the freight of the said goods and merchandize so on board the said ship on freight as aforesaid; of all which, &c. [*State notice of loss, and conclude as ante*, 136.]

Goods damaged
by a leak sprung
in a storm. (k)

And that afterwards and during the said voyage, that is to say, on &c., the said ship, so having the said goods and merchandizes on board thereof, whilst she was sailing and proceeding on her said voyage, and after her departure from, &c., aforesaid, and before her arrival at, &c., aforesaid, on the high seas, was, by and through the perils and dangers of the seas, and the force and violence of the winds and waves, and by means of stormy tempestuous weather, greatly damaged and opened in her seams, and between her planks rendered leaky, and greatly filled with water, and the said goods and merchandizes thereby then in the said voyage were wetted, damaged and wholly spoiled, and rendered of no use or value to the plaintiff; of all which, &c. [*State notice of loss, and conclude as ante*, 136.]

Loss
BY WORMS.

Was upon the high seas greatly eaten, damaged and destroyed by worms

(i) What is a stranding, *Harman v. Vaux*, 3 Camp. 431; *Rayner v. Godmond*, 5 B. & A. 225; *Kingsford v. Marshall*, 8 Bing. 458; *Bistropp v. Pentland*, 7 B. & C. 219; *Carruthers v. Sydebottom*, 4 M. & S. 77; *Barrow v. Bell*, 4 B. & C. 736; *Baker v. Tovey*, 1

Stark. 436; what not, *Heams v. Edmunds*, 1 B. & B. 388; *M'Dougle v. The Royal Exchange Assurance Company*, 4 M. & S. 503.

(k) See another precedent, 1 Wentw. 401, 468.

and other insects, and thereby and by and through the force of certain hurricanes of wind and stormy and tempestuous weather, and by and through the perils and dangers of the seas, the said ship or vessel was rendered of no use or value to the plaintiff, and was thereby wholly lost to him; of all which, &c. [*State notice of loss, and conclude as ante, 136.*]

**PARTS OF
DECLARATIONS
ON A POLICY.**

Ship lost by eating of worms and by storms. (l)

And the plaintiff further saith, that whilst the said ship or vessel, in the said policy of insurance mentioned, was proceeding on her said voyage, and before her arrival at any of her port or ports of destination in the said policy of insurance mentioned, to wit, on &c., a certain other ship or vessel on the high seas, by and through the force and violence of the winds and waves, was carried and sailed against, and ran foul of the said ship or vessel in the said policy of insurance mentioned, without any default or neglect of any persons in and on board the said ship or vessel in the said policy of insurance mentioned, and the same thereby then became and was lost and stranded by and through the perils and dangers of the sea; of all which, &c. [*State notice of loss, and conclude as ante, 136.*]

**LOSS BY SHIPS
RUNNING FOUL.**

Loss by another ship's running down ship insured. (m)

Was on the high seas burnt and consumed with and by fire; and the said goods and merchandizes, then being and remaining in and on board the said ship, were thereby then wholly burnt and consumed with and by fire, and wholly lost to the owners and proprietors thereof; of all which, &c. [*State notice of loss, and conclude as ante, 136.*]

LOSS BY FIRE.

Ship and goods burnt at sea. (n)

Was on the high seas wholly consumed, destroyed and burnt by fire; and the said ship, and the said goods and merchandize so being on board thereof as aforesaid, were thereby then wholly destroyed and lost; of all which said premises, &c. [*State notice of loss, and conclude as ante, 136.*]

The like in another form. (o)

And the plaintiff further saith, that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, with the said goods and merchandize on board thereof as aforesaid, and before her arrival at &c. aforesaid, to wit, on &c., the said ship or vessel, with the said goods and merchandize so on board thereof, was, on the high seas, with force and arms and in a hostile manner, attacked, conquered, seized, captured, taken and carried away by certain then enemies of our lady the queen and her crown of Great Britain, to wit, by certain Frenchmen, and subjects of the king of France, then in open war with our said lady the queen; and the said ship or vessel, and goods and merchandize so on board thereof as aforesaid, were thereby then wholly lost to the plaintiff; of all which &c. [*State notice of loss and conclude as ante, 136.*]

**LOSSES BY
CAPTURE.**

Loss by capture of ship and goods. (p)

(l) 1 Went. 446.

(m) See the law, *Smith v. Scott*, 4 Taunt. 126.

(n) See precedent, 1 Wentw. 402; 1 Rich. C. P. 465; see *Austin v. Drew*, 6 Taunt. 436; *Burk v. The Royal Exchange Assurance Company*, 2 B. & A. 73; *Gordon v. Rimington*, 1 Campb. 123; as to what is a loss by fire for which the underwriters are liable. If a fire arises on board a ship from the damaged quality of goods on board which are insured, the underwriters are not liable; but if the loss is not occasioned by the damaged state of the

goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though that might have a tendency to increase the risk; *Royd v. Dubois*, 3 Campb. 133.

(o) See form, 1 Wentw. 396.

(p) See precedent, *ante*, 132 to 136; and 1 Wentw. 401, 406, 411, 412; 15 East, 525. And as to the statement of losses by capture in general, see 2 Saund. 203 a, note 18; 1 B & P. 153, 155; 3 Chit. Com. Law, 493.

**PARTS OF
DECLARATIONS
ON A POLICY.**

For a total loss of ship and freight by capture, and defendant's proportion of expenses of endeavouring to regain the ship. (g)

And the plaintiff further says, that afterwards, and whilst the said ship or vessel was proceeding on her said voyage with the said goods and merchandize so on board thereof, on freight as aforesaid, and before her arrival at &c. aforesaid, to wit, on &c., the said ship or vessel, with the said goods and merchandize, was, on the high seas, with force and arms, and in a hostile manner, attacked, seized, captured and carried away as prize, by certain persons unknown to the plaintiff, to wit, by certain enemies of our said lady the queen, whereby the said ship, and the freight thereof, then became and were wholly lost to the plaintiff, and a large sum of money, to wit, to the amount of £—— for each and every sum of £100 assured by the said policy, was afterwards, to wit, on &c. aforesaid, expended by the plaintiff in and about the claiming and endeavouring to recover the said ship, the rateable proportion of which said sum so expended to be paid by the defendant then amounted to a large sum of money, to wit, the sum of £20, in addition to the said sum of £200 so insured by him as aforesaid; of all which said premises &c. [*State notice of loss, and conclude as ante, 136, with a promise to pay the said sums.*]

Total loss of goods in consequence of capture and recapture.

Vessel and goods were so damaged that they did not produce sufficient to pay salvage and incidental expenses.

Was, with force and arms, and in hostile manner, attacked, conquered, seized, captured and taken a prize by certain enemies of our lady the now queen and her crown of Great Britain, to wit, by certain Frenchmen, and subjects of the king of France, then in open war with our said lady the queen; and the said goods and merchandizes were by those enemies then taken and carried away in the said ship, and afterwards, and before that the said ship, goods and chattels were by those enemies carried into any port, to wit, on &c., the said ship, with the said goods and merchandizes so being and remaining on board her as aforesaid, was, upon the high seas, retaken and recovered out of the hands and possession of the said enemies by one of her present majesty's ships of war, and afterwards, to wit, on &c., brought into the port of Plymouth, in the county of Devon, by the said ship of war, and there kept and detained for a long time, to wit, for the space of three months and more, then next following; and the said first-mentioned ship or vessel, at the end of that time, to wit, on &c., proceeded on her said voyage to the said island of Antigua aforesaid; but by reason of such capture, recapture and detainer of the said ship, goods and merchandizes as aforesaid, and the said goods being a perishable commodity, the said goods and merchandizes, before the said ship arrived at Antigua aforesaid, to wit, on &c., were so lessened in value, spoiled and damaged, that the same were not, at the time of their arrival at Antigua aforesaid, or at any time afterwards, of value sufficient to pay the salvage due to the crew of the said queen's ship for the recaption of the said goods and merchandizes, and other the necessary expenses relating thereto, and were afterwards, to wit, on &c., sold and disposed of towards payment and satisfaction thereof, and never came to the hands or possession of the plaintiff, but have been and are wholly lost to him. [*Conclude as ante, 136.*]

Loss by being

And the plaintiff further saith, that afterwards, and whilst the said ship,

(g) See the precedent, *ante*, 132, 136. As a, note 18; 15 East, 525; 1 Wentw. 401, to the statement of this loss, see 2 Saund. 203 406, 411, 412.

with the said goods and merchandizes so laden on her as aforesaid, was proceeding on her said voyage, to wit, on &c., on the high seas, the said ship was, with force and arms, and in a hostile manner, attacked and fired upon by certain men of war, to the said plaintiff unknown, and was thereby then so greatly shattered and damaged in her hull, masts, yards and rigging, that by reason thereof the said ship, with all her tackle, apparel, ordnance, munition, boat and furniture, together with the said goods and merchandizes so laden and being on board thereof as aforesaid, were afterwards, to wit, on &c. aforesaid, sunk in the sea and destroyed, and became and were wholly lost to the plaintiff. [*State notice of loss, and conclude as ante*, 136.]

PARTS OF
DECLARATIONS
ON A POLICY.

fired upon and
sunk by the
enemy. (r)

And the plaintiff further saith, that the said ship, with the said goods and merchandizes so being on board thereof, afterwards, and whilst she was proceeding on her said voyage, and before her arrival at &c. aforesaid, to wit, on &c., upon the high seas, near Cadiz, in the kingdom of Spain, was so broken and shattered, and suffered so much by and from storms and tempests, and the violence and perils of the seas, that she was thereby then wholly disabled and rendered incapable of performing, nor could nor did the said ship perform, the residue of the said voyage. And the plaintiff further saith, that the said ship, being so disabled as aforesaid, the said E. F., her master, and the mariners belonging to and sailing in her, thereupon afterwards, to wit, on &c. last aforesaid, for the preservation of their lives, were obliged to put into Cadiz aforesaid, and that the said ship, with the said goods and merchandizes so laden on board her as aforesaid, together with the master and mariners belonging to the said ship, afterwards, to wit, on &c., at the said port of Cadiz, by force of arms, and against the will of the said E. F., the master, and mariners then belonging to and sailing in the said ship, in a hostile manner was seized, taken and detained, in the said port of Cadiz, by divers soldiers and mariners belonging to a ship of war in the service of the king of Spain, and the said goods and merchandizes were there confiscated, and thereby then became wholly lost to the plaintiff. [*State notice of loss, and conclude as ante*, 136.]

Total loss of
goods, ship be-
ing compelled by
storms and shat-
tered condition
to go into Cadiz,
and there was
taken by the
king of Spain,
and she and all
her cargo for-
feited. (s)

And the plaintiff further saith, that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, to wit, on &c., the said ship or vessel was, by force and violence, upon the high seas, arrested, restrained and detained by certain people, (u) unknown to the plaintiff, on the coast of America, whereby the said ship and freight in the said policy of insurance mentioned became and were wholly lost to the plaintiff; of all which &c. [*State notice of loss, and conclude as ante*, 136. *See a second count*, 1 *Wentw.* 419.]

LOSS BY ARREST
OR DETAIN-
MENT.

Ship arrested
and detained, by
persons un-
known to plain-
tiff on the coast
of America. (t)

(r) See a precedent, 1 *Wentw.* 445. Where ship fired upon by another English ship, mistaking her for an enemy, it was held not a loss by perils of sea, but the plaintiff might recover under a special count, stating particular circumstances, for it was within the general words, "all other perils, losses and misfortunes;" 5 *M. & S.* 461.

(s) 1 *Wentw.* 428; 3 *B. & P.* 23.

(t) See precedent, 1 *Wentw.* 419—421.

(u) The word "people" in the policy, means the governing power of the country,

and this breach will not be supported by evidence of rioters having seized upon the ship; see *Nesbitt v. Lushington*, 4 *T. R.* 783, 788; 2 *Saund.* 202 c, note 12; 3 *Chit. Com. Law*, 495. But in 4 *T. R.* 787, it was said, that if the averment had been, that the ship was taken by pirates, the evidence would have been sufficient to support it. Per *Lord Kenyon*. If the detention were occasioned by the improper conduct of the assured, he cannot recover; 3 *Campb.* 85; 14 *East*, 19; 1 *Campb.* 434, 436. See further *Selw. N. P.* 10th edit. 957.

**PARTS OF
DECLARATIONS
ON A POLICY.**

Loss by the ship
being seized by
savages. (x)

And the plaintiffs further say, that long after the expiration of twenty-four hours from the arrival of the said ship at Gambia aforesaid, and during her abode there, that is to say, on &c., certain inhabitants of Africa, to the plaintiffs unknown, and without the default of the plaintiffs, or any or either of them, by force and violence seized the said ship, and broke in pieces, shattered and spoiled the said ship and the tackle, apparel and furniture thereof; of all which &c. [*State notice of loss, and conclude as ante, 136.*]

LOSS BY
PIRATES.
Loss by capture
of Americans,
then regarded as
rebels. (y)

And the plaintiff further saith, that the said ship, with the said sugars and rum on board, afterwards, and before her arrival at &c. aforesaid, to wit, on &c., whilst she was proceeding on her said voyage on the high seas, was, with force and arms, and in a hostile manner, attacked, conquered and taken by certain rebellious subjects of our lady the queen, and by means whereof the said sugars and rum then became and were wholly lost to the said W.; of all which &c. [*State notice of loss, and conclude as ante, 136.*]

Second count,
as if taken by
pirates. (z)

On the high seas, was, with force and arms, and in a hostile manner, attacked, conquered and taken by pirates, and by means thereof the said last-mentioned sugars and rum then became and were wholly lost to the plaintiff. [*State notice of loss, and conclude as ante, 136.*]

LOSS BY
THIEVES.
Ship damaged
on her voyage by
unknown persons
and
robbed. (a)

And the plaintiff further saith, that after the departure of the said ship from Cork aforesaid, and before the said ship had finished her said intended voyage, to wit, on &c., certain persons, to the plaintiff as yet unknown, and without the default of the plaintiff, broke, damaged and spoiled the body of the said ship, and broke, spoiled, took and carried away the tackle, apparel, ordnance, munition, artillery, boat and furniture of the said ship in the said writing or policy of assurance mentioned, to a great value and amount, to wit, to the value and amount of £——, whereby the said last-mentioned ship was disabled from performing her said voyage, and did not perform the same, and was and is of no use or value to the proprietors thereof; of all which &c. [*State notice of loss, and conclude as ante, 136.*]

LOSS BY
BARRATRY.
Loss of ship and
goods by barra-
try of master and
mariners. (b)

And the plaintiff further says, that afterwards, and whilst the said ship was proceeding on her said voyage, and before the arrival of the said ship, with the said goods and merchandizes so laden on board her as last aforesaid,

(x) See precedent, 1 Wentw. 402.

(y) See precedents, 1 Wentw. 415, 416, and 418; 2 Saund. 203 b, note 18.

(z) See similar loss, 4 T. R. 783; 2 Saund. 203 b, note 18; 1 Wentw. 416, 417. As to the meaning of the word pirates, see 4 Bl. Com. 72; 4 T. R. 788.

(a) See precedent, 1 Wentw. 402.

(b) See precedent, 2 Saund. 202 e, note 13; 1 Wentw. 401, 428, 435; 24 Mr. Justice Ashurst's Paper Books, 318. Barratry comprises every species of fraud, knavery or criminal conduct in the master or mariners by which the owners or freighters are injured; 2 Wms. Saund. 202, n. 13; *Lockyer v. Offley*, 1 T. R. 252; *Knight v. Cambridge*, Str. 581; *Heyman v. Parish*, 2 Camp. 149; *Vallejo v. Wheeler*, Cowp. 143; *Hibbert v. Martin*, 1

Camp. 539; *Hucks v. Thornton*, 1 Holt, 30; *Toulmin v. Inglis*, 1 Camp. 411; *Toulmin v. Anderson*, 1 Taunt. 227; *Roscoe v. Corson*, 8 Taunt. 684; *Dixon v. Reid*, 5 B. & A. 597; *Ross v. Hunter*, 4 T. R. 38; *Earle v. Rowcroft*, 8 East, 126; *Nutt v. Bourdieu*, 1 T. R. 330. See further as to what constitutes barratry and who is considered "owner," *Soares and another v. Thornton*, 7 Taunt. 627; *Hobbs v. Hannam*, 3 Campb. 94; *Selw. N. P.* 10th edit. 959; 3 Chit. Com. Law, 497. It is not necessary to use the word "barratrous" in the statement of this loss. It will be sufficient if the breach assigned be "that the ship was lost through the fraud and negligence of the master." 2 Lord Raym. 1349; 8 Mod. 231; 1 Stra. 581; see *Park. on Ins.* 94; *Hughes*, 471.

at Rotterdam aforesaid, to wit, on &c., on the high seas, the master and mariners in and on board the said ship, in a barratrous and fraudulent manner, without the knowledge and against the will of the plaintiff, took and carried away the said ship, with the said goods and merchandizes so on board her as aforesaid, to places unknown to the plaintiff, and converted and disposed thereof to their own use; and the plaintiff thereby then lost and was deprived of the said ship and the goods and merchandize so on board thereof as aforesaid, and the profits thereof. [*State notice of loss, and conclude as ante*, 136.

PARTS OF
DECLARATIONS
ON A POLICY.

And that afterwards, and before the arrival of the said ship or vessel, with the said goods and merchandizes so on board thereof as aforesaid, at Guernsey aforesaid, to wit, on &c. the said E. A., then being such master and commander of the said ship or vessel as aforesaid, and the said goods and merchandizes so being on board her as aforesaid, by and through the fraud and barratry of the said E. A., the said master of the said ship or vessel, became and were wholly lost to the plaintiffs, and the plaintiffs thereby then lost all benefit and profit arising from the same, and the whole freight so insured as aforesaid; of all which, &c. [*State notice of loss, and conclude as ante*, 136.

The like in a
more general
form. (e)

And the plaintiffs further say, that whilst the said ship or vessel, with the said goods and merchandizes on board thereof as aforesaid, remained and continued in the port of Plymouth aforesaid, to wit, on &c., and on divers other days and times between that day and the time of seizure and condemnation of the said ship or vessel as hereinafter mentioned, he the said E. A. in a barratrous and fraudulent manner, and contrary to the form of the statute in that case made and provided, (e) and without the knowledge, privity, or consent, and against the will of the plaintiffs, or either of them, did unship from and on board the said ship or vessel, to be laid on land in the said port of Plymouth aforesaid, divers large quantities of brandy and coffee, of and belonging to him the said E. A. and being in and on board the said ship or vessel last-mentioned, on the account and adventure of himself the said E. A. and not the property of or on account or adventure of the plaintiffs, brought and imported from parts beyond the seas into Great Britain, in the said ship or vessel, the customs, subsidies, and other duties due and payable to our sovereign lady the now queen not being first paid or lawfully tendered to the collectors of the said customs at Plymouth aforesaid, or to any other person whatsoever there or elsewhere lawfully entitled to receive the same, or to the said collector's deputy, with the consent or agreement of the said comptroller or surveyor there, or one of them at least, nor agreed with him for the same at the custom-house, according to the form of the statute in such case made and provided, whereby and according to such statute in such case made and provided the said ship then became and was forfeited to our lady the queen for the cause last aforesaid, and thereupon the said ship or vessel was afterwards,

The master put
smuggled goods
on board,
whereby the
ship became
forfeited. (d)

(e) 1 Wentw. 435; 24 Mr. Justice Ashhurst's MS. Paper Books, 318.

(d) See precedent, 2 Saund. 203 b, note 18; 4 T. R. 33; 1 Wentw. 446.

(e) "Contrary to the statute, &c." is not in the precedent in 24 Mr. Justice Ashhurst's MS. Paper Books, 318; 4 T. R. 33; 2 Saund. 203 b, note 18.

**PARTS OF
DECLARATIONS
ON A POLICY.**

to wit, on &c. seized there and arrested on the behalf and account and to and for the use of our said lady the queen, and afterwards, to wit, on &c. was in due form of law condemned as forfeited, according to the form of the statute in such case made and provided; and by reason of the premises the said ship or vessel, by and through the said fraud and barratry of the said master, became and was wholly lost to the plaintiffs, and the plaintiffs thereby then lost all benefit and profit arising from the same and the whole freight so insured as aforesaid; of all which said premises, &c. [*State notice of loss, and conclude as ante, 136.*]

Ship confiscated through barratry of master, in taking her into an hostile port. (f)

And the plaintiff further saith, that afterwards, and whilst the said ship was proceeding on her said voyage, to wit, on &c. the master of the said ship, in a barratrous and fraudulent manner, took and carried the said ship or vessel, with the said goods and merchandize so on board her as aforesaid, to certain places to the said plaintiff unknown, to wit, at &c. aforesaid, by means whereof the said goods and merchandize then became and were subject to capture, seizure, and confiscation, and wholly lost to the said plaintiff and the other persons interested therein as aforesaid; of all which, &c. [*State notice of loss, and conclude as ante, 136.*]

**AVERAGE
LOSSES.**
For an average loss on goods, damaged by sea-water rushing into ship.

And the plaintiff further saith, that the said ship, with the said goods and merchandize so laden and remaining on board thereof as aforesaid, afterwards, to wit, on &c. departed and set sail with convoy from — aforesaid, on her said voyage towards and for &c. aforesaid, and that afterwards, and after her departure from &c. aforesaid, and before her arrival at &c. aforesaid, and whilst the said ship was so proceeding on her said voyage as aforesaid, with her said goods and merchandize so on board thereof as aforesaid, to wit, on &c., on the high seas, by the violence of the winds and waves, storms and tempests, and by the rolling and labouring of the said ship, and the sea water which came into the said ship, and other perils of the seas, the said goods and merchandize were greatly wasted, destroyed, damaged, and spoiled; whereby the plaintiff sustained an average damage or loss on the said goods and merchandize to a larger amount than £5 per cent. on all the money insured thereon, to wit, to the amount of £70 by the hundred, for each and every £100 insured thereon by the plaintiff, whereby the defendant then became liable to pay to the plaintiff a large sum of money, to wit, the sum of £70, being his, the defendant's, proportion of the said average loss, for and in respect of the said sum of £100 so by him insured as aforesaid; of all which said premises, he the defendant afterwards, to wit, on the day and year last aforesaid, had notice. [*Conclude as ante, 136.*]

Second count for general average, which plaintiff was obliged to pay, as owner of the goods insured, where it was necessary to cut away the masts, &c. in a storm. (g)

And the plaintiff further saith, that during the said voyage, to wit, on &c., on the high seas, the ship, with the said goods and merchandize on board the same, was, by storms and tempests, perils, and dangers of the seas, brought into great distress, and in danger of perishing and being lost and destroyed in the sea; wherefore the said master of the said ship, and the

(f) See 3 Taunt. 509.

(g) An eminent pleader at the bar was of

opinion that the general average might be recovered under the count for money paid, if

mariners thereof, for the general safety and preservation of the said ship and the said goods and merchandize on board the same, during such voyage, were necessarily obliged to cut away, and did then cut away divers masts, yards, sails, cables, anchors, ropes, and buoys, of and belonging to the said ship, and to cast and leave them in the sea, whereby they were lost; by reason whereof the plaintiff, in respect of his interest in the said goods and merchandize, then became liable to bear and pay a proportionable part of the value of the said masts, yards, sails, cables, anchors, ropes, and buoys, so lost as aforesaid, and thereby sustained a general average loss, amounting to a large sum of money, to wit, the sum of £70 by the hundred, for each and every £100 so by him insured as aforesaid, whereby the defendant then became liable to pay to the plaintiff the sum of £70, for and in respect of the said sum of £100 so by him insured as aforesaid; of all which said premises, the defendant afterwards, to wit, on &c. had notice. [*Add counts for money paid, had and received, account stated, and breach, as ante, 86.*]

PARTS OF
DECLARATIONS
ON A POLICY.

And the plaintiff further saith, that the said ship or vessel, in the said policy of insurance mentioned, afterwards, to wit, on &c. departed and set sail from the said port of — on her said intended voyage in the said policy of insurance mentioned, with certain goods and merchandize in and on board thereof, but that after her departure, and before the completion of the said voyage, and in the course thereof, to wit, on &c. on the high seas, the said ship or vessel was, by and through the force and violence of the winds and waves, and by the perils and dangers of the seas, forced, driven, and cast upon and against certain shoals and sands, and sand banks, and thereby then became and was strained, bulged, and disjointed, broken, and otherwise damaged in her body, rudder, irons, and other parts, in so much that by means thereof the said ship or vessel was wholly disabled from proceeding on her said voyage without being repaired as to the said damage so by her sustained as aforesaid; and in consequence thereof, and for the purpose of such repair, and the safeguard, safety and preservation of the said ship or vessel, the said ship or vessel was forced and obliged to be, and then was, piloted and attended by a pilot and a certain ship or vessel during her distress, and to be conducted, conveyed and carried into port, and unloaded and repaired; and on that occasion, and by reason and means of the said several premises, the plaintiff, by himself and his servants and agents, did labour for, in and about the safeguard, safety and preservation of the said ship or vessel, and in so doing, and in about the repair of the said ship or vessel, as to the said damage so by her sustained as aforesaid, and of the premises aforesaid, did necessarily lay out and expend a large sum of money, to wit, &c., to wit, on &c., in &c.; whereby the defendant, according to the tenor and effect of the said policy of insurance and his promise and undertaking thereupon, then became

Ship stranded and disabled from prosecuting her voyage without being unloaded and repaired, and for safety was piloted, and plaintiff incurred trouble and expense, whereby defendant liable to pay average loss. (h)

the plaintiff had paid the same to the owners of the ship. The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended, and labour bestowed about the defence, safeguard,

and recovery of the ship, to a much greater amount than the subscription, and it shall be recoverable as an average loss; see 4 Taunt. 367.

(h) See precedent, 1 Wentw. 450; 4 Taunt. 367; 2 Burr. 1167, 1172; and ante, 148.

**PARTS OF
DECLARATIONS
ON A POLICY.**

and was liable to pay the rateable part or proportion of the charges aforesaid, which he, the defendant, then ought to have paid and contributed in respect of his said insurance, amounting to a large sum of money, to wit, the sum of £——; of all which, &c. [*State notice of loss, and conclude as ante, 136.*]

For a rateable part of expense incurred in endeavouring to recover ship, according to terms of policy.
(i)

And the plaintiff further saith, that after the said capture of the said ship, and by reason and in consequence thereof, the said E. F. and G. H., for whose benefit the said insurance was so made as aforesaid, afterwards, to wit, on &c. did sue, endeavour, and labour to recover the aforesaid ship, and in so doing did then necessarily expend a large sum of money, that is to say, £600, whereby the defendant, according to the terms of the said policy of insurance and of his said promise and undertaking, then became liable to pay, and ought to have paid to the plaintiff, for the use of the said E. F. and G. H. the further sum of £100, being the rateable part or proportion of the expense aforesaid, which the defendant ought to have paid and contributed in respect of the insurance aforesaid; whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice. [*Conclude as ante, 136.*]

The ship damaged by bad weather, her cables, masts, &c. cut away, and she was forced to put into a port whereby another cable was destroyed, expense of salvage incurred, and consequent average loss.

And the plaintiff further saith, that afterwards, and during the said voyage, to wit, on &c. on the high seas, the said ship or vessel, and the tackle, apparel, and furniture thereof, by and through the mere force and violence of certain hurricanes of wind and stormy weather, and by the perils and dangers of the seas, became and was greatly strained, broken, shattered, damaged, and spoiled, and thereby the quarter-boards and star-board cable of the said ship or vessel, together with the companion-wheel and stern-sail thereof, were carried away and wholly lost to the plaintiff; and also thereby, and for the preservation of the said ship and cargo, the master and crew of the said ship or vessel were then forced and obliged to and did necessarily cut away the larboard anchor of the said ship or vessel, and a certain other cable of and belonging to the same, and likewise the stay-sail mast, with the boom-sail and rigging thereof, and all the wreck occasioned as aforesaid, and divers, to wit, two four-pound guns and one gun-carriage, were then, by the means aforesaid, washed overboard and wholly lost to the plaintiff, whereby, in order to repair the damage done to the said ship or vessel, and the tackle, apparel, and furniture thereof as aforesaid, the said ship or vessel was then necessarily forced and obliged to proceed, and did proceed, to the port of Kingston-upon-Hull, in the county of York, and there to unload the said cargo; and that, before her arrival at the said last-mentioned port, to wit, on &c. on the high seas, the said ship or vessel was necessarily obliged to and did slip and let go a certain cable and anchor belonging to the same, by means and in consequence of which said several premises and of the charges and expenses occasioned thereby, and by the salvage of the said last-mentioned cable and anchor, the plaintiff necessarily suffered and sustained an average loss, to wit, an average loss of £—— per cent. upon the said ship or vessel, so assured as aforesaid; and in consequence thereof, the defendant then became liable to pay to

(i) See precedents, 1 Wentw. 403; 4 Taunt. 367.

the plaintiff a certain sum of money, to wit, the sum of £—, being his proportion of the said average loss for and in respect of the said sum of £— so by him assured as aforesaid; of all which said premises the defendant, afterwards, to wit, on the day and year last aforesaid, had notice. [*Conclude as ante*, 136.]

PARTS OF
DECLARATIONS
ON A POLICY.

And the plaintiff further says, that afterwards, and whilst the said ship was proceeding on her said voyage, and before her arrival at the port of London aforesaid, to wit, on &c. in parts beyond the seas, the said ship or vessel, by the perils and dangers of the seas, sprung a leak, and became and was broken and damaged, insomuch that by means thereof the said ship or vessel was forced and obliged to and did put into the harbour of Lisbon, in the kingdom of Portugal; and that afterwards, and while she continued in the same harbour, to wit, on &c. the said ship or vessel, with the said cotton on board thereof, was, by the violence of the winds and waves, driven ashore, and stranded in the said harbour of Lisbon, and thereby the said ship or vessel then became and was incapable of further proceeding on her said voyage, and also thereby the said cotton then became and was greatly soiled, wetted, damaged, and spoiled, insomuch that it was then expedient and necessary to sell the said cotton, and the same was accordingly then sold at Lisbon aforesaid, and by means of the premises aforesaid the plaintiff sustained an average loss, to wit, an average loss of £60: 0s. 9d. per cent. upon and in respect of the said cotton; and thereby and according to the form and effect of the said policy of insurance and his said promise, the defendant then became liable to pay, and ought to have paid to the plaintiff, a certain sum of money, to wit, the sum of £120. 18s., being his the defendant's proportion of the said average loss for and in respect of the said sum of £200 so by him insured as aforesaid; of all which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice. [*In this case, being before the Reg. Gen. Hilary Term, 4 Will. 4, reg. 5, the declaration contained a second count for a total loss, stating that the ship was stranded and lost in the said harbour of Lisbon, and also thereby the said last-mentioned cotton became and was wholly lost to the said A. B. and never did arrive at London aforesaid. Of all which said several premises, &c. Notice to defendant, as ante, 136, and thereby, &c. liability of defendant to pay to plaintiff the said last-mentioned sum of £200, when, &c.*]

Average loss where the ship sprung a leak, and was forced to put into the port of Lisbon, where she was stranded and goods sold at a loss.

And the plaintiff further says, that afterwards, and whilst the said ship or vessel with the said sugar aboard thereof was proceeding on her said voyage, to wit, on &c. on the high seas, the said ship or vessel was, by and through the perils and dangers of the seas, struck and run aground, and became and was leaky, and thereby the said sugar then became and was wetted and greatly damaged, lessened in value, and spoiled, insomuch that by means thereof the said sugar was then obliged to be forthwith unloaded and sold, and by means of the several premises aforesaid, he the plaintiff suffered and sustained an average loss, to wit, an average loss of £10 per cent. upon the said share of the said sugar. [*State liability to pay defendant's proportion, and notice, as in the precedent, ante, 149.*]

Average loss on sugars, by the ship's becoming leaky, and the sugar thereby wetted and deteriorated in value.

**PARTS OF
DECLARATIONS
ON A POLICY.**

For an average loss, the anchor being entangled with the shore, it became necessary to cut it away, to proceed on the voyage, and the sails, &c. were torn away.

And during the said voyage, to wit, on &c. it became and was necessary to cast anchor in the port of — and the best bower anchor was then accordingly cast, and thereupon the same then became and was accidentally entangled in certain mooring-chains there, called Land Borringdon's Moorings, insomuch that it then became and was found impracticable and impossible to weigh and raise the same; and the plaintiff in fact saith, that afterwards, to wit, on &c. it became and was necessary for the said ship or vessel to proceed on her said voyage immediately, in order to join the first convoy to sail to the port of her destination; and it being then impossible to weigh or raise the said anchor, it then became and was necessary to cut the cable thereof, for the purpose of enabling the said ship or vessel to proceed on her said voyage, and the same was then accordingly cut, and a part thereof, together with the said anchor, being then of great value, to wit, of the value of £——, were then necessarily left at the moorings aforesaid; and the plaintiff in fact further saith, that afterwards, and during the said voyage, to wit, on &c., on the high seas, by the force and violence of the winds and waves, divers, to wit, twenty sails of the said ship or vessel were torn to pieces and destroyed, and divers, to wit, twenty ropes and twenty cables thereof torn away from the said ship, were then washed away and wholly lost, by means of which said several premises, &c. [*State the average loss, and defendant's liability to pay his proportion, and notice, as ante, 148, 149.*]

For average loss by tackle of ship being burnt and damaged by fire.

And the plaintiff further saith, that afterwards and whilst the said ship was proceeding on her said voyage, to wit, on &c. on the high seas, the said ship caught fire, whereby a great part of the tackle, apparel, ordnance, munition, artillery, boats, and other furniture of the said ship, in the said policy of insurance mentioned, then became and was wholly burnt and consumed by fire, and the residue thereof thereby then became and was greatly damaged, lessened in value, and spoiled, by means of which said several premises, he the plaintiff then sustained an average loss on the said tackle, apparel, ordnance, artillery, boats, and other furniture, so burnt and consumed with fire, and so damaged, lessened in value, and spoiled as aforesaid, above the amount of £3 per cent., that is to say, to the amount of £10 per cent., by means whereof, &c. [*State defendant's liability to pay proportion of average, and notice, as ante, 149.*]

For an average loss, ship was detained by embargo in this country, and during that time part of the goods were stolen.

And that afterwards, and whilst the said ship or vessel remained and continued at &c. aforesaid, waiting for convoy for the said voyage, to wit, on &c., the said ship or vessel, and the said two bales of woollen cloth, so shipped and loaded on board thereof, were respectively arrested and detained by the authority of our said lady the now queen, whereby the said ship or vessel was restrained and hindered from further prosecuting the said voyage; and that afterwards, and whilst the said ship or vessel was under such restraint and so detained as aforesaid, to wit, on &c., one of the said bales of woollen cloth, that is to say, the said bale of woollen cloth, No. 229, being of great value, to wit, &c. was taken and carried away by certain thieves, to the plaintiff as yet unknown, and wholly lost to the plaintiff, and by means of the said several premises aforesaid, he the plaintiff then sus-

tained an average loss, to wit, an average loss of £— per cent. on the value of the said two bales of woollen cloth, that is to say, for and in respect of the said bale of woollen cloth so lost as aforesaid. [*State defendant's liability to pay proportion of average, and notice, as ante, 149.*]

PARTS OF
DECLARATIONS
ON A POLICY.

After stating the loss and notice to defendant, proceed as follows:] And whereupon, afterwards, to wit, on &c., the plaintiff gave notice thereof to the defendant, and then, according to the usage and custom of merchants, abandoned and renounced to the defendant, and the other assurers who had subscribed the said policy, all his interest in the said ship and the other premises so insured as aforesaid, and then requested the defendant to pay to him the plaintiff the said money so by him insured as aforesaid, and which he the defendant by reason of the premises, and according to the custom of merchants, then ought to have paid to the plaintiff.

STATEMENT OF
ABANDONMENT.

Averment that plaintiff abandoned all his claim to the ship. (k)

After stating the loss, notice thereof to defendant, and his liability, as ante, 136, proceed as follows:] And thereupon the defendant and the plaintiff, afterwards, to wit, on &c., ascertained and adjusted the said loss to amount to a large sum of money, to wit, the sum of £100 per cent.; and the defendant, in consideration of the premises, then, by a certain memorandum of agreement, signed and subscribed by him on the back of the said writing or policy of insurance, undertook and then promised the plaintiff to pay to him, the plaintiff, the said sum of £200, so by him insured as aforesaid, in one month then next following. [*As to what are instruments of bottomry and as to insurances thereon, see Simonds v. Hodgson, 3 Bar. & Adolph. 50. And as to insurances against canal navigation risks, see Crowley v. Cohen, 3 Bar. & Adolph. 478.*]

STATEMENT OF
AN ADJUSTMENT.

Statement of adjustment of loss in an action on a policy of insurance. (l)

VI. ON LIFE POLICIES.

VI. ON
LIFE POLICIES.

For that whereas the plaintiff, heretofore, to wit, on &c. [*date of policy*], caused to be made a certain policy of assurance, whereby, in consideration of £— per cent., the receipt of which the defendant thereby acknowledged, the defendant did promise to and agree with the plaintiff, that he would well and truly pay, or cause to be paid, without any dispute, abate-

On a policy on life against an assurer who underwrote by agent. (m)

(k) See the precedents, 2 Saund. 202, 203, and note 19; 1 Mod. Ent. 225. It is not now usual to state the abandonment.

(l) See other precedents, 1 Wentw. 412, 458, 459. It is not necessary to state the adjustment specially as above, and it will suffice to declare on the policy generally, and the adjustment may be given in evidence under a general count; see Marshall on Insurance, 544 and 588; 1 Wentw. 412; but in some cases it is necessary to declare specially on the defendant's adjustment; 1 J. B. Moore, 563; 7 Taunt. 306; 3 Barn. & Cress. 9. An adjustment is not binding, if it in any degree proceeds on mistake; 3 Taunt. 286; 3 Chitty's Com. Law, 531, as to the effect of adjustment.

(m) See other precedents, 1 Wentw. 465 to 470. For forms in covenant, see post; and see Park on Ins. 429 to 440; Marsh. on

Ins. 664 to 680; Hughes on Ins. 496 to 504; Selwyn's N. P. tit. Insurance, 928 to 1037. Most of the principles which govern marine insurances are also applicable to contracts of this nature; see ante, 132 to 136; and see the cases collected in Harrison's Index, 2nd ed. tit. Insurance; and Chitty's Medical Jurisprudence, vol. ii.

Insurances on lives, wherein the insured have no interest, are prohibited by 14 Geo. 3, c. 48, s. 1, which directs that the name of the person interested, or on whose account the insurance is effected, shall be inserted in the policy. A creditor has in general an insurable interest in the life of his debtor; 9 East, 72; Von Lindenau v. Desborough, 8 Bar. & C. 586; Park. 432; Marsh. 673 to 676. But if the executor of the debtor pay the creditor, the latter cannot sue the insurer; 9 East, 72. A trustee may insure; Marsh.

ON LIFE
POLICIES.Reference to
policy.

ment, or contention whatever, unto the plaintiff, the full sum and sums of money which he had thereunto subscribed, on the following conditions, (that is to say) in case John Earl of Glencairn should die or decease out of his natural life, by any ways or means whatsoever, suicide and the hands of justice excepted, at any time between the [10th day of January, 1796, and the 10th day of January, 1797, both days included,] and during the life-time of the Dowager Countess of Glencairn, his mother; but in case the said Dowager Countess of Glencairn, his mother, should depart this life before the above-named John Earl of Glencairn, that policy or obligation to be null and void, and otherwise to be and remain in full force until the [10th day of January, 1797]; and by the said writing or policy of assurance, the interest of the plaintiff in the life of the said John Earl of Glencairn was valued at the sum insured; and by a certain memorandum thereunder written the said John Earl of Glencairn was "*warranted in health*," as by the said policy of assurance and memorandum more fully appears. And thereupon after-

676; 8 T. R. 22. And a mere *expectancy*, as a father's expectation that his son, on his coming of age, will make a will in his favour, is not insurable; *Halford v. Kymor*, 10 Bar. & C. 724. See further Selw. N. P. 10th edit. 1030.

It is usually one of the conditions of the policy that the insured shall subscribe a declaration or warranty, containing a statement of the age, state of health, and other circumstances relating to the life insured. Upon the truth of this declaration (which is construed literally, *Duckett v. Williams*, 2 Cr. & M. 348,) the validity of the contract depends. A warranty that the party is in good health, will not, however, be falsified by proving that he laboured under a particular infirmity which had no tendency to shorten life; 1 Bla. Rep. 312; Park, 438; Marsh. 667; Hughes, 500. Nor is it to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life, is a disorder tending to shorten life, within the meaning of the declaration of insurance offices, from the mere circumstance that he afterwards dies of it, if it be not a disorder necessarily having that tendency; 4 Taunt. 763. But if particular questions be asked, which are not fairly answered, as if the name of a physician who last attended be withheld, this avoids the policy if material, though the death happened from another disorder, and the creditor for whose benefit the policy was made was in no ways privy to the fraud; 5 D. & R. 266; 1 Car. & P., S. C.; and see 3 Bing. 60; 6 Taunt. 186; see exception, *Swete v. Fairlee*, 6 Car. & P. 1. If no such warranty be required, the insurer takes the risk upon himself; though even in this case fraud or misrepresentation will prevent the insured from claiming the benefit of the policy; *id. ibid.* Interest is not recoverable on a policy; 3 D. & R. 613; but see 3 & 4 W. 4, c. 42.

The Declaration.—As to the mode of stating a policy in general, see *ante*, 132 to 136, notes. It is usual to recite the policy *verbatim*, together with all the proposals and conditions to which it refers; though it is not necessary in this or in any other case of special *assumpsit* on an agreement not under seal, to state any

more than is relevant to the plaintiff's cause of action; 6 East, 567; 4 Taunt. 287. The plaintiff must also state his compliance with the conditions of the policy, his interest in the life insured, (which by Reg. Gen. Hil. T. 4 W. 4, may be in the alternative,) and the truth of his warranty or declaration, if any such were made. By Reg. Gen. Hil. T. 1834, r. 5, it is declared that two or more counts on the same policy shall not be allowed; but a count upon a policy, and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed. If the policy be under seal, the declaration must be in debt or covenant. The 6 Geo. 1, c. 18, s. 4, prescribes the form of declaring against the two incorporated insurance companies. This form, which was not absolutely enforced by the statute, has not, however, been usually adopted; see 2 Marsh. on Ins. 601.

Plea.—The most usual plea is the general issue, *non assumpsit*, which formerly put in issue every material fact alleged in the declaration. But since Reg. Gen. Hil. T. 4 W. 4, the general issue that defendant did not promise, only puts in issue the *subscription* of the alleged policy by the defendant; and all other matters of defence, as denials of the *interest*, commencement of the risk, loss, or alleged compliance with warranties, must be specially pleaded. In actions of debt and covenant against the two insurance corporation companies they are allowed to plead *nil debet* or *non-infregit conventionem*; see 11 Geo. 1, c. 30, s. 43; 2 Marsh. 601.

Evidence.—In an action by a husband, on a policy of insurance on the life of his wife, her declarations are admissible, to show her own opinion of her state of health at the time of effecting the policy; see 6 East, 188; 2 Smith's Rep. 646, S. C. Unwritten evidence will not be permitted to vary or contradict the terms of the policy; Skin. 54; 3 Campb. 58; 4 Taunt. 846. Where the defendant underwrites by agent it will be sufficient proof of his agency that the defendant usually recognized policies so subscribed, without producing the agent's authority in writing; 4 Campb. 88.

wards, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, had then paid to the defendant a certain sum of money, to wit, the sum of £3. 3s. as a premium for the assurance of £100 upon the premises mentioned in the said policy of assurance, and had then promised the defendant to observe, perform, and fulfil all things in the said policy of assurance contained on the part and behalf of the assured, he the defendant then promised the plaintiff that he the defendant would become and be an assurer to the plaintiff of the said sum of £100 upon the premises, and would perform and fulfil all things in the said policy of assurance contained on his part and behalf as such assurer to be performed and fulfilled; and the defendant then became and was an assurer to the plaintiff, and then by one E. F., his agent in that behalf, subscribed the said policy of assurance as such assurer of the said sum of £100 as aforesaid: and the plaintiff saith, that at the time of making the said policy of assurance, and of the said promise of the defendant, the said John Earl of Glencairn was in health, and that the plaintiff was then, and from thence until the time of the death of the said John Earl of Glencairn, interested in the life of the said John Earl of Glencairn to a large amount, to wit, to the amount of all the monies by him ever caused to be insured thereon; and the plaintiff further saith, that after the making of the said policy of assurance, and between the [said 10th day of January, 1796, and the said 10th day of January, 1797,] in the said policy of assurance mentioned, during the life-time of the said Dowager Countess of Glencairn, the mother of the said John Earl of Glencairn, to wit, on &c., (o) the said John Earl of Glencairn died by other ways and means than by suicide, or by the hands of justice; of all which premises the defendant afterwards, to wit, on the day last aforesaid, had notice; and was then requested by the plaintiff to pay him the said sum of £100, so by him assured as aforesaid, and which said sum of £100 he the defendant then ought to have paid to the plaintiff. [*Add counts for money had and received for the premium, account stated, and the common conclusion, as ante, 36.*]

ON LIFE
POLICIES.Payment of
premium.Mutual prom-
ises.Defendant's
subscription of
policy.Averments of
health of life
insured.Plaintiff's in-
terest. (n)Death of life
insured.Notice to de-
fendant, &c.

For that whereas the plaintiff heretofore, to wit, on &c. [*date of policy*], caused to be made a certain policy of insurance, whereby, after reciting that the plaintiff, therein described by the name and addition of —, of &c., esquire, being interested in the life of E. F., wife of the plaintiff, of — aforesaid, was desirous to effect an insurance with the Atlas Company on the life of the said E. F., for the term of one year, commencing from &c., and ending &c., and renewable from time to time at his option, at the end of every year, during the term of one year, and that the plaintiff accordingly paid, at the said company's office in Dublin, the sum of £82 Irish currency, as a premium of such insurance for one year, the defendants, three directors of

On the life of a
third person,
not under seal,
against the At-
las Assurance
Company, sta-
ting the policy,
declarations,
proposals, and
averments. (p)

(n) See *ante*, 132. By Reg. Gen. Hil. T. 4 W. 4, reg. 5, it is ordered that in actions on policies of insurance the interest on the assured may be averred thus: "That A. B. C. and D., or some or one of them, were or was interested, &c.;" and it may also be averred, "That the insurance was made for the use and benefit and on the account of the person or persons so interested."

(o) Day of the death, or about it.

(p) See notes to last precedent. It will

be observed, that the policies of some of the companies are so framed as to contain no personal contract to pay, so as to sustain an action at law, but at most a charge on the stock or funds of the company; and on a special case from equity, it was held that in such a case no action is sustainable; but the companies rarely venture to take that legal objection. See *Anscomb v. Shore*, in K. B., A. D. 1818, argued by Puller and Chitty.

ON LIFE
POLICIES.

Payment of
premium and
mutual pro-
mises.

Averment of
contents of de-
claration.

the said company, whose hands were thereto subscribed and affixed, relying upon the truth of a certain declaration, bearing date on &c., and made by the plaintiff, in compliance with the conditions on the said policy indorsed, did agree with the said assured that they, the said three directors, would, in case the said E. F. should happen to die at any time within the term of one year commencing from and ending at the respective times therein and hereinafore mentioned, pay out of the stock and funds of the said company to the said assured, his executors, administrators, and assigns, within three months after the decease of the said E. F. should have been certified to the said directors of the said company, at their principal office, the sum of £5000 Irish currency; [and that if the said E. F. should survive the said term of one year, and the said A. B., his executors, administrators, and assigns should, on &c., in every subsequent year during so many years of the said term of seven years as the said E. F. should happen to live, pay at the office of the said company the like premium of &c., Irish currency; and if the said E. F. should actually depart this life during the said term of years, then that the said three directors would, within three months after the decease of the said E. F. should have been duly certified as aforesaid, pay out of the stock and funds of the said company to the said assured, his executors, administrators, and assigns the sum of £5000 Irish currency:] provided always, and it was declared by the said policy, that the funds and property of the said company for the time being should be answerable to the demands thereupon under the said policy; and that neither the persons who were subscribers thereto, nor any other member of the said company should, upon any account, be subject or liable to any demands beyond his or her share or interest in the capital, stock, or funds of the said company, and which share was set opposite to his or her signature to the deeds of settlements establishing the said company, or mentioned in some other deed referring thereto, and declaring him or her to be a member thereof, (any thing contained in the said policy to the contrary notwithstanding): provided also that the said policy, and the assurance thereby effected, should at all times and under all circumstances be subject to such conditions and stipulations as were contained in the printed proposals indorsed thereon, in the same manner as if the same were there wholly and actually repeated and adapted to that present case; as by the said policy, reference being thereunto had, will fully appear; and thereupon afterwards, to wit, on &c. in consideration that the plaintiff, at the request of the defendants, had heretofore, to wit, on the day and year last aforesaid, paid to the said company a certain sum of money, to wit, the sum of £82 Irish currency, as a premium or reward for the insurance of the said sum of £5000 Irish currency, upon the life of the said E. F. as in the said policy is mentioned, for one year, to wit, from &c. to &c., aforesaid, in the said policy of insurance mentioned, and had then promised the defendants to perform and fulfil, &c. [*State mutual promises to perform policy, same as ante, 135.*] And the plaintiff further saith, that the said declaration in the said policy mentioned was and is a certain declaration as follows, (that is to say) I, A. B., of Merion Street, in the city of Dublin, being desirous to make an assurance with the directors of the Atlas Assurance Company, in the sum of 5000, upon the life of E. F., born in the parish of &c., on &c., but now residing at Merion Street, in the city of Dublin, do hereby declare to the best of my belief, that the said E. F. is

not, nor has she been, afflicted with gout, asthma, fits, or any other disorder which tends to shorten life; that she has had the small-pox (or cow-pox), and that the age of the said E. F. does not exceed twenty-seven years, and that I have an interest in the life of the said E. F. to the full amount of the said sum of £5000; and I do hereby agree that this declaration shall be the basis of the contract between me and the said company, or any of the members thereof, and that if any untrue averment is contained in this declaration, in setting forth the age, state of health, profession, occupation, or other circumstances relative to the said E. F., all monies which shall have been paid to the said company, or to any member thereof, upon account of the insurance so made by me, shall be forfeited. Dated, &c. And the plaintiff further saith, that in the printed proposals mentioned and referred to by the said policy of insurance, it was expressed and declared, that persons proposing to effect life insurances would be required to state the following particulars, namely, [*Here state the proposals, which are sometimes as follows:*] name and residence of the party by whom the proposal was made; name, residence and profession of the party whose life is to be insured, and in case of an assurance upon survivorship, the name, residence and profession of each party, place and date of birth, and age next birthday; sum to be insured, and the name and residence of the medical gentleman to be referred to for the state of the person's health; whether afflicted with the gout, asthma, or any other disorder which tends to shorten life; whether the party had had the small-pox or cow-pox; whether the party would attend personally at the office; whether employed in the military or naval service; a declaration as to all the above points would be considered as the basis of the contract between the assured and the company; if any such declaration should not be in all respects true, then the policy would become void, and the premium that might have been paid would be forfeited; the lives of persons in the military or naval service might be assured at the office on moderate terms; that no assurance should be in force until the premium should have been paid, nor would any policy be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium conditioned for the renewal of such policies should have been paid within that period; that assurances might be revived at any period not exceeding three months, on sufficient proof of the unimpaired state of health of the party, and on payment of the premium, with the addition of 5s. for every £100 so assured; that such policies would become void if the parties whose lives had been assured should go beyond the limits of the United Kingdom, or should die on the high seas, (except in his majesty's packets passing between Great Britain and Ireland,) unless permission should have been granted to leave the United Kingdom, which might be obtained on such parties attending personally to give every requisite explanation, and paying a premium adequate to such risk; that when parties whose lives have been assured should not appear personally at the office, an additional charge of £10 per cent. would be made on the sum assured; that assurances made by persons on their own lives would be void if they should die by the hand of justice, by duelling, or suicide; but should the family of such person be left in distress and poverty, the directors, in their own discretion, would make such allowance in respect of the policies of the deceased as they

Averment of
contents of
printed propo-
sals.

**ON LIFE
POLICIES.**

Averment of
truth of the
written decla-
ration.

Other aver-
ments.

E. F.'s death
certified.

Proof of death
adduced.
Plaintiff's gene-
ral performance
of conditions.

might deem just and reasonable; that if any person should become desirous of discontinuing an insurance effected in that office, the company would purchase the interest in such policy at an equitable valuation; that transfers might also be made by any person without giving notice to the company; that persons effecting assurances on other lives than their own would be required to state the nature of the interest they possessed in such lives; that all claims upon the company would be paid within three months after satisfactory proof should be produced of the death of the persons on whose lives assurances had been effected. And the plaintiff in fact says, that the said last-mentioned declaration, so referred to in the said policy as aforesaid, so by him made as aforesaid, was in all respects true. And the plaintiff further saith, that at the time of the making of the said last-mentioned declaration, and also at the time of making of the said last-mentioned policy of insurance, and of the said last-mentioned promise of the defendants as last aforesaid, and also at the time of the death of the said E. F., as hereinafter mentioned, he, the plaintiff, was interested in the life of the said E. F. to a large amount, to wit, to the amount of all the monies by him insured thereon. (q) And that he, the plaintiff, did, before the making of the said policy of insurance, to wit, on the day and year last aforesaid, state to the said company the nature of the said interest which he, the plaintiff, possessed in the life of the said E. F.; and the plaintiff further saith, that afterwards, to wit, on &c. [*the day of death, or about it,*] aforesaid, the said E. F. died; and the plaintiff further saith, that the decease of the said E. F. as aforesaid was afterwards, to wit, on &c., duly certified to the said directors of the said company, at their principal office, at &c., and that afterwards, to wit, on the day and year last aforesaid, satisfactory proof was produced to the said company by the plaintiff of the death of the said E. F. as aforesaid; and although the plaintiff hath in all things conformed himself to, observed, performed, fulfilled, and kept all things in the said policy of insurance, and the said conditions, and the said stipulations contained, on his part and behalf to be observed and performed, according to the form and effect of the said policy of assurance, and of the said proposals and conditions; and although the said stock and funds of the said company always, from the time of the making of the said policy of insurance, have been, and yet are sufficient to pay to the plaintiff the said sum of £5000; and although three months after the decease of the said E. F. was duly certified to the directors of the said company at their principal office as aforesaid, and after satisfactory proof was so produced of the death of the said E. F. as aforesaid, have long since elapsed; of all which premises the defendants, afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice, and were then requested by the plaintiff to pay him the said sum of £5000, so by them insured as aforesaid; yet the defendants, disregarding their said promise, have not yet paid the said sum of £5000, or any part thereof, but have hitherto wholly neglected and refused so to do, and still neglect and refuse so to do.

(q) See note (n), *ante*, 185.

VII. FOR GENERAL AVERAGE.

For that whereas the plaintiff, before and at the several times hereinafter mentioned, was owner of a certain ship or vessel called the —, and of her tackle, anchors, masts, boats, and appurtenances, the same being of great value, to wit, of the value of £ —; and which ship or vessel was then proceeding on a certain voyage, to wit, from &c., towards &c., with certain goods and merchandizes of the defendant, of great value, to wit, of the value of £ — on board thereof, to be carried and conveyed therein on freight during the said voyage.* And thereupon, whilst the said ship or vessel was sailing and proceeding on her said voyage with the said goods and merchandize on board thereof, to wit, on &c., by storms, winds and tempestuous weather, one of the anchors of and belonging to the said ship or vessel, and then being the property of the plaintiff, and of great value, to wit, of the value of £ —, was washed, forced and driven overboard from and out of the said ship or vessel, and became and was suspended on the side of the said ship or vessel, and entangled in the rigging thereof; and thereupon, in order to preserve the said ship or vessel and the goods and merchandizes on board thereof, it then became and was expedient and necessary to cut away the jibs and forestay-sail, and the downhall and bury rope, and other parts of the rigging of and belonging to the said ship or vessel, and then being the property of the plaintiff, of great value, to wit, of the value of £ —, and the same were then accordingly cut away, and thereby then became and were wholly lost to the plaintiff: and the plaintiff further saith, that by means of the said damage and loss, and other damage to the said ship or vessel occasioned by the said storms, winds and tempestuous weather, the said ship or vessel became and was so greatly damaged that it then became and was expedient and necessary, in order to preserve the said ship or vessel and her cargo on board thereof, for the said ship or vessel to put back again to — aforesaid, and to repair the said damage so occasioned as aforesaid; and the said ship or vessel, with the said goods and merchandizes of the defendant so on board thereof, did thereupon then put back and sail back again to — aforesaid, and the said damage was then repaired, and the necessary expenses incurred by the plaintiff in the premises amounted to a large sum of money, to wit, the sum of £ —, and the plaintiff further saith, that whilst the said ship or vessel was so repairing as aforesaid, to wit, on &c., at — aforesaid, the plaintiff was forced and obliged to pay the wages and maintenance of divers, to wit, fifty seamen, of and belonging to and then in and on board the said ship or vessel, in the whole amounting to £ —; and the said goods and merchandizes were, by means of the premises, then saved and preserved, and arrived safely into the hands and possession of the defendant; of all which said several premises the defendant afterwards, to wit, on &c., had notice; and by reason of the premises, and of the defendant so being such owner of the said goods and merchandizes so on board the said ship or vessel, on freight

FOR
GENERAL
AVERAGE.

By the owner of a ship, against a person who had goods on board, for his proportion of general average loss, accruing from damage done by the loss of an anchor cut away to preserve the ship and cargo, as also for loss of boats, and for repairs of such ship in part. (r)

(r) See precedents, 1 East, 220; 4 Taunt. 124. Damage done to ship by tempest falls also on the owners; 6 Abbott on Shipping, 4th ed. 261. And for law as to average in general, see Abbott on Shipping; Holt on

Shipping; Marshall on Insurance; Park on Insurance; Hughes on Insurance, 284, &c.; 3 Chit. Com. Law, 432. See also 3 Campb. 480; 2 Marsh. 309; 2 M. & S. 482; 4 Bing. N. C. 134.

FOR
GENERAL
AVERAGE.

as aforesaid, and so saved and preserved by the means aforesaid, he the defendant, as such owner, became and was liable to contribute to the said losses, damages, and expenses, in a general average. And thereupon, in consideration of the premises, the defendant then promised the plaintiff to pay him so much money as he the defendant, as owner of the said goods and merchandizes, was by reason of the premises liable to contribute to the said losses, damages and expenses, in a general average, when he the defendant should be thereunto requested: and the plaintiff avers, that the defendant, as such owner of the said goods and merchandizes, was, by reason of the premises, liable to pay and contribute to the said losses, damages, and expenses, in a general average, a large sum of money, to wit, the sum of £—; whereof the defendant, afterwards, to wit, on the day and year last aforesaid, had notice.

Before the rules, prohibiting a second count on the same policy, it was usual to add a second count, and the form of which will be found in the 5th edit. 218, but which now can only assist in framing a distinct declaration. An indebitatus count for general average used also to be added, with a count for money paid, and an account stated, &c. but now they are to be omitted.

For an average loss, anchor being cut away, it being entangled with the shore, and the ship sailing after convoy, sails, &c. being blown away from the ship.

As in the last precedent to the asterisk in page 159.]* And whereas also, during the said voyage, to wit, on &c. it became necessary to cast anchor in the port of E., and the best bower anchor was then accordingly cast, and thereupon the same then became and was entangled in certain mooring-chains there, insomuch that it then became and was found impracticable and impossible to weigh and raise the same; and the plaintiff in fact saith, that afterwards, to wit, on &c., it became and was necessary for the said ship or vessel to proceed on her said voyage, and immediately to sail, in order to join the first convoy to the port of her destination; and it being then impossible to weigh or raise the said anchor, it then became necessary to cut the cable thereof, for the purpose of enabling the said ship or vessel to proceed on her said voyage, and the same was then accordingly cut, and a part thereof, together with the said anchor, being of great value, to wit, of the value of £—, &c., was then necessarily left at the moorings aforesaid: and the plaintiff in fact further saith, that afterwards, and during the said voyage, to wit, on &c., by the force and violence of the winds and waves, divers, to wit, twenty sails of the said ship or vessel were torn to pieces and destroyed, and divers, to wit, twenty ropes and twenty cables thereof torn away from the said ship, the same then being the property of the plaintiff, of great value, to wit, of the value of £—, and the same were then wholly lost to the plaintiff; of all which said premises the defendant afterwards, to wit, on the day and year aforesaid, had notice; and by reason of the premises became liable to contribute &c. [*Conclude as in the last precedent.*]

For general average, where ship damaged by storms, and obliged to put into port, and be laid on beach, where she, by weight of cargo, be-

Same as the precedent, ante, 159, to the statement of the damage, and then proceed as follows:] The said ship or vessel having the said goods and merchandize on board her as aforesaid, was, by and through the perils and dangers of the seas, and the force and violence of the winds and waves, and by means of stormy and tempestuous weather in the course of such voyage, greatly damaged, strained, and rendered leaky, insomuch that divers large quantities of water entered the same; and the said ship or vessel, with the

said goods and merchandizes on board thereof, being thereby in great and imminent danger of sinking and foundering, it afterwards, to wit, on &c. last aforesaid, became and was necessary and expedient, for the preservation and safety of the said ship or vessel and the said goods and merchandizes, to put into a certain harbour, to wit, the harbour of Cork, and then to lay the said ship or vessel, with the said goods and merchandizes on board her, on a certain beach there, and the same was accordingly laid on such beach; and thereby, and by means of the several premises, the said ship or vessel, her tackle and appurtenances, respectively became and were unavoidably greatly bilged, broken, injured and deteriorated, and rendered of little or no value to the plaintiff; but the said goods and merchandizes of the defendant were thereby saved and preserved from loss and damage with great trouble and expense, to wit, an expense of £—; and the same were afterwards, to wit, on &c., safely and securely delivered to the defendant; of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and by reason of the premises, and of the defendant being owner of the said goods and merchandizes during the said voyage, and at the time when the said brig or vessel was so strained, laid upon the beach, broken, injured and deteriorated as aforesaid, and being thereby benefited as aforesaid, he the defendant then became liable to contribute to the said loss or damage and injury, so occasioned to the said ship or vessel as aforesaid, in a general average; and thereupon, &c. [*State promise, and averment, and notice, as in the precedent, ante*, 160.

For
GENERAL
AVERAGE.

came bilged, and defendant's goods being saved, he became liable to pay proportion of injury and expense incurred in saving goods.

See Gould and others v. Oliver, 4 Bing. N. C. 134; 2 M. & Gr. 211.

By the proprietor of goods

laden on the deck of a ship, according to the custom of a particular trade for contribution from the ship-owner for a loss by jettison.

VIII. ON CHARTER PARTIES.

VIII. ON
CHARTER
PARTIES.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c. [*date of charter-party*], by a certain charter-party of affreightment then made between the plaintiff, therein described to be the part owner of the good ship or vessel

On charter-party, by owner of ship against freighter, for not despatching ship, and not loading her, and for non-payment of freight and demurrage. (s)

(s) See precedents and notes in covenant, *post*. And see a form, *Irving v. Clegg*, 1 Bing. N. C. 53. As to charter-parties in general, see *Abbott on Shipping*, 5th edit. 162 to 211; *Holt on Shipping*; 3 Chit. Com. Law, 387, 426. The action must be brought in the name of the contracting party, see 2 Taunt. 407, 414; 10 East, 279; *Abbott*, 165; *ante*, vol. i.; 2 M. & S. 426; 4 Taunt. 4, 52; 1 Camp. 532, and the cases collected in *Harrison's Index*, title "Ship." See a form of declaration on a charter-party for detention in not fixing a time for loading, *Harper v. M'Carthy and another*, 2 N. R. 258.

As to the Declaration.—The charter-party is sometimes under seal, in that case the plaintiff must frame his declaration specially upon the deed, 1 New Rep. 104; *sed quæ* whether in an action brought by and against the parties to the deed, the declaration may not be framed in debt generally, and the deed given in evidence. See per *Bailey, J.*, 4 B. & C. 968. If the owner execute a deed to the freighter containing a covenant for the right

delivery of the cargo, he cannot afterwards be sued by the merchant in an action of assumpsit, grounded on the bill of lading, signed by the master; 10 East, 378; *Abbott*, 186. So where the master of a ship entered into a charter-party under seal, on behalf of the owners, with one partner of the firm, the owners cannot maintain assumpsit for the freight against the whole firm; for though the parties are different, the interest is the same, 1 M. & S. 573. An action may, however, be maintained on a parol contract, notwithstanding a sealed charter-party, if such contract be distinct in its provisions and not inconsistent with the deed; 12 East, 578. Where the owner and freighter covenant by deed, that forty days shall be allowed for loading and unloading, the freighter impliedly covenants not to detain the ship longer than that time, and if he do, the owner's remedy is upon the deed, and not in assumpsit, as upon an implied contract; 12 East, 179; 4 Campb. 131; 2 Chit. Rep. 570. And where a charter-party under seal was made by the master,

ON CHARTER-PARTIES.

Statement of the charter-party.

called the [Neptune] of the burthen of [one hundred and forty-two tons] or thereabouts, whereof G. H. was master, then lying in the river Thames, (t) of the one part, and the defendants, therein described of the city of London, merchants, freighters of the said ship, of the other part, (t) it was witnessed [here set forth the charter-party in the past tense, as thus:] amongst other things, that the said owner, for the considerations thereafter mentioned, did thereby promise and agree to and with the said freighters, their executors, administrators and assigns, that the said ship, being tight, staunch and strong, and every way properly fitted, victualled and manned with all things needful and necessary, as is usual for vessels in merchants' service, and for the voyage thereafter named, the said master should and would receive on board the said ship, from alongside in the river Thames, a full and complete cargo of such lawful goods, wares and merchandizes, as should be tendered for the said vessel by the said freighter or his agents, and from no other person or persons in the port of London, that is to say, in the whole as much as could be laden and stowed in the said ship or vessel over and above her provisions, tackle and furniture, (the master's cabin, and sufficient room for his crew excepted,) and being so fully laden and despatched, he the said master should and would (wind and weather permitting) set sail in and with the said ship, and proceed for the port of Gibraltar, or so near thereto as she might safely get, and, being arrived there, should and would address himself with the said ship to the freighters' correspondents, and make a right and true delivery of the cargo unto them the said freighters' agents, correspondents, or assigns, or their order, according to bills of lading which might have been signed for the same, and having discharged such part of the cargo as might be required to be unladen at the port of Gibraltar, should, if required, immediately proceed to a port on the coast of Spain, not higher up than Valencia, and address himself as aforesaid, and make a right and true delivery of the remainder of the cargo, and thus end and complete the said intended voyage (the act of God, the queen's enemies, restraints of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever excepted): and it was thereby further declared and agreed, that the said owner, for and in consideration of the payment of the freight thereafter agreed on, should effect an insurance to the amount thereof, holding the policy as a security for the same, deducting the premium of insurance; in consideration whereof, and of every thing above mentioned, the defendants for themselves, their executors and administrators, did thereby promise and agree to and with the plaintiff, his executors, administrators or

in that character, with merchants who did not know that he was also a part owner in the ship, as in fact he was; it was held, they might sue him and the other owners in an action upon the case, for a breach of such general duties as were not inconsistent with the stipulations of the charter-party, such as the not providing necessaries for the voyage, and employing a negligent and unskilful master; 3 B. & B. 171; 6 J. B. Moore, 415, S. C.; and see 8 Bar. & Cres. 166; 2 Moo. & Ry. 47, S. C. See a form in Case, post, also the form in Case, in 6 J. B. Moore, 415.

If the freighter covenant to provide a full cargo, consisting of copper, tallow, and hides, or other goods, he is not bound to provide a

properly assorted cargo, and he is not obliged to furnish any copper, though without it the ship would be kept in ballast, and the freight would be materially diminished; 4 Campb. 103.

It is usual for the parties to these contracts to bind themselves to each other in a penal sum for the performance of their respective stipulations, but this does not preclude the party from bringing his action on any of the other clauses, and he may recover damages beyond the amount of the penalty; 13 East, 343; 1 Bla. Rep. 395; Abbott, 5th edit. 170; but see 1 Campb. 78.

(t) Let this description of the parties agree with their description in the charter-party.

assigns, that they should and would load the said vessel with a cargo of merchandize, and despatch her for Gibraltar, and one other port on the coast of Spain, and, on the arrival of the said vessel there, receive the said cargo out of her, according to the custom of their ports of loading and unloading respectively, and within the days thereafter agreed on; and further that the said freighters should and would well and truly pay, or cause to be paid, unto the said owner, or his order, freight for the said voyage £850, provided the said vessel was required to proceed from Gibraltar to a port on the coast of Spain not higher up than Valencia, but if the cargo was wholly discharged at Gibraltar, then £756 was to be paid in full for freight for the said voyage, of lawful money of Great Britain, with five per cent. like money for primage and taking the measurement of the cargo, and in lieu of all port charges and pilotage whatsoever, during the said intended voyage; but should the ship discharge at a port on the coast of Spain, then all port charges at such port to be paid by the freighter's agents, the said freight to be paid as follows, £350, and with five pounds per cent. primage, by the acceptance of the freighters at three months' date; and £300, with five pounds per cent. primage, by the said acceptance at four months' date from the day the ship should clear outwards at the custom-house in London; and £100 more, with five pounds per cent. primage thereon, by the said acceptance at sixty days' sight, upon receipts being received of a right and true delivery of the cargo, or such part thereof as might be discharged at Gibraltar, and one £100 more, with five pounds per cent. thereon, by the said acceptance at sixty days' sight, on a right delivery at a port on the coast of Spain as aforesaid, if so required. And it was mutually agreed by and between the said parties, that thirty running days should be allowed for loading at London, and ten days for unloading the said ship at the port or ports of discharge, to commence in London from the day the said master should be ready to load, to recommence in Gibraltar from the day the said master should be ready to begin to unload, and notice thereof having been given to the agents of the said freighters, the vessel having free pratique and being current at the custom-house, cease when discharged, and recommence from the day the said master should be ready to begin to discharge at the ordered port on the coast of Spain; and it was thereby further agreed between the said parties, that it should and might be lawful for the said freighters or their agents to retain and keep the said vessel at the port of discharge ten days on demurrage, over and above the lay days before limited, at and after the rate of six pounds six shillings per day, to be paid day by day as the same should become due, and the said vessel should be despatched so as to enable the master to join and sail with the first regular convoy that might be appointed to sail in July from Portsmouth for the Mediterranean, wind and weather permitting, any thing contained therein to the contrary in anywise notwithstanding; and the said charter-party of affreightment being so made as aforesaid, afterwards, to wit, on the day and year first aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendants, had then promised the defendants to perform and fulfil the said charter-party of affreightment in all things on his part and behalf to be performed and fulfilled, they the defendants then promised the

ON CHARTER-
PARTIES.

Mutual pro-
mises. (u)

(u) As to the wording of the mutual promises, see *Thornton v. Jenyns and others*, 1 M. & Gr. 166.

ON CHARTER-PARTY.

Averment that the vessel was tight, staunch &c. (x)

And the master ready to receive the cargo on board, and did receive the same on board, and other performance.

Defendants' breach not despatching the vessel, and plaintiff's consequent expense.

Second breach, not loading and despatching within specified lay days. (y)

plaintiff to perform and fulfil the said charter-party of affreightment in all things on their part and behalf to be performed and fulfilled; and the plaintiff in fact saith, that the said ship within a reasonable time after the making of the said charter-party, to wit, on the day and year first aforesaid, was tight, staunch and strong, and every way properly fitted, victualled and manned, with all things needful and necessary, as was usual for vessels in merchants' service, and for the voyage in the said charter-party mentioned; and thereupon the said master was then ready and willing to receive, and did afterwards, to wit, on &c., receive on board the said ship, in the river Thames aforesaid, a cargo of such lawful goods, wares and merchandizes, as they the defendants tendered for the said vessel, and from no other person or persons, and afterwards, to wit, on &c., being fully laden and despatched, did then set sail in and with the said ship and cargo, and proceed for the port of Gibraltar aforesaid, and being afterwards, to wit, on &c., arrived there, made a right and true delivery to the agents, correspondents and assigns there of the defendants, according to bills of lading, of such parts of the said cargo as the said agents and correspondents and assigns required to be there delivered, and afterwards, being thereto required, to wit, on &c., proceeded to a port on the coast of Spain not higher than Valencia, to wit, the port of Malaga, and there, to wit, on &c., made a right and true delivery of the remainder of the said cargo to the agents of the defendants, according to the terms of the said charter-party; and the plaintiff saith that although he hath always performed and fulfilled all things in the said charter-party mentioned on his part and behalf to be performed and fulfilled; yet the defendants, not regarding their said promise, did not despatch the said vessel upon the voyage aforesaid, so as to enable the master to join and sail with the first regular convoy that was appointed to sail in July from Portsmouth for the Mediterranean, but, on the contrary thereof, kept and detained the said vessel a long space of time, to wit, for the space of two months, after the sailing of the first convoy was appointed to sail in July aforesaid, from Portsmouth for the Mediterranean, before she was despatched from the Thames aforesaid upon the said voyage, whereby the plaintiff was put to much cost and charge, and expended a large sum of money, to wit, the sum of £300, in and about the maintenance of the master and mariners of the said vessel during the time aforesaid, and lost and was deprived of great gains and profits which he would have had and acquired by the use of the said vessel during the said time; and the plaintiff further says, that the defendants did not nor would, within the number of days in the said charter-party mentioned on their behalf respectively, load the said vessel with a cargo of merchandize, at &c, and despatch her from thence on the said voyage, and receive the said cargo at the said ports of discharge, according to the tenor and effect of the said charter-party and the said pro-

(x) The plaintiff must aver the performance of every act which constituted a condition precedent, or state some excuse for the omission, and the following averments must only be adopted when the conditions are the same in the charter-party, as in this particular case. Where a charter-party provided that a vessel should proceed to a certain place, and there land a full cargo, the vessel to sail from England on or before the 4th of February next, it was held that the sailing on or before the

4th of February was a condition precedent; *Glaholm v. Hays*, 2 M. & Gr. 257.

(y) As to the calculation of the lay days, see next note. If a new port for that mentioned in the charter-party be substituted by consent of the parties, this will not affect the lay days mentioned in the original contract; *Jackson v. Galloway*, 5 Bing. N. C. 71. As to the form of the breach, see *Hoggett v. Ealey*, 6 Bing. N. C. 207.

mise and undertaking; but, on the contrary thereof, kept and detained the said vessel after she was ready to receive her cargo aforesaid, at &c., and they had notice thereof, and after she was ready to deliver the same at the ports of discharge aforesaid, and they had notice thereof, in and about the loading and unloading of the said vessel at the said places respectively, a long space of time, to wit, the space of one hundred days, over and above the said lay days and ten days of demurrage in the said charter-party mentioned, whereby the plaintiff was put to great costs, charge and expense, to wit, the further expense of £500, in and about maintaining the master and mariners of the said vessel for the said time last-mentioned, and lost and was deprived of the use of the said ship or vessel, and of all the profits thereof, during the time last aforesaid; and the plaintiff further says, that although by reason of the premises, a large sum of money, to wit, the sum of £892: 10s. became due and payable to the plaintiff as and for the freight of the said vessel for the voyage aforesaid, and primage thereon, according to the terms of the said charter-party, to be paid as in the said charter-party is mentioned and agreed, and a further sum of [£63] as and for demurrage, for the detention of the said vessel at Gibraltar and Malaga aforesaid for the days of demurrage in the said charter-party mentioned, to be paid as therein mentioned; yet the defendants have not, nor hath either of them, paid to the plaintiff the said two several sums of money or either of them, or any part thereof, but to pay the same or any part thereof to the plaintiff according to the terms of the said charter-party, or in any other manner, the defendants have hitherto wholly refused and still do refuse so to do, contrary to their said promise and undertaking. [*A common count for freight, and an account stated, may be added. Conclude as ante, 36.*]

ON CHARTER-PARTIES.

Third Breach, non-payment of freight and demurrage. (s)

Commencement, ante, 13.] For that whereas heretofore, and before the making of the promise of the defendant as hereafter mentioned, to wit, on &c. [*date of charter-party*] by a certain charter-party of affreightment then made, it was mutually agreed between the plaintiffs, by one D. C., their agent in that behalf, therein described as Captain D. C., master of the good ship or vessel called the Gough, of B., measuring her register 126 tons or thereabouts, then lying at Hamburg, and certain persons therein described as Messrs. G. and H. of Hamburg, merchants; that the said ship being tight, staunch and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Wells, (Norfolk,) after having taken on board about one hundred tons of oil cakes, or more if the said freighters should think proper to put a larger quantity of cakes on board the said vessel the Gough, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions and furniture; and, being so loaded, should therewith proceed to the port of Wells, or before or so near thereunto as she could safely get, and there deliver the same to the said freighters or their assigns, they paying freight for the same at the rate of

By the owners of ship against a party to whom the freighter assigned the goods and who promised to perform the charter party, for damages, in detaining the ship beyond the days of demurrage, and for freight, primage, and demurrage.

(s) The days mentioned are reckoned from the time of the arrival of the ship at the usual place of discharge; *Brereton v. Chapman*, 7 Bing. 562; *Kell v. Anderson*, 10 M. & W. 498; and, unless there be some custom to the contrary, Sundays are computed in the calculation of the lay days; *Brown v. Johnson*, 10 M. & W. 331. The merchant must pay demurrage for any delay beyond the specified

time, even though the delay be not attributable to his fault, but to some unforeseen impediment in loading or unloading; *Barker v. Hodgson*, 3 M. & Sel. 267; *Barrett v. Dutton*, 4 Camp. 333; *Harman v. Clarke*, *ibid.* 159; *Jesson v. Solly*, 4 Taunt. 52; but see *Stringer v. Gammell*, Ex. 7th June, 1843. The delay must, however, be for the purpose of loading or unloading; *Pringle v. Mollett*, 6 M. & W. 82.

ON CHARTER-PARTIES.	10s. sterling, and 10 per cent. primage for each English ton of oil cakes delivered, with no charges for pilotage and port charges during the said voyage, (the act of God, the queen's enemies, fire, and all and every other damages and accidents of the seas, rivers and navigation, of whatever nature and kind soever, during the said voyage, always excepted.) The freight to be paid in cash after the delivery of the cargo, fourteen running days being allowed for loading and discharging the oil cakes, — days were to be allowed the said merchant, (if the ship was not sooner despatched); and the said freighters to have the option of keeping the ship eight days on demurrage, over and above the said laying days, at £5 sterling per day. And whereas also within a reasonable time after the making of the said charter-party, and before the making of the promise of the defendant hereafter next mentioned, to wit, on the day and year aforesaid, the said ship, being tight, staunch and strong, and every way fitted for the said voyage, did, with all convenient speed, sail and proceed to W. Norfolk aforesaid, after having loaded and taken on board the said oil cakes and cargo, as agreed on by the said charter-party; and did afterwards, to wit,
Sailing of ship.	on the 16th day of November, in the year aforesaid, arrive at the port of W. aforesaid, with the said oil cakes and cargo on board, whereof the said freighters and their assigns then had notice; and the plaintiffs were then ready and willing to deliver the same to the said freighters or their assigns, according to and upon the terms of the said charter-party. And the plaintiffs in fact say, that afterwards, to wit, on the day and year last aforesaid, the said freighters assigned to the defendant, and the defendant then became and was the assignee of the said oil cakes and cargo, and entitled to receive the same, and thereupon, heretofore, to wit, on the day and year last aforesaid, in consideration of the premises, and that the plaintiffs, at the request of the defendant, would deliver unto the defendant, as such assignee, and suffer and permit him to take, the said oil cakes and cargo according to the said charter-party, and perform and fulfil all things in the said charter-party contained on the plaintiffs' parts to be performed and fulfilled towards the assignee of the said oil cakes and cargo, he the defendant then promised the plaintiffs to perform and fulfil all things in the said charter-party contained on the part and in behalf of the freighters and their assigns to be performed and fulfilled. And the plaintiffs aver, that they, confiding in the said promise of the defendant, afterwards, to wit, on the day and year last aforesaid, did deliver to and suffer and permit the defendant, as such assignee as aforesaid, to take the said oil cakes and cargo according to the said charter-party, and the plaintiffs have performed and fulfilled all things in the said charter-party contained on the plaintiff's part and behalf to be performed and fulfilled. Yet the defendant, disregarding his said promise, did not nor would, within the number of days allowed by the said charter-party as aforesaid in that behalf, load and discharge the said oil cakes and cargo; and on the contrary thereof the plaintiffs in fact say, that the said freighters and the defendant kept and detained the said ship and vessel over and above the said fourteen running days, and the said eight demurrage
Arrival of ship with cargo, &c.	
Defendant becomes assignee.	
Mutual promises between defendant and plaintiff. (s)	
Delivery of cargo to defendant.	
Breach in detaining ship above the time allowed. (a)	

(s) As to the wording of the mutual promises, see *Thornton v. Jenyns and others*, 1 M. & G. 166.

(a) As to the calculation of the lay days, see *Brown v. Johnson*, 10 M. & W. 331.

And has to how the declaration should be framed for detaining the ship beyond demurrage days, see *Benson v. Blunt*, 1 G. & D. 449, and *ante*, 61, note (g).

days, at W. aforesaid, for a long time, to wit, for the space of two days, whereby the plaintiffs were put to great costs, charges and expenses, amounting, to wit, to the sum of £20, in and about the maintaining and keeping the master and mariners of the said ship or vessel, and during that time lost and were deprived of the use and profits of the said ship or vessel. And the plaintiffs further say, that by reason of the premises a large sum of money, to wit, the sum of £74:18s., became due and payable to the plaintiffs as and for the freight of the said ship or vessel for the voyage aforesaid and primage thereon, according to the terms of the said charter-party, to be paid as in the said charter-party is mentioned and agreed; and a further sum of £50, as and for demurrage, for the detention of the said ship or vessel for the days of demurrage in the said charter-party mentioned, to be paid as therein mentioned, to wit, at Lynn aforesaid; whereof the defendant hath always had notice; yet the defendant, not regarding his said promise, hath not as yet paid the said last-mentioned two several sums of money, or either of them, or any part thereof, but to pay the same or any part thereof to the plaintiffs hath wholly neglected and refused, and still doth neglect and refuse, contrary to his said promise. [*Add a common count for freight or demurrage, or for the use and hire of the ship, as ante, 49, 50, 51, when applicable, and an account stated. Conclude as ante, 36.*]

ON CHARTER-PARTIES.

Non-payment of freight, primage, and demurrage.

IX. ON WAGERS.

IX. ON WAGERS.

Commencement, ante, 13. For that whereas at the time of the making of the agreement and the promise of the defendant hereinafter mentioned, a

On a wager on a horse-race for a hunters' sweepstakes. (b)

(b) See other precedents, *post*; Herne, 79. 176; Bro. Red. 29; Plead. A. 97, 143, 216; Morg. Prec. 192; 1 Wentw. 100 to 119; 2 West. 541, 3, 4; 10 East, 22; 3 T. R. 693; 16 East, 150.

Horse-racing, how far legal.—A wager on a horse-race is legal, if the sum bet do not exceed £10, and provided the race, which is the subject of the bet, is run for the sum of £50 or upwards, or £25 deposited by each party; 2 Campb. 438; 3 T. R. 706; 2 Stra. 1159; 2 Wils. 309; 2 Bla. Rep. 706; 4 Burr. 2433; 4 T. R. 1; 2 B. & P. 61; 9 Ann. c. 14; 13 G. 2, c. 19. But horse-races against time on a highway, or for a stake of less value than £50, are illegal; 4 T. R. 1; 2 B. & P. 61, 54. A wager of £25 a side on a trotting match, to be trotted along a turnpike road, is a legal race within the 18 Geo. 2, c. 34, s. 11; and a party therefore, who, according to the terms of the wager, has forfeited his deposit money, placed in the hands of a stake-holder, cannot recover it back from him; *Challand v. Bray*, 1 Dowl. P. C. N. S. 783. So a steeple-chase is a race within the protection of the same section of the statute, which is not confined to races run on the turf; *Evans v. Pratt*, 1 Dowl. N. S. 505. And a wager of £50 to £1, that a certain horse had not won a by-gone race, is lawful; *Pugh v. Jenkins*, 1 G. & D. 40.

When the game itself is illegal, then no action can be maintained for a wager respecting it, however small the bet. See *infra*.

How far a judge may refuse to try a wager.—A judge is bound to try such actions at

some time, though he may postpone them till after cases of more importance have been tried; 5 M. & W. 80.

What wagers legal or not.—A wager upon an indifferent matter, which has no tendency to produce any public mischief or individual inconvenience, is legal; but to make the wager legal, the subject-matter of it must be perfectly innocent, and have no tendency to impolicy or immorality; 3 Chit. Com. Law, 82; Cowp. 37; 3 T. R. 693; 1 Salk. 366, note; 5 Burr. 2802; 1 Ld. Raym. 69; 3 Salk. 14, 176; 16 East, 161. A wager between voters on the event of an election (1 T. R. 66; 2 D. & R. 450), or on the event of a war (7 T. R. 535, 1 T. R. 67; 3 B. & P. 194), or concerning the produce of the revenue, as of the hop duties (2 T. R. 610; 2 B. & P. 130), or tending to inconvenience or degrade the courts of justice (2 Hen. Bla. 43; 12 East, 247; 3 Campb. 140; 1 Car. & P. 613; 1 Ry. & Moo. 213; 7 Price, 540; 8 B. & Crea. 221; 6 D. & R. 28, *supra*), or concerning an abstract question of law or legal practice, in which the parties have no interest (12 East, 247), is illegal and void. A cock match or wager upon it is illegal; 3 Campb. 140. So is a wager on the result of a sparring exhibition; 1 Bing. 1; 7 J. B. Moore, 212. And a wager as to the conviction or acquittal of a prisoner is illegal; *Evans v. Jones*, 5 M. & W. 77. See further as to what wagers are legal or not, Chitty, *jun.* on Contracts, 3d ed. 495 to 498.

A wager, prejudicial to the interest or feelings of a third person, as on the sex of a per-

ON WAGERS.

Mutual promises. (d)

certain race for hunters' sweepstakes, amounting to a large sum of money, to wit, the sum of £——, was about to be run over the Nottingham course to wit, at ——, and it was then expected that a certain horse called ——, and also certain other horses, would run the said race over the said course for the said stakes; and thereupon, heretofore, to wit, on &c., (c) it was agreed by and between the plaintiff and the defendant, that if the said horse called ——, in running the said race, should beat the said other horses which should run the said race over the said course for the said stake, he the defendant should pay to the plaintiff the sum of £——; but that if the said horse called —— should be beaten by any or either of the said other horses which should run as aforesaid, he the plaintiff should pay to the defendant the sum of £——. And the said agreement having been so made as aforesaid, afterwards, to wit, on the day and year aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform and fulfil the said agreement

son, is illegal; Cowp. 729; 2 Lev. 161; *Eltham v. Kingsman*, 1 B. & A. 683. A wager, whether an unmarried woman has had a child, was held void; 4 Campb. 152. A wager tending to restrain marriage is void; 10 East, 22. A wager on the life of Bonaparte was held void; 16 East, 150. A person may lay a wager upon his own age; 3 Campb. 168. There is no illegality in betting a rump and dozen; *Id. ibid.*

By the 9 Ann. c. 14, s. 15, all written securities given to secure the payment of money won at any game, are void. See 3 Stark. 1; 1 Wils. 220; 2 Wils. 36; Byles on Bills, 4th edit. 102. But an action of assumpsit will lie to recover money won at play at a legal game not amounting to £10; 1 Esp. Rep. 235.

Supposing the subject-matter of the wager to be legal, the point must not be certain on one side, and contingent on the other; 5 Burr. 2802. But a person who lays a wager cannot set it aside on the ground that at the time when it was laid the opposite party had received information that he was mistaken: and it is too late for him on his discovering his mistake to countermand the authority of the stake-holder to pay over the money betted; 4 Campb. 157; see 5 Burr. 2639.

Action to recover deposit money.—It has been decided that a stake-holder is bound to retain the money till one of the parties be clearly entitled to receive it; and if he unduly pay it over to either party not entitled to it, he will be liable to repay the stake; 5 Burr. 2639. But while the stake remains in the hands of the stake-holder, either party may sue him for the stake he deposited; 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrill*, 1 C. & M. 797. And money deposited on an illegal wager may be recovered by either party from the stake-holder, before it has been paid over, whether the wager has been determined or not; 3 Taunt. 282; 4 Taunt. 474; 5 T. R. 405, *acc.*; 3 Esp. 253, *semble contra*. But an action cannot be maintained by the loser of an illegal wager after the sum has been paid to the winner; for when both parties are *particeps criminis*, the rule is, that *in pari delicto potior est conditio possidentis*; 6 T. R. 575; 1 East,

96; 8 East, 381, in note, *acc.*; 7 T. R. 635, *contra*.

An agent who is authorized only to contract illegal bets, cannot, if he loses, pay the winner without an express direction so to do; 4 Taunt. 165. Where a dinner is ordered at a tavern by the authority of two persons who have laid a wager of a rump and dozen, if the winner pays the bill, he may maintain an action against the loser for money paid, to recover the amount; 3 Campb. 168.

Declaration.—It is necessary, in an action against the loser of a wager, to state the special circumstances, and the wager cannot be recovered from him under an *indebitatus* count; 6 Mod. 129; 12 Mod. 81; 3 Lev. 118; Carth. 338; Ld. Raym. 69; Salk. 23; 3 T. R. 700. But the stake may be recovered from the stake-holder upon a common count for money had and received; 6 Mod. 128; 12 Mod. 81. In the declaration against the loser mutual promises should in general be stated: and though it has been usual to allege that a discourse was had, &c. as in the case of feigned issues (3 T. R. 693), that form is unnecessary, and it is sufficient to state as inducement the expectation of the event upon which the parties betted, and then to show the agreement, &c. of the parties, with other proper averments of the events on which the right of the action depend. If a man agrees to ride without a whip or stick, or other arms, an allegation that he rode without whip and stick, or other arms, is a sufficient averment of performance; at least, it is good after verdict; 2 Ld. Raym. 1366. If the contract be incorrectly stated, the judge in some cases will amend; *Evans v. Fryer*, 10 A. & E. 609.

Plea.—See a plea of special denial that plaintiff won the wager, 1 Wentw. 101; but the general issue is the most usual plea.

(c) The day of the wager, or about it.

(d) As a general rule, it would seem that when an agreement has been formally stated, there seems to be no occasion also for the statement of mutual promises; 2 New Rep. 62; 3 Bing. 470; and as to the form of the statement of mutual promises, see *Thornton v. Jenyns*, 1 M. & G. 166.

on his part, the defendant then promised the plaintiff to perform and fulfil the said agreement on his the defendant's part. And the plaintiff saith, that afterwards, to wit, on the day and year aforesaid, at the Nottingham course aforesaid, the said race for the said stakes was run between the said horse called — and divers, to wit, — other horses; and that in running the said race the said horse called — did beat the said other horses so running as aforesaid, whereof the defendant then had notice; yet the defendant, not regarding the said agreement nor his said promise, hath not as yet paid the said sum of £—, or any part thereof, to the plaintiff, although often requested so to do, but hath hitherto wholly neglected and refused and still neglects and refuses so to do. [*If the defendant have received the deposit money, then add a count for money had and received; and if the defendant have promised to pay any named sum, then add account stated, and conclude as ante, 36.*]

ON WAGERS.
Averments.

Commencement, ante, 13.] For that whereas, before and at the time of the making of the agreement and the promise of the defendant hereafter next mentioned, the plaintiff was the owner and proprietor of a certain filly, and the defendant was the owner and possessed of a certain other filly. And thereupon, heretofore, to wit, on &c., it was agreed by and between the plaintiff and the defendant, that a race, to wit, a race of — miles should be run by and between the said fillies of them the plaintiff and defendant at Chester, to wit, at the Chester races, to be holden in the year of our Lord —, when the said fillies respectively would be two years old, for £— each, and that one-half of that sum should be forfeited by the party making default in causing his filly to run the said race; each of the said fillies to carry eight stone. [*Here mutual promises were stated, as ante, 168.*] And the plaintiff further saith, that although the Chester races, in the year of our Lord — aforesaid, were had afterwards, to wit, on the day and year aforesaid, and the said filly of the plaintiff was then ready and prepared to run the said race, and for that purpose was then duly started with the said weight of eight stone, so agreed upon as aforesaid, and did then proceed on the said race; yet the defendant, not regarding the said agreement nor his said promise, then wholly neglected and omitted to cause the said filly of the defendant to run the said race, and therein wholly failed and made default, and thereby the defendant then forfeited and became liable to pay to the plaintiff the sum of £— so agreed to be forfeited, as half of the said sum of £— as aforesaid. Yet the defendant, although often requested so to do, hath not as yet paid the same, or any part thereof, to the plaintiff, but hath hitherto altogether neglected and refused, and still neglects and refuses so to do. [*In this particular case there were a second and third counts more general than the first, see 5th edit. 230, 231.*]

On a horse-race agreement for a sum of money forfeited by the defendant's making default in running his horse. (e)

Commencement, ante, 13.] For that whereas, at the time of the making of the promise of the defendant hereafter next mentioned, a certain race was intended and about to be run at a certain place called —, in the county

For money won by betting at a horse-race. (f)

(e) See preceding form and notes. This last form, after several objections taken to it, was held sufficient, and the plaintiff recovered,

A. D. 1815.

(f) See form, 2 Wentw. 545; see note to form, ante, 167.

ON WAGERS.

of —, by and between a certain horse called — and a certain horse called —, for a certain piece of plate of great value, to wit, of the value of £100, (g) and thereupon, heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to pay him the sum of £— in case the said horse called —, in the event of the said race, should win the said piece of plate so intended and about to be run for as aforesaid, he the defendant then promised the plaintiff to pay him the sum of £— in case the said horse called — should not, in the event of the said race, win the said piece of plate so intended and about to be run for as aforesaid; and the plaintiff saith, that the said expected race was afterwards, to wit, on the day and year aforesaid, accordingly run at the said place called—, by and between the said horse called — and the said horse called —, for the said piece of plate; and that the said horse called — did not win the said piece of plate, for that the same was then won by the said horse called —, whereof the defendant on the day and year aforesaid had notice; and by means thereof, and according to the tenor and effect of his said promise, he the defendant then became liable to pay the plaintiff the said sum of £—, when he the defendant should be thereunto afterwards requested. [*Add a count for money had and received, and an account stated, if they can be proved, and conclude as ante, 36.*]

On a wager concerning the weight of hogs. (h)

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., a certain discourse was had by and between the plaintiff and the defendant of and concerning the weight of — hogs of the plaintiff, and upon that discourse the defendant then affirmed that the said hogs did not weigh seven stone a-piece one with the other, which the plaintiff then denied, and affirmed that the said hogs did weigh seven stone a-piece one with the other; and thereupon, afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to pay him £—, if the said — hogs did not weigh seven stone a-piece one with the other, upon weighing the same the then next day, he the defendant then promised the plaintiff to pay him £—, if the said — hogs did weigh seven stone a-piece one with the other, upon weighing the same the next day; and the plaintiff in fact saith, that the said — hogs, upon the next day, to wit, upon &c., were weighed, and that the said — hogs then, upon weighing the same as aforesaid, weighed seven stone a-piece one with the other, whereof the defendant afterwards, to wit, upon the day and year last aforesaid, had notice. [*Add counts for money had and received, and on an account stated, when they can be proved, and conclude as ante, 36.*]

For recovery of money lost at the game of cribbage. (i)

For that whereas heretofore, to wit, on &c., in consideration that the said A. B., at the special &c., had then agreed with and undertaken and faithfully promised the said C. D. to play at a certain game, that is to say, at a

(g) See form and note, *ante*, 167. The race must have been for a prize of £50, or upwards, 4 T. R. 1; but £25 on each side will suffice, 4 Burr. 2433; *ante*, 167, note.

(h) See Plead. Assist. 97; see note, *ante*, 167.

(i) See precedents for money lost at whist, 2 Wentw. 543, 544; 2 Sid. 425. Money won fairly at play, if under £10, is recoverable in an action of assumpsit; see 1 Esp. R. 235, and stat. 9 Ann. c. 14; 2 Bla. Rep. 1226; *ante*, 167, note.

certain game called cribbage, with him the said C. D., and to pay him all such sum and sums of money as he the said A. B. should lose to the said C. D. by means of his said playing with him the said C. D., he the said C. D. then agreed with and undertook &c. to play at the said game with him the said A. B., and to pay him the said A. B. all such sum and sums of money as he the said C. D. should lose to the said A. B. by means of his so playing with him the said A. B., when he the said C. D. should be thereunto afterwards requested; and the said A. B. avers, that he, confiding &c., did afterwards, to wit, on &c., play at the said game with him the said C. D., who did also then play at the said game with him the said A. B.; and the said C. D., by means of his so playing with him the said A. B. as aforesaid, did then lose to him the said A. B., who did then win of the said C. D. divers sums of money, amounting to a large sum of money, to wit, &c.; yet the said C. D., although he was then and oftentimes afterwards requested by the said A. B. to pay him the said sum of money so by him lost to the said A. B. in manner aforesaid, did not nor would, when he was so requested as aforesaid, pay, nor hath he, at any time before or since, paid or caused to be paid the said sum of &c. so by him lost to the said A. B. as aforesaid, or any part thereof, to the said A. B., but hath hitherto wholly refused and still refuses so to do.

ON WAGERS.

X. ON FEIGNED ISSUES.

X. ON FEIGNED ISSUES.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of —, A. D. —.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., (k) a certain discourse was had and moved by and between the plaintiff and the

Feigned issue to try the existence of a *modus* in lieu of tithes. (j)

(j) See forms of different feigned issues, 1 Westw. 120 to 240; Plead. Assist. 100, 160; Lil. Ent. 45, 65, 66; 2 Rich. C. P. 120; 1 Mod. Ent. 139; and feigned issues in general, Vin. Ab. Feigned Action; Com. Dig. tit. Chancery. Formerly, the feigned issue was more prolix than at present; see 2 Saund. 261; see the modern practice, 1 Chitty's Archb. 677.

Nature of feigned issue.—A feigned issue is in the nature of a wager between two or more parties, invented to ascertain a matter in dispute between them, and is either authorized by act of parliament, as under the Tithe Commutation Act, 6 & 7 W. 4, c. 71, s. 46, or directed by a court of law or equity, or by a judge of one of the superior common law courts.

Venue.—When the venue is local, and a fair trial cannot be had in the proper county, the question may, by feigned issue, be tried in any other county; Skin. 44.

Who to be the plaintiff in; 2 Ross, 97.

Declaration.—The declaration usually commences with an allegation that a certain discourse was had &c., but in some cases, as when a petitioning creditor's debt is to be tried, it is usual to begin with an inducement, as follows, 1 Westw. 188:—"For that whereas before and at the time of the making

of the promise of the defendant hereinafter next mentioned, a certain fiat in bankruptcy had been and was issued against the defendant, and thereupon afterwards, and before the making of the said promise, to wit, on &c., a certain discourse &c.," stating the wager to have been "whether at the time of the issuing of such fiat the defendant was indebted to plaintiff in the sum of £100, &c.;" see 3 Younge & Jerv. 305.

Leave of Court to try.—The attempt to try a feigned issue without leave of the Court, or the direction of an act of parliament, is a contempt of Court, 4 T. R. 402; and trying a feigned issue without such consent is a contempt, and after such trial the proceedings will be stayed; 4 T. R. 402; 9 East, 381; 15 East, 309.

Other points.—As to consolidation of issues, see 6 Taunt. 167.

As to costs in general, see Tidd, 9th edit. 986, 987; 2 Marsh. 355; and as to costs when a feigned issue is directed under the Interpleader Act, see *post*, 175.

When the whole issue need not be proved, see 3 Gwill. on Tithes, 1229.

It is said to be proper to move the Court of Chancery for a special jury; Pre. Ch. 264; 2 P. W. 68; 4 M. & S. 195, 196.

(k) The day is not material.

ON FEIGNED
ISSUES.

defendant, wherein a certain question then arose, [*whether, for every acre of land within the parish of &c. producing grass, whether mowed and made into hay, or taken by the mouth of cattle, there hath been, from time whereof the memory of man is not to the contrary, paid by the occupier of such lands to the vicar of the said parish for the time being two pence per acre, in lieu of all tithes of such hay or grass;*] and in that discourse the plaintiff then asserted and affirmed, [*“that for every acre of land within the said parish of &c. producing” &c., same as the words in italics to the end:*] which assertion and affirmation the defendant then contradicted and denied. And thereupon, afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, had then paid to the defendant the sum of £5, he the defendant then promised the plaintiff to pay him the sum of £10, if for every &c. [*same as the words in italics.*] And the plaintiff in fact says, that for every acre of land &c. [*same as the words in italics, averring in the affirmative.*] Whereof the defendant afterwards, to wit, on the day and year aforesaid, had notice; whereby he the defendant then became liable to pay and ought to have paid to the plaintiff the said sum of £10.⁽¹⁾ Yet the defendant, not regarding his said promise, hath not yet paid the sum of £10, or any part thereof, to the plaintiff (although often requested so to do), but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, To the damage of the plaintiff of —, and therefore he brings his suit &c. [*The pleader framing the declaration also frames the plea and the award of venire, and in short the whole issue, as follows, commencing on a fresh line:—*

Plea thereto.

And the defendant, by E. F. his attorney, says, that for every &c. [*negating the first assertion in italics,*] in manner and form as the plaintiff hath above in that behalf alleged, and of this the defendant puts himself upon the country, and the plaintiff doth the like; thereupon &c. [*Award of venire as usual in an issue.*

Feigned issue, with two counts, at the suit of surviving partners, first count to try petitioning creditor's debt, and second count to try act of bankruptcy. (m)

Commencement, ante, 13.] For that whereas, before and at the time of the making of the promise of the defendants hereinafter next mentioned, a certain joint fiat in bankruptcy had been and was issued against the defendants. And thereupon afterwards, and before the making of such promise, to wit, on &c., a certain discourse was had and moved by and between the plaintiffs and the defendants, wherein a certain question then arose; that is to say, [*whether the defendants were, at the issuing of the said fiat, jointly indebted to the plaintiffs, as surviving partners of E. F., late of &c. iron-master, deceased, in the sum of £—— or upwards;*] and in that discourse the plaintiffs then asserted and affirmed that the defendants were &c. [*same as the words in italics to the end,*] which said assertion and affirmation the defendants then contradicted and denied, and then asserted and affirmed to the contrary thereof; and thereupon, afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiffs, at the request of the defendants, had then paid * to the defendants the sum of £5, they the defendants then promised the plaintiffs to pay them the sum of £10, if they

(1) In some precedents is here inserted, "and being so liable, he the defendant then promised the plaintiff to pay him the said sum

of £10 upon request."

(m) See notes to preceding form.

the defendants were, at the issuing, &c. [*same as the words in italics.*] And the plaintiffs in fact say, that the defendants were at the issuing of the said &c. [*same as the words in italics,*] to wit, whereof the defendants, on the day and year aforesaid, had notice, whereby they the defendants then became liable to pay and ought to have paid to the plaintiffs the sum of £10: And whereas also, after the issuing of the said fiat against the defendants as aforesaid, to wit, on the day and year aforesaid, a certain other discourse was had and moved by and between the plaintiffs and the defendants, wherein a certain other question then arose, that is to say, [*whether each of them the defendants had at any time, and when, at and before the date and suing forth of the said fiat in bankruptcy issued against the defendants by the plaintiffs as aforesaid, committed any and what act of bankruptcy;*] and in that discourse the plaintiffs then asserted and affirmed, that each of them the defendants &c. [*same as the last words in italics*], which said last-mentioned assertion and affirmation the defendants then denied, and asserted and affirmed to the contrary thereof; and thereupon afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiffs, at the request of the defendants, had then paid &c. [*As in the first count from the asterisk, stating the plaintiff's payment of £5, and the defendant's promise, and averring the affirmative of the last question; notice to defendants and their liability, as in first count, and then conclude as in last precedent.*]

And the said defendants, by L. M. their attorney, and as to the said first count, say &c. [*plea as ante, 172.*] And as to the said second count the defendants say, [*same as first plea, negating the question in the second count, and conclude as ante, 172.*]

ON FEIGNED
ISSUES.

Second count,
to try act of
bankruptcy.

Plea to first
count.
Plea to second
count.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., a certain discourse was had and moved by and between the plaintiff and the defendant of and concerning a fiat in bankruptcy which had heretofore, to wit, on &c. [*date of fiat*], been issued under the great seal of Great Britain, and bearing date the same day and year last aforesaid, against the defendant, on the petition of the plaintiff, and in that discourse a certain question then arose, that is to say, [*whether the defendant was a trader within the meaning of the statutes in force concerning bankrupts, or any of them, at or before the said date and suing forth of the said fiat against him or not;*] and in that discourse the plaintiff affirmed &c. [*Proceed as directed in the last precedent, and as ante, 172, to end of plea and award of venire, mutatis mutandis.*]

The like to try
trading of a
supposed bank-
rupt. (n)

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., a certain discourse was had and moved by and between the plaintiff and the defendant of and concerning a certain act of parliament made and passed in the — year of the reign of &c., intituled "An Act," &c. [*set forth the title*], and of and concerning the moors, commons and waste grounds by the said act intended to be divided and inclosed, and the rights of common thereupon, and in that discourse a certain question then arose, that is to say, [*whether the plaintiff was entitled to a right of common in and upon the*

The like issue
in one count to
try several
rights of com-
mon in respect
of plaintiff's se-
veral freehold
and copyhold
estates, on cer-
tain waste
grounds in-
closed in pur-
sue of in-
closure act. (o)

(n) See a form, Plead. Assist. 100; see the form directed, *ante*, 172, as to trying a

petitioning creditor's debt.

(o) 1 Wentw. 120; 5 B. & C. 239.

ON FEIGNED
ISSUES.

said moors, commons and waste grounds, for or in respect of the several freehold and copyhold tenements in the town of &c., of him the plaintiff hereinafter mentioned, that is to say, one freehold messuage, or site of messuage, late E. F.'s, and known by the name of &c., or for and in respect of any of the same freehold or copyhold tenements;] and in that discourse the plaintiff &c.—*[State the affirmation and defendant's denial of it, as ante, 172.]* And thereupon afterwards, to wit, on the same day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, had then paid to the defendant the sum of £9, the defendant then promised the plaintiff to pay him the sum of £2, if the plaintiff was entitled to a right of common in and upon the said moors, commons and waste grounds for and in respect of the said first-mentioned freehold tenement of the plaintiff; and the further sum of £2, if the plaintiff was entitled to a right of common in and upon the said moors, commons and waste grounds for and in respect of the said freehold tenement of the plaintiff secondly above-mentioned; and the further sum of £2, if the plaintiff was entitled to a right of common in and upon the said moors, commons and waste grounds for and in respect of the said freehold tenement of the plaintiff thirdly above mentioned; and also the further sum of £2, if the plaintiff was entitled to a right of common in and upon the said moors, &c., for and in respect of the said first-mentioned copyhold tenement of the plaintiff; and the further sum of £2 for each of the said five-last-mentioned copyhold tenements of the plaintiff for and in respect of which the plaintiff was entitled to right of common in and upon the said moors, &c., if the plaintiff was entitled to such right of common for and in respect of the said five last-mentioned tenements, or any of them. And the plaintiff avers &c. *[affirming the questions as directed, ante, 172, to the end of declaration.]* And the defendant, by — his attorney, as to the sum of £2, parcel of the said sum of £18 in the said declaration mentioned, saith, that the plaintiff was not entitled to such right of common in and upon the said moors, &c. for and in respect of the said freehold tenement of the plaintiff first above mentioned, as the plaintiff has above alleged, and of this he the defendant puts himself upon the country, and the plaintiff doth the like; and as to the sum of £2, other parcel of the said sum of £18 in the said declaration mentioned, the defendant says that the plaintiff was not entitled, &c. *[Separately negativing and taking issue on all the questions, and conclude as ante, 172.]*

Feigned issue
out of Chancery
devisavit vel non
of freehold and
leasehold es-
tates. (p)

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., a certain discourse was had and moved of and concerning divers freehold estates, to wit, &c., situate in the county of —, and of and concerning a certain leasehold estate, situate at &c., late the estates of one E. F. deceased, and of which said freehold estates the said E. F. deceased, on &c. *[the date of the will]*, was seised in his demesne as of fee, and afterwards died seised thereof; and of which said leasehold estates the said E. F. deceased, on the day and year last mentioned, was possessed, and afterwards died so possessed thereof; and also of and concerning a certain paper writing, bearing date &c. *[the date of the will]*, purporting to be a last will and testament, and which the defendant then asserted and affirmed was the

last will and testament of the said E. F. deceased, and in that discourse a certain question then arose, that is to say, [*whether the said E. F. deceased, did by his said will devise the said freehold and leasehold estates or not* ;] and upon that discourse the plaintiff then asserted and affirmed, &c. [*as ante*, 172, to the end.

ON FEIGNED
ISSUES.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., a certain discourse was had and moved by and between the plaintiff and the defendant of and concerning him the plaintiff, and in that discourse a certain question then arose, that is to say, [*whether he the plaintiff was heir at law of one E. F.*]; and thereupon the plaintiff then asserted &c. [*as ante*, 172, to the end.

The like to try whether plaintiff was heir at law or not.

Commencement, ante, 13.] For that whereas heretofore, and before the making of the promise by the defendant hereinafter mentioned, certain goods and chattels had been seized and taken in execution by the sheriff of the county of —, under and by virtue of a certain writ of execution against the goods and chattels of one A. B., and thereupon afterwards, to wit, on the — day of —, A. D. —, a certain discourse was had and moved by and between the plaintiff and the defendant, of and concerning the said goods and chattels, and in that discourse a certain question then arose, that is to say, whether the said goods and chattels were at the time of the seizure thereof by the said sheriff of — under and by virtue of the said writ of execution, the goods and chattels of the said plaintiff, and thereupon the plaintiff then asserted and affirmed that the said goods and chattels were at the time of the said seizure thereof by the said sheriff of — the goods and chattels of him the said plaintiff, which assertion and affirmation the defendant then contradicted and denied, and thereupon afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, had then paid to the defendant the sum of £5, he the defendant then promised the plaintiff to pay him the sum of £10, if the said goods and chattels were at the time of the seizure thereof by the said sheriff of —, the goods and chattels of the plaintiff, and the plaintiff in fact says, that the said goods and chattels were at the time of the seizure thereof by the said sheriff of — the goods and chattels of him the said plaintiff, whereof the defendant afterwards, to wit, on the day and year aforesaid, had notice, whereby he the said defendant then became liable to pay and ought to have paid to the plaintiff the said sum of £10; yet the defendant, not regarding his said promise, hath not yet paid the said sum of £10, or any part thereof, to the plaintiff, although often requested so to do, but hath hitherto wholly neglected and refused, and still neglects and

Feigned issue under the Interpleader Act, to try whether goods seized by the sheriff were at the time of the seizure the property of the claimant. (9)

(9) As to this issue see 1 & 2 Will. 4, c. 56, and the cases collected on the subject in 2 Chitty's Arch. Prac. 1046. Any other issue directed under the Interpleader Act may easily be framed from this. It is advisable to insert some averment in the declaration to identify the goods, &c.

The amount of the damage laid in the declaration is unimportant, as the issue is only directed for the information of the Court,

but it is sometimes necessary for the jury to find the value of the goods, &c.

The costs of the proceedings under the Interpleader Act are in the discretion of the Court, and where only some of the goods claimed are proved to have been the property of the claimant, the defendant is generally allowed a portion of his costs; see *Staley v. Rodwell*, 2 P. & D. 309; *Lewis v. Holding*, 9 Dowl. P. C. 662.

ON FEIGNED
ISSUES.

refuses so to do, To the damage of the plaintiff of £10, and therefore he brings his suit &c. :

Plea.

And the defendant by — his attorney, says that the said goods and chattels were not, nor was any or either of them, at the time of the seizure thereof by the said sheriff of the county of — the goods and chattels of the plaintiff in manner and form as the plaintiff hath above in that behalf alleged, and of this the defendant puts himself upon the country, and the plaintiff doth the like. Thereupon &c. [*award of venire as usual in an issue.*]

XI.
ON AWARDS.

On a parol submission to an award. (r)

Mutual promises.

XI. ON AWARDS.

For that whereas, before the making of the promise of the defendant hereinafter next mentioned, certain differences had arisen and were then depending between the plaintiff and the defendant, touching and concerning (s) certain books before then sold by the defendant, as the agent of and for the plaintiff. And thereupon, for the putting an end to the said differences, the plaintiff and the defendant, heretofore, to wit, on &c. [*date of submission, or about it*], respectively (t) submitted themselves to the award of one E. F., to be made between them, of and concerning the said differences; and in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised (u) the defendant to perform and fulfil the award of the said E. F. to be so made between the plaintiff and defendant, of and concerning the said differences in all things on the plaintiff's part to be performed and fulfilled, he the defendant then promised the plaintiff to per-

(r) See precedents, 1 Wentw. 90 to 100, and vol. ii. Index; 2 Rich. Prac. C. P.; Mod. Ent. 165; 1 Saund. 28; 8 T. R. 571. For the law relating to awards, see Tidd's Prac. 9th edit. 819 to 845; Watson on Awards; Cald. on Awards; Kyd on Awards; 3 Chit. Com. Law. 637; and the more recent decisions and practice, 2 Chit. Gen. Prac. 73 to 126. As to other remedies, see Tidd, 9th edit. 833; Com. Dig. Arbitrament, I. 1; 3 Chit. Com. Law, 660 to 665.

There are early instances of the action of *assumpsit* on a parol submission; 1 Saund. 28; 8 T. R. 571. It lies on an award in pursuance of an order of nisi prius; 5 East, 139; or of a judge, or by rule of Court; 4 Campb. 17; 11 Mod. 170; and this though a collateral act be awarded to be done; 2 Ld. Raym. 1040.

Assumpsit will lie for revoking a parol submission; 2 Keb. 10, 20, 24; 1 Sid. 281.

When the submission is by deed, the remedy is by debt or covenant unless the award be made after the limited time; 3 T. R. 592.

Debt on a parol submission is frequently most advisable when the award is merely for the payment of money, and the whole sum is due; Watson on Awards, 200, 201. See a precedent in debt; 2 Saund. 61, 127, 128. Also forms, *post*. But if there be any other demand, more properly the subject of an action of *assumpsit*, which may be joined

with the demand on the award, or if the award were not merely for the payment of money, or for the payment of money by instalments, not all due, or for any collateral act, then the plaintiff should declare in *assumpsit*; 2 Saund. 62 b, 1, n. 5; 2 H. Bla. 547; Ld. Raym. 1040.

The assent of a party to submit a matter to arbitration is a sufficient consideration, even though he had no cause of action; 1 Leon. 103; 4 Leon. 31.

As to how far the irregularity of the proceedings on the reference may be set up as a defence, see Watson on Awards, 222, denying the correctness of the law laid down in 2 Phil. Evid. 107. See also 1 R. & M. N. P. C. 17.

(s) Or, "*divers sums of money due and owing from the said defendant to the said plaintiff.*" But it seems the declaration may either state or omit the subject-matter of the dispute, though it is more usual to state it; 2 Saund. 61, h. n. 1.

(t) Declarations on awards must state a mutual submission. If the action were brought on an arbitration bond it is otherwise; for the defendant by praying oyer shows that there was a mutual submission, 2 Saund. 61 h, n. 2; 2 Stra. 923.

(u) The mutual submission implies mutual promises to observe the award; 11 Mod. 170.

form and fulfil the said award in all things therein contained on the defendant's part to performed and fulfilled. And the plaintiff in fact saith, that the said E. F. having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on &c. [date of award, or about it], made his certain award (x) between the plaintiff and the defendant, of and concerning the said differences, (y) and did thereby award (z) that the defendant should, on &c., pay to the plaintiff the sum of £100, in full satisfaction and discharge of the said matters in difference. Of which said award the defendant afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice. (a) And although he the defendant afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, was requested (b) by the plaintiff to pay him the said sum of £100, according to the tenor and effect of the said award and his said promise; yet the defendant, not regarding his said promise, did not, nor would, on the day and year last aforesaid, or when he was so requested as aforesaid, or at any time afterwards, (c) pay the said sum of £100, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. [Before the rules of Hil. T. 4 W. 4, it was usual to add an *indebitatus count*, as ante, 65, and a count on the plaintiff's original demand referred to arbitration, and the account stated, and breach; (d) but now there should be only one count, and in general the special count will be preferable. Add an account stated, and conclude as ante, 36.

ON AWARDS.

The award.

Breach.

XII. ON JUDGMENTS.

XII. ON JUDGMENTS.

For that whereas the plaintiff, heretofore, to wit, at a supreme Court of judicature of our sovereign lady the queen, holden at the town of St. Jago

On a Jamaica judgment. (e)

(x) The award in pleading must be stated to have been made agreeably to the submission—as if the submission were “so that the award may be made in writing,” &c., it must be stated to have been so made; 2 Saund. 62, n. 3; 2 Marsh. 304.

(y) What is a sufficient allegation that it was so made, see 2 Vent. 242; Kyd on Awards, 291.

(z) Here set forth the award in its legal effect or literal words. The plaintiff need not in the declaration state more of the award than is relative to his case. Where there is a condition precedent, which qualifies the terms of the award, and the performance of it, it must be averred; 2 Saund. 62 b, n. 5; 1 Barr. 278; 1 Salk. 72.

(a) This averment is in general unnecessary, for one party is as much bound to take notice of the award as the other, unless the stipulation be that the award shall be notified to the parties, in which case notice must be averred; 2 Saund. 62 a, n. 4.

(b) Sometimes a request to perform the award is necessary; and in a case, where an award directed that one of the parties to the submission should pay the expenses of the reference, and that the other should repay them on demand, and the party directed having paid them made an affidavit of debt against the other party, alleging such payment, but not stating any demand of re-

payment, it was held this was not sufficient; 7 Bar. & Cres. 494; 1 M. & R. 324, S. C.

(c) Let this breach deny the performance of the award in the words thereof.

(d) It has been decided that the award, when there is a submission not under seal, may in most cases be given in evidence under the common count founded on the original debt, or on the account stated, and is no bar to such action, as it only settles the amount of claim; *Allen v. Milner*, 2 Crom. & Jerv. 47; 2 Tyr. 113; 1 Price, P. C. 142; *Peake*, C. N. P. 227; 1 Esp. Rep. 194, 377; 5 T. R. 6; *Tidd's Prac.* 9th ed. 834; see also *Whitehead v. Tattersall*, 1 A. & E. 491.

(e) See other precedents, Doug. 4, n. 1. An action will lie in one Court on a judgment obtained in another; for a judgment pronounced by a Court of competent jurisdiction creates a debt all over the kingdom; *Gilb. Debt*, 392, 393.

Form of remedy, &c.—Assumpsit or debt will lie here on a judgment of a Court not of record, or on a foreign judgment; Doug. 1; 4 T. R. 493; 3 Taunt. 85, n.; or on an Irish judgment, whether before or since the union; 4 Bar. & Cres. 411; 5 East, 473; or on a Scotch decree, obtained in absence against a native of Scotland, for a debt contracted in Scotland; 1 Moo. & Pay. 663; 4 Bing. 686, S. C., ante, vol. i. An action is not maintainable on a decree of a Court of equity; 3

ON
JUDGMENTS.

and La Veza, in and for the island of Jamaica, and within the jurisdiction of the said Court, heretofore, to wit, on &c. [*day of the judgment, or about it*], before the honourable —, chief judge of the said Court, and his associates, then sitting judges of the same Court, by the consideration and judgment of the same Court recovered against the defendant, (by the name and addition of &c.) [*as in the judgment, and then set out the judgment, which may be as follows:*] As well a certain sum of money, to wit [£1024 : 14s. 7½d.] current money of the said island of Jamaica, with interest on £829 : 19s. 5d. current money of the said island, from the 10th day of April then next ensuing, for his damages which he had sustained by and on occasion of the non-performance of certain promises before that time made by the defendant to the plaintiff, as also the sum of £14 : 14s. current money of the said island, for his costs and charges by him about his suit in that behalf expended, to the plaintiff by the said Court there, of their own assent, adjudged, whereof the defendant was convicted, which said judgment still remains in that behalf in full force and effect, not in anywise satisfied, reversed, or annulled, aforesaid; and the plaintiff in fact says, that no execution hath as yet been obtained of or upon the said judgment, and that the damages, costs and charges aforesaid, in form aforesaid recovered, are of great value, to wit, of the value of £—; by means of which said several premises the defendant then became liable to pay to the plaintiff the said last-mentioned sum of money, when he the defendant should be thereunto afterwards requested; and being so liable, and the said last-mentioned sum of money being and remaining wholly due and unpaid, he the defendant afterwards, to wit, on the day and year aforesaid, promised the plaintiff to pay him the said last-mentioned sum of money on request. [*Add counts for*

B. & Adol. 52; and see *ante*, vol. i. Debt is the usual and preferable form of action, unless there be another demand recoverable only in assumpsit; Doug. 5, *post*.

In an action on a judgment pronounced by an English Court of record the decision cannot be impeached; Doug. 5. And it should seem that the judgment of an inferior Court in England, whether of record or not, is conclusive and incontrovertible between the same parties, upon the same subject-matter, provided, upon the face of the proceedings, it appears to have been fairly and justly obtained; 2 Burr. 1009; 2 Bing. 216; 1 Stark. Evid. 208; but see Doug. 5. But the judgment of an inferior Court may be controverted where it appears the proceedings have been bad in law; as where a summons and attachment were issued against defendant at the same time, returnable at the same time, and to which the defendant never appeared; 3 Bar. & Cres. 772; 5 D. & R. 719, S. C.; and it seems that the judgment of an inferior Court, though it cannot be controverted, may yet be avoided by proof that the cause of action did not arise within the jurisdiction of the Court; Willes, 36, n.; 2 Bing. 213. But as to the conclusive qualities of an English or foreign judgment, see the various cases referred to on the subject in the notes to the *Duchess of Kingston's case*, 2 Smith's Leading Cases.

Declaration.—It is necessary to set forth

with certainty the parties to the judgment, and the term in which it was recovered; Com. Dig. Pleader, 2 W. 12. And if the judgment was given in the Common Pleas, or an inferior Court, it is advisable to state the names of the judges and suitors; *id. ibid.*; Carth. 86; 2 East, 362; 7 Dowl. 841. The omission of this will be aided by verdict, *id. ibid.* The plaintiff need not show the ground of the judgment, and any matter which affects its validity must be insisted upon by the defendant; Doug. 1. It is unnecessary to allege that the judgment remained unsatisfied; 1 Saund. 330, n. 4. It is expedient to add counts for the debt upon which the judgment was founded, that the plaintiff may be enabled to recover upon these, if the judgment should be impeached with success.

Plea.—Though the plaintiff should erroneously or unnecessarily conclude the statement of a judgment which is not matter of record, or a foreign judgment with a *prout patet per recordum*, the defendant cannot plead *nul tiel record*, and the erroneous conclusion must be rejected as surplusage; Doug. 1. And although since the union the plea of *nul tiel record*, concluding to the country, has been adopted to an action of assumpsit on an Irish judgment; 5 East, 473; 9 Price, 1; yet since the decision in 4 Bar. & Cres. 411, the correctness of such a plea seems more than questionable, for an Irish judgment is no record here.

the original debt for which the judgment was recovered, account stated, and breach, as ante, 36.

ON
JUDGMENTS.

For that whereas heretofore, to wit, on &c. [*date of decree, or about it*], a certain decree was made and pronounced in and by the Court of our lady the queen before the lords of council and session at Edinburgh, in that part of the United Kingdom of Great Britain and Ireland called Scotland, in and concerning a certain action then depending in the same Court, at the instance of J. S. and R. S. before they became bankrupts, against the defendant, whereby the lords of council and session aforesaid did then decree and ordain the defendant to make payment to the said J. S. and R. S., before they became bankrupts as aforesaid, of a certain sum of money, to wit, the sum of [£447 : 6s. 3d.] sterling money of Great Britain, and annual rent, that is to say, legal interest thereof from a certain day, to wit, the [18th day of November, 1801,] and until payment, together with the sum of [£50] of like sterling money, as the expense of process, besides the sum of [£1 : 0s. 3d.] sterling money of Great Britain, being the full dues of extracting that decree, as by the said decree remaining in the court of session at Edinburgh aforesaid more fully appears, which said decree remains in full force and wholly unsatisfied, whereby the defendant became liable to pay to the said J. S. and R. S., before they became bankrupts as aforesaid, the said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid on the said sum of [£447 : 6s. 3d.] according to the said decree, when he the defendant should be thereunto afterwards requested. And being so liable, the defendant, in consideration thereof, to wit, on &c. [*any day before the bankruptcy*], promised the said J. S. and R. S., before they became bankrupts as aforesaid, to pay them the said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, on request. [*Add counts for the original debt for which the decree was given, account stated, and breach, as ante, 36.*]

On a Scotch decree at suit of assignees of a bankrupt. (f)

XIII. FOR LEGACIES.

XIII. For
LEGACIES.

For that whereas one E. F. heretofore, to wit, on &c. [*date of will, or about it*], by his last will and testament, in writing, did (amongst other things) give and bequeath unto the plaintiff the sum of £—, if he the plaintiff should be living at the time of the said E. F.'s death and of his said

Against an executor on a promise to pay a legacy in consideration of forbearance. (g)

(f) That assumpsit lies, see 1 M. & P. 663 ; 4 Bingham. 686, S. C., and see the notes, ante, 178, note (e). As to the power of the defendant to question the decision in Scotland, see *Cowan and another v. Braidwood*, 1 M. & Gr. 882.

(g) No action at law lies against an executor to enforce the payment of a pecuniary legacy, he acting as such, and retaining the sum in his hands as the trustee for the party entitled to receive it ; 5 T. R. 690 ; Peake, 73 ; 1 Sid. 45, 46 ; 1 Lord Raym. 23, 24. The remedy of the legatee in such a case is in a court of equity. But the legatee of a specific chattel may recover it after the executor has assented to the bequest ; 3 East, 120. And if the executor expressly promise, (by writing, according to the Statute against Frauds,) to

pay in respect of any new consideration, such as forbearance, or the like, the executor may, in that case, be sued ; 5 T. R. 693 ; 2 Lev. 3 ; 1 Saund. 210, n. 1 ; 7 T. R. 350, note ; 2 Saund. 136 ; Wms. Exors. 3d edit. 1397 ; and see 1 Chit. Gen. Prac. 562. And when the pecuniary legacy can no longer be considered as retained by the executors in their character of executors, it may be recovered from them by action at law ; as where the plaintiff and three others, being residuary legatees under the will of one T. P., the defendants, as the executors named in the will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them and the plaintiff a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands, it

FOR LEGACIES. last will and testament [*let this averment agree with the bequest*], and made the defendant one of the executors thereof; and the said E. F. afterwards, to wit, on the day and year aforesaid, died without altering or revoking his said will as to the said bequest; and the defendant afterwards, to wit, on the day and year aforesaid, took upon himself the burthen of the execution of the said will; and the plaintiff further says, that divers goods and chattels of the said E. F. of great value, to wit, of £——, afterwards, to wit, on the day and year aforesaid, came to the hands and possession of the defendant to be administered, which said goods and chattels were more than sufficient to pay the just debts and legacies and funeral expenses of the said E. F. and the charges of proving the said will, of all which said several premises the defendant then had notice; by reason of which said premises the defendant then became liable to pay to the plaintiff the said sum of £—— so bequeathed by the said E. F. as aforesaid; and being so liable he the defendant, in consideration thereof, and that the plaintiff, at the request of the said defendant, would [*here state the consideration and promise, according to the fact, and which may be thus,*] forbear to proceed against the defendant for recovery of the said sum of £—— so bequeathed as aforesaid, for six months then next following, he the defendant then promised the plaintiff to pay him the said sum of £—— so bequeathed by the said E. F. as aforesaid; and the plaintiff avers that he, confiding in the said promise of the defendant, did [*here state the plaintiff's performance of the consideration, which may be thus,*] forbear and give time to the defendant for the payment of the said sum of £—— for upwards of six months after the making of the said promise of the defendant, whereof the defendant afterwards, to wit, on &c., had notice; and thereby, and according to the tenor and effect of the said promise, he the defendant became liable to pay to the plaintiff the said sum of £——, when he the defendant should be thereunto afterwards requested. [*Add money counts, account stated, and breach as ante, 36.*]

XIV. FOR CONTRIBUTIONS TO PARTY-WALLS.

On 14 Geo. 3, c. 78, s. 41, (g) for a moiety of the expense of pulling down an old wall, and building a party-wall where the two buildings were of the same rate or class.

XIV. FOR CONTRIBUTIONS TO PARTY-WALLS.

For that whereas, after the making of a certain act of parliament made and passed in the 14th year of the reign of our late sovereign lord the king, George the Third, to wit, on &c., a certain old party-wall had been pulled down, and a certain other party-wall built in lieu thereof, by and at the expense of the plaintiff, agreeably to the directions of the said statute, between a certain house and building of the plaintiff, situate and being in the parish of, &c. and a certain other building adjoining thereto, being of the same rate or class of building as the said house and building of the plaintiff;

was held he might recover it from them by action; 1 Moore & Pay. 209; Wms. Exors. 3d edit. 1517, 1518. The plaintiff in that case declared specially, but it should seem the common counts for money lent, had and received, and account stated, would have sufficed. It is not necessary to aver in the declaration, that the defendant had assets at the time of the promise; 9 Co. 94; 2 Saund. 137 c.; 1 Saund. 210, n. See 2 Chitty's Gen. Prac. 466, 467, 498, 499, as to the excellent and summary remedy for a pecu-

niary legacy in the Court of Arches. As to when an action of debt for a legacy can be supported, see *Braithwaite v. Skinner and others*, 5 M. & W. 313.

(g) See the notes, *ante*, 46; Chit. Col. Stat. vol. i. 127; see other forms, 1 Wentw. 184; 3 *Id.* 682, and *post*. It should seem that the plaintiff might recover on the common count for money paid; 5 T. R. 130; 8 T. R. 602; Comyn on Cont. 407.

To enable the plaintiff to recover the contribution, he must be prepared to prove that

and the defendant, at the time of pulling down the said old party-wall, and of building and finishing the said new party-wall, was the owner of and entitled to the improved rent of the said house and building so adjoining the said house and building of the plaintiff as aforesaid, and upon that occasion the defendant then made use of the last-mentioned party-wall so built by the plaintiff, by means whereof, and according to the tenor and effect of the said statute in that behalf, the defendant then became liable to reimburse and pay to the plaintiff a certain sum of money, to wit, the sum of £—, being a moiety of the expense of building so much of the said party-wall, so built by the plaintiff as aforesaid, as the defendant did make use of as aforesaid, according to the said act, together with the like proportional part of certain other expenses which were necessary to the pulling down of the said old party-wall, amounting in the whole to a large sum of money, to wit, the sum of £—, together with certain other reasonable expenses

in every respect his *proceedings* have been regular within the Building Act, 14 Geo. 3, c. 78; 10 East, 227. But the formalities as to notices, &c. required by the act, may be dispensed with by agreement between the parties; 5 T. R. 130; Holt, C. N. P. 321; 7 Taunt. 158; 2 Marsh. 436, S. C. In *Readay v. Barnard*, June 8th, 1827, K. B. at Westminster, Chit. Col. Stat. vol. i. 129, n. (g), Lord Tenterden held that an account of what the defendant is liable to pay must be delivered by him, as required by the 41st section of the act; but that a demand was only essential to entitle the plaintiff to double costs; and see as to the demand, 2 Taunt. 62. The statute requires a three months' notice of action to entitle the plaintiff to double costs. In 1 Moo. & Mal. 71, it was held, that an account, claiming more than the sums prescribed by the act, was nevertheless sufficient. But it seems that no more than such prescribed sum can be recovered, though the price of brick work is much higher. The account or estimate required by the act to be given in ten days after the building of the wall, does not apply to the case of a new wall to a house, there being no house on the property adjoining it, but only where an old wall is removed; 1 M. & P. 454; 4 Bing. 551, S. C. In the former case it suffices to give in the account in a reasonable time, which is a question for the judge; *Id.*

As to the party liable, as observed in Chit. Col. Stat. vol. i. 127, note (c), it seems to have been the intention of the legislature to throw the burthen on the lessees of building leases, by whom the value of the estate is considerably improved, and who afterwards make under-leases, reserving improved rents; *Southal v. Leadbetter*, 3 T. R. 461; that is, the best or highest rent, 1 B. & P. 305; and to make the owner of the improved rent and not of the improved value liable, 2 B. & A. 467. In case of a lessor at a rack rent (there being no other person entitled to any other kind of rent) he is liable, though the lessee has improved the house demised. See 8 T. R. 214; 3 T. R. 461. And a tenant who rebuilds a house without a lease, or an agreement for a lease, and in so doing

makes use of the party-wall of the adjoining house, cannot be sued for half the cost as owner of the improved rent, though the house was worth £60 *per annum*, and he afterwards, in consideration of the rebuilding, obtained a beneficial lease at the low ground-rent of less than seven guineas *per annum*; 6 Taunt. 249. So where the lessee has sold his term for a large sum in gross, and not underlet, the original lessor is still liable to pay the moiety; 3 T. R. 458; and it seems that the *dicta* ascribed to Gibbs, C. J., in 2 Marsh. R. 436, and to Lord Kenyon, in 3 T. R. 461, are not law; see Chit. Col. Statutes, vol. i. 128, n.; 2 B. & Ald. 467. Where the defendant held land under a lease from J. S. and underlet a portion of it at an advanced rent, to one G., who built thereon, using the party-wall of plaintiff, it was held the defendant was the owner of the improved rent, and liable to a moiety of the expense of building a party-wall; 1 M. & P. 454; 4 Bing. 551, S. C. If there be several improved rents, the owner of the highest must bear the expense, although at the time of the using the party-wall his interest had nearly expired, and there is no provision in the act for dividing the burthen between the owners of the different improved rents; 1 B. & P. 305.

A tenant who means to recover from his landlord must not perform the work himself; 10 East, 227, and 1 R. & M. 357; and in a late case it was held, that a tenant who is under a covenant to repair cannot maintain an action on the above act against his landlord, for a moiety of the expense of building a party-wall, which being out of repair the tenant pulled down and rebuilt at the joint expense of himself and the occupier of an adjoining house, to whom he had given the notice required by the statute, in the landlord's name, but without his authority; 1 R. & M. C. N. P. 367.

A general covenant to repair will not subject a tenant to pay any part of the expense of a party-wall; 1 B. & P. 305; 8 T. R. 214. But a tenant may, by express stipulation to repair party-walls, become liable to such contribution; 8 T. R. 605; see 5 Taunt. 90.

FOR CONTRI-
BUTIONS TO
PARTY-WALLS.

of shoring up the said house and building of the defendant, amounting in the whole to a large sum of money, to wit, the further sum of £—; and being so liable, he the defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, promised the plaintiff to pay him the said sums of money on request; and the plaintiff further says, that as soon as conveniently might be, and within *ten days* (i) after the said new party-wall had been so built as aforesaid, to wit, on &c., he the plaintiff, so being such first builder as aforesaid, did leave at the said adjoining house and building of the defendant a true account in writing (k) of the number of rods in the said party-wall, for which the owner of the said adjoining building was liable to pay, and of the deduction which such owner was entitled to make thereout on account of such materials in the said act mentioned, as did belong to the said adjoining building, and an account of such other expenses so incurred as aforesaid; and the plaintiff afterwards, and upwards of twenty-one days before the commencement of this suit, to wit, on &c., did demand (l) of the defendant payment of the said sum of money which he was so liable to pay as aforesaid. [*Before Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibiting two or more counts on the same transaction, it was the practice to add an indebitatus count, as ante, 46; also counts for work and labour and materials found, money paid and an account stated; but, now, there can be only one count and the account stated. Conclude as ante, 36.*]

The like where there was no old party-wall before the new party-wall was erected (m).

For that whereas heretofore, to wit, on &c. [*day of defendant's using the wall, or about it*], the plaintiff was lawfully possessed of a certain piece or parcel of ground, situate within the weekly bills of mortality, to wit, in the parish of &c., in the county of *Middlesex*, and at his own expense had erected and built thereon a certain messuage and building, and had erected and built a certain party-wall, parcel of the said messuage and building, agreeably to the directions of the statute in that behalf made and passed in the fourteenth year of the reign of our late sovereign lord King George the Third: And whereas also, the plaintiff having so erected and built the said messuage and building, and the defendant then being the owner and occupier of a certain piece or parcel of ground situate within the weekly bills of mortality, to wit, in the parish aforesaid, and adjoining to the said messuage and building so erected and built by the plaintiff, and abutting thereupon, he the defendant afterwards, to wit, on the same day and year aforesaid, did begin to erect and build, and did erect and build, and cause and procure to be erected and built on the said last-mentioned piece or parcel of land, a certain messuage or building, of the same rate or class of building as the messuage and building first above mentioned, and did, for the purpose of erecting and building the same, cut into and make use of the said party-wall of the plaintiff. And the plaintiff in fact says, that at the time of the making use of the said party-wall, and cutting into the same by the defendant as aforesaid, the defendant was the owner of and entitled to the im-

(i) It seems that the account in this case must be left during the *ten days*; see 1 M. & P. 454; 4 Bing. 551, S. C.

(k) An account must be delivered; see section 41 of the act, and the cases, *ante*, 181, as to the form of the account, &c.

(l) Such demand was only necessary to entitle the plaintiff to *double costs*; see *ante*, 181, note (g); as to which costs now see 5 & 6 Vict. c. 97.

(m) See 1 Moo. & Pay. 454; 4 Bing. 551, S. C.; see notes, *ante*, 180.

proved rent of the said adjoining building so erected and built as aforesaid, And the plaintiff further says, that he the plaintiff did, as soon after the cutting into and using the said party-wall by the defendant as conveniently might be, to wit, on the day and year aforesaid, deliver and cause to be delivered to the defendant a true account in writing of the number of rods in the said party-wall so cut into and made use of by the said defendant, for which the defendant, as owner of such adjoining building as aforesaid, by virtue of the said statute, was liable to pay to the plaintiff a large sum of money, to wit, the sum of £100, (there being no deductions to be made thereout for old materials or otherwise,) and did then demand payment thereof from the defendant; by reason whereof, and by force of the statute, he the defendant became liable to pay to the plaintiff the said sum of £100 within twenty-one days next after such demand thereof as aforesaid. And the plaintiff further says, that, being so liable, the defendant afterwards, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said sum of £100 within twenty-one days next after such demand thereof as aforesaid. Nevertheless the defendant, not regarding his said promise, did not nor would, within such twenty-one days, which had elapsed before the commencement of this suit, or at any other time, pay the plaintiff the said sum of £100 or any part thereof; but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse. [*Before the rules of Hil. Term, 4 Will. 4, an indebitatus count like the one ante, 46, and the common money counts, and account stated were added, but now there can only be one count and the account stated. Conclude as ante, 36.*]

FOR CONTRI-
BUTIONS TO
PARTY-WALLS.

For that whereas, before and at the time of the making of the indenture of demise hereinafter mentioned, and after the making of a certain act of parliament, &c., one E. F. was lawfully possessed of a certain piece or parcel of ground hereinafter mentioned to be demised to the said A. B., and at his own expense had erected and built a certain messuage or tenement, coach-house and stables, upon the ground hereinafter mentioned to be demised, and had also erected and built a certain party-wall, parcel of the said messuage or tenement, and according to the form of the statute in such case made and provided, to wit, at &c.; and the said E. F., being so possessed of the said premises, and having so built and erected the said messuage and tenement as aforesaid, upon the said ground as aforesaid, at his own expense, by a certain indenture made, on &c., between the said E. F., by the name and description of &c., and the said A. B., by the name of &c., and after reciting that &c. [*here set out the indenture*], (as by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear;) by virtue whereof, he the said A. B. afterwards, to wit, on &c. aforesaid, entered into the said demised premises, with the appurtenances, and became and was thereof possessed, and being so possessed thereof, he the said C. D. afterwards, to wit, on &c., was the owner and occupier of a certain piece of ground adjoining to the said demised premises of the said A. B., and abutting throughout at the east end of the same; and as such owner and occupier of the said piece and parcel of ground did there erect and build, and cause and procure to be erected and built, a certain tenement of the

The like by a lessee for years in whom the property of the party-wall was vested, for the defendant's share of the expenses of the party wall which he had cut into (n).

(n) See notes, ante, 180, 181. This declaration was settled by an eminent pleader at the bar, and is copied from the 5th edit. of this work.

FOR CONTRI-
BUTIONS TO
PARTY-WALLS.

said C. D., and did, for the purpose of erecting and building the same, cut and make use of the said party-wall of the said A. B. ; and the said A. B. in fact saith, that at the time of the making use of the said party-wall, and cutting into the same by the said C. D., the property of the said party-wall was vested in the said A. B. by virtue of the said indenture of demise, and that he, the said C. D. was the owner of and entitled to the improved rent of the said adjoining building so erected and built as aforesaid ; and that he, the said A. B., afterwards and on &c., did cause to be estimated the expense of building of so much of the said party-wall as was made use of by the said C. D., at the rate of £ — by the rod of the new brick-work, according to the form of the statute in such case made and provided, there being no deductions to be made thereout in respect of old materials or otherwise, and that the said expense, estimated at the said rate, did amount to a large sum of money, to wit, the sum of £ — of lawful &c., whereof the said C. D. afterwards, to wit, on &c. aforesaid, had notice. And the said A. B. avers, that he the said A. B., as soon after the cutting into and using the said party-wall by the said C. D. as aforesaid as conveniently might be, to wit, on &c., did deliver and cause to be delivered to the said C. D. a true account in writing of the number of rods in such party-wall for which the said C. D., as such owner of such adjoining building as aforesaid, was liable to pay to the said A. B. a large sum of money, to wit, the sum of £ —, according to the form of the statute in such case made and provided, and did demand payment thereof from the said C. D. ; by reason whereof, and by force of the statute in such case made and provided, the said C. D. became liable to pay to the said A. B. the said sum of £ — within twenty-one days next after such demand thereof as aforesaid ; and being so liable, he the said C. D., in consideration thereof, afterwards, to wit, on &c., promised the said A. B. to pay him the said A. B. the said sum of £ — within twenty-one days next after such demand thereof as aforesaid ; nevertheless the said C. D., not regarding his said promise so by him made as aforesaid, nor the statute in such case made and provided, but contriving &c., did not pay to the said A. B. the said several sums of money, or either of them, or any part thereof, within the said space of twenty-one days next after such respective demands, nor hath he yet paid the said several sums of money, or either of them, or any part thereof, to the said A. B., although often requested so to do, but to pay the same or any part thereof hath hitherto altogether refused and still doth refuse.

The like by executrix to recover a moiety of the expenses of building a party-wall, used by defendant after death of testator. (o)

For that whereas, after the making of a certain act of parliament made at the parliament of our sovereign lord the late king, holden at Westminster, in the county of Middlesex, in the fourteenth year of his reign, intituled, " An Act for the further and better Regulation of Buildings and Party-walls ; and for the more effectually preventing Mischiefs by Fire within the Cities of London and Westminster, and the Liberties thereof, and other the Parishes, Precincts, and Places within the weekly Bills of Mortality, the Parishes of St. Mary-le-bone, Paddington, St. Pancras, and St. Luke, at Chelsea, in the county of Middlesex, and for Indemnifying, under certain

(o) See a form against an executor, *Thacker v. Wilson*, 3 A. & E. 142 ; where see also forms of pleas.

conditions, Builders and other Persons against the Penalties to which they are or may be liable for erecting Buildings within the limits aforesaid contrary to law;" and in the life-time of the said E. F., to wit, on &c., a certain party-wall had been built, at the expense of the said E. F. agreeably to the directions of the said act of parliament, between a certain messuage or dwelling-house, situate and being in &c. and certain ground, then also situate and adjoining the said party-wall; and whereas afterwards, and after the death of the said E. F., and since the intermarriage of the said plaintiffs, to wit, on &c., he the said C. D., being then the owner, and entitled to the improved rent of the said adjoining ground, did cut into and make use of the said party-wall, by then and there beginning to build, and afterwards building against the same, a certain messuage or dwelling-house of the same rate or class of building as the said first-mentioned messuage or dwelling-house; by means whereof, and according to the tenor and effect of the said act of parliament in that behalf, he the said C. D. then became liable to reimburse and pay to the said A. B. and G. H., as executrix as aforesaid, a certain sum of money, to wit, the sum of £—, of lawful money of Great Britain, being one moiety of the expense of building the said party-wall, after the rate in the said act mentioned; and being so liable, he the said C. D., in consideration thereof, afterwards, to wit, on &c., promised the said A. B. and G. H. his wife, as executrix as aforesaid, to pay them the said sum of £—, when he the said C. D. should be thereunto afterwards requested.

FOR CONTRI-
BUTIONS TO
PARTY-WALLS.

XV. TO PAY MONEY IN CONSIDERATION OF FORBEARANCE TO DEFENDANT.

For that whereas before the making of the promise of the defendant hereinafter next mentioned, a certain action had been commenced and prosecuted by and at the suit of the plaintiff against the defendant, in the Court

XV. TO PAY
MONEY IN
CONSIDERA-
TION OF FOR-
BEARANCE TO
DEFENDANT.

On a promise to pay the costs of an action within a week, in consideration of plaintiff staying proceedings. (o)

(o) See forms, Plead. Assist. 95, 127. See a form, *ante*, 179, against an executor, on his promise to pay a legacy in consideration of forbearance. An agreement to forbear for a certain or reasonable time to institute or prosecute legal or equitable proceedings for a well-founded legal or equitable demand, is a sufficient consideration for the promise of the debtor, or a third person, to pay the debt, or more, or do any other legal act. See the various cases on the subject referred to in Chit. jun. on Contr. 3rd edit. 35 to 38. But forbearance to sue is an insufficient consideration, unless a right of action be shown to have existed; 4 East, 455; 1 New Rep. 172; 1 B. & Ad. 604; 4 M. & W. 797.

Assumpsit in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against A. on a cognovit, defendant promised to pay £30 on account of the debt (for which the cognovit was given) on the 1st of April then next; averment that the plaintiff did suspend the proceedings on the cognovit. The plaintiff, at the trial, proved the following agreement

in writing:—"The plaintiff having at my request consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay £30 on account of the debt, on the 1st day of April next;" held, that as the request must have preceded the consent to suspend proceedings, the contract might be declared on as an executory contract, and, consequently, that there was no variance. Secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least until the 1st of April. Thirdly, that after verdict, the averment that plaintiff had suspended proceedings, without specifying for what period, was sufficient; 7 Bar. & Cres. 423; 1 M. & R. 708, S. C. It is not necessary to state the subject-matter of the debt; Com. Dig. Action on the Case on *Assumpsit*, F. 8, H. 3; Hob. 18. Though it must be shown that there was some cause of action against the defendant, or some other person; 4 East, 455; 1 New Rep. 172; 4 Taunt. 117; *post*, 186, note.

TO PAY MONEY
IN CONSIDERA-
TION OF FOR-
BEARANCE TO
DEFENDANT.

of our lady the now queen, before the queen herself, (p) [*or if in C. P. say, "in the Court of our lady the queen, before her majesty's justices of the bench at Westminster,"*] for the recovery of a certain sum of money, to wit, the sum of £——, then and at the time of the making of the promise of the defendant hereinafter next mentioned due and owing from the defendant to the plaintiff. And which said action, at the time of the making of the said promise of the defendant hereinafter next mentioned, was depending in the said Court, whereof the defendant then had notice. And thereupon heretofore, to wit, on &c. [*day of promise, or about it*], in consideration of the premises, and that the plaintiff, at the request of the defendant, would (q) cease to prosecute the said action, and would stay all further proceedings therein, he the defendant promised the plaintiff to pay the costs of commencing and prosecuting the said action in a week then next following. And the plaintiff avers that he, confiding in the said promise of the defendant, did then cease (r) to prosecute the said action, and hath hence hitherto stayed all further proceedings therein; and that the costs of commencing and prosecuting the said action amounted to a large sum of money, to wit, the sum of £—— [*state enough*], whereof the defendant afterwards, to wit, on the day and year aforesaid, had notice. And although a week from the time of the making the said promise of the defendant hath long since elapsed, yet the defendant, not regarding his said promise, hath not as yet paid the said costs of commencing and prosecuting the said action, or any part thereof, although he the defendant afterwards, and after the expiration of a week from the time of making his said promise, to wit, on &c. [*any day before the day of the date of the first writ*], was requested by the plaintiff so to do; but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse. [*Add a count on the original debt, money paid, the account stated, and conclude as ante, 36.*]

XVI. TO PAY
MONEY FOR
FORBEARANCE
TO THIRD
PERSONS.

On a promise to
pay the debt of
a third person
in consideration
of forbearance.
(s)

XVI. TO PAY MONEY IN CONSIDERATION OF FORBEARANCE TO THIRD PERSONS.

For that whereas one E. F., before and at the time of the making of the promise of the defendant hereinafter next mentioned, was indebted to the plaintiff in a certain sum of money, to wit, the sum of £—— [*state*

(p) The Court must be accurately described; 3 M. & Sel. 166.

(q) When it suffices to declare on an executory consideration, though the contract was in its terms on an executed consideration, see 7 Bar. & Cres. 423; 1 Mo. & Ry. 708, S. C.; ante, 185, note.

(r) See *id.*

(s) Observe the notes to the preceding form. See forms, Morg. 152, 166; Plead. Assist. 129; Rob. Ent. 100; 2 Wentw. 405, &c. and Index to ditto; see also *post*, precedent for declaration on guarantee for goods sold.

The mere promise of a third person to pay the debt of another, without a stipulation by the plaintiff to forbear, or some other new consideration, is not valid; 1 Saund. 211 a; Com. Dig. Action on the Case on *Assumpsit*,

B. 1, 2; Chitty jun. on Contracts, 3d edit. 35 to 38. The promise of an heir who has no assets by descent to pay the debt of his ancestor in consideration of forbearance, is not binding (2 Saund. 137; Com. Dig. Action of *Assumpsit*, F. 8; 4 East, 455; see the form of declaring against an heir, 2 Saund. 135); but a promise by an executor, in consideration of forbearance, is valid, though he have no assets at the time, because by the forbearance the plaintiff is precluded from obtaining judgment of assets *quando acciderint*; 2 Saund. 137; ante, 179, notes; and see a form, ante, 179. See form of declaration by baron and feme on promise to render third person or pay debt, 4 B. & Adol. 739; and a declaration on a promise to pay a larger sum than debt, in consideration of plaintiff's forbearing

enough]; (t) and thereupon heretofore, to wit, on &c. [day of guarantee, or about it], in consideration of the premises, and that the plaintiff, at the request of the defendant, would (u) forbear and give time to the said E. F. for the payment of the said sum of money until the — day of — [let this agree with the consideration (u)], he the defendant promised (x) the plaintiff to pay him the said sum of £—— on &c. [let this agree with the promise.] And the plaintiff avers that he, confiding in the said promise of the defendant, did forbear and give time to the said E. F. for the payment of the said sum of money until the said — day of — [let this agree with the consideration]; but that the said E. F., although he was afterwards, to wit, on &c. [any day before the commencement of the suit], requested (y) by the plaintiff so to do, hath not as yet paid (z) the said sum of money, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused so to do; whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and thereby and according to the tenor and effect of his said promise, he the defendant became liable to pay the plaintiff the said sum of money on the said — day of —. [If there were any doubt as to the meaning of the guarantee, it was advisable before the pleading rules, Hil. T. 4 W. 4, prohibiting more than one count, to let one count follow the very words of it, and to add another count stating the substance of it. But now there can be only one count unless another distinct subject matter of complaint be shown. Add an account stated and breach, as ante, 36.]

TO PAY MONEY
FOR FORBEAR-
ANCE TO THIRD
PERSONS.

For that whereas, before the making of the said distress hereinafter next mentioned, one J. S. held, occupied and enjoyed certain premises, with the appurtenances, as tenant thereof to the plaintiff, by virtue of a certain demise thereof before then made, at a certain rent, to wit, the rent of £20 per annum; and because a certain sum of money, to wit, the sum of £10 of the aforesaid rent, at the time of making the distress hereinafter mentioned, was

On a promise that if plaintiff would withdraw distress for rent on the goods of a third person, defendant would pay the rent.(a)

to execute *fi. fa.* against third person, *Smith v. Alger*, 1 B. & Adol. 603; and see a declaration on a promise to give a note on plaintiff's discharging debtor out of custody, 5 Bar. & Adol. 848.

As to what is or is not a collateral promise within the statute, see 3 Chit. Com. Law, 318 to 322; 1 Chitty's Coll. Stat. 369; 1 B. & A. 297.

(t) It is not necessary to state the subject-matter of the debt, though some demand recoverable at law or in equity must be stated, 4 Taunt. 117; ante, 185, n. (o). It is better not to state it with unnecessary particularity; *Peake's Rep.* 117. Though a larger sum be stated under a videlicet to be due, it need not be proved; 8 Taunt. 197; 2 J. B. Moore, 114, S. C.

(u) See 7 B. & C. 423; 1 M. & R. 708; 8 C.

(z) Though the promise must, under the stat. 29 Car. 2, c. 3, s. 4, be in writing, and the whole consideration must be stated in such writing, see 4 B. & A. 595; 5 East, 10; 6 J. B. Moore, 86; it need not be so stated in the declaration, 1 Saund. 211, n. 2. See 6 Bing. 529.

(y) From Cro. Jac. 500; Cro. Eliz. 85, 91; 3 Hem. Bla. 181, it seems necessary to

aver this request. *Sed quære*, and see 1 Stra. 88, 89. If it be not necessary to state it, the statement will not require it to be proved, *Plowd.* 128, unless traversed.

(x) It should seem, from 1 Sid. 178; 2 Roll. 738, l. 15, that this averment of the non-payment by the principal is unnecessary, and that it suffices to aver merely a non-payment by the defendant.

(a) A promise of this nature, whether the distress was begun or not, is not within the Statute against Frauds, and need not be in writing, 3 Burr. 1886; 2 Wils. 308, S. C.; and see 4 Taunt. 117; 3 Esp. 86; 2 Cr. & Mee. 710; 2 P. & D. 433. As to what is a sufficient commencement of a distress, see 5 Bing. 10; 8 B. & Cres. 456; and see a declaration on a promise that in consideration plaintiff would give up his lien on goods for debt of third person, defendant promised to pay debt, *Clancy v. Piggott*, 4 Nev. & M. 496. On a promise that in consideration that plaintiff would withdraw distress made on the effects of a bankrupt, defendant, being his assignee, promised that the amount of the distress should be paid to plaintiff out of the produce of the sale of the same effects distrained on; *Stephens v. Fell*, 4 Tyr. 6; and see pleas and law, *id.*

**TO PAY MONEY
FOR FORBEAR-
ANCE TO THIRD
PERSONS.**

then due and owing from the said J. S. to the plaintiff, he the plaintiff, during the said tenancy, and before the making of the promise of the defendant hereinafter mentioned, to wit, on &c. [*day of distress, or about it*], took and distrained divers goods and chattels then being in and upon the said demised premises, as a distress for the said sum of money, to wit, the said sum of £10, so then due and owing to the plaintiff as aforesaid, and the plaintiff then intended, after the expiration of five days after the making of the said distress, to sell the said distress according to the form of the statute in such case made and provided, &c., whereof the defendant then had notice; and thereupon heretofore, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, would withdraw the said distress, and forbear to proceed thereupon, he the defendant then promised the plaintiff to pay him the said sum of £10 in one month then next following [*let this be according to the very terms of the promise*]. And the plaintiff avers that he, confiding in the said promise of the defendant, did then withdraw the said distress, and forbear to proceed thereupon, and hath thence hitherto forbore to proceed on the same; and although a month from the making of the said promise hath long since elapsed, and although the said J. S. afterwards, to wit, on &c. [*any day before the commencement of the suit*], was requested by the plaintiff to pay him the said sum of £10, yet the same still wholly remains due and unpaid by him; of all which said premises the defendant then had notice. Nevertheless, the defendant, not regarding his said promise, hath not paid to the plaintiff the said sum of £10, or any part thereof, and the said sum of £10 still remains wholly due and unpaid to the plaintiff. [*The declaration might at once commence with the statement of plaintiff's having distrained, without stating the terms of tenancy. If there be any doubt as to the distress having been actually commenced, merely state defendant's intention to distrain, and that defendant promised to pay the rent if he would forbear so doing. Conclude as ante, 36.*]

On an agree-
ment in con-
sideration of forbearance to deliver up the body of a person that he might be arrested.

See form of declaration, Lewis v. Davison, 4 M. & W. 654.

**XVII. TO PAY
MONEY IN CON-
SIDERATION OF
MARRIAGE.**

On a promise to
pay £200 if
plaintiff would
marry a girl.(b)

XVII. TO PAY MONEY IN CONSIDERATION OF MARRIAGE.

For that whereas heretofore, to wit, on &c. [*day of promise, or about it*], in consideration that the plaintiff, at the request of the defendant, would marry

(b) See other forms, 2 Wentw. 491, 492; 1 Mod. Ent. 128; Plead. Assist. 51, 137; Morg. 133. And see form of declarations on mutual promises to marry, *post*; 2 Wentw. 487 to 489; Plead. Assist. 47, 99; 2 Rich. C. P. 128; 1 Sid. 180.

When action lies.—An action will lie on a contract or promise to pay money in consideration of marriage; Cro. Eliz. 63. If the promise be to pay 20 French pieces, it is sufficiently certain and shall be intended to mean French crowns; Cro. Car. 194. So if it be to pay £100 at a time to come, and in the mean time to pay interest after the rate of £8, the promise is good and not usurious; 1 Vin. Abr.

297, pl. 15; 2 Sid. 116, S. P. So if a man promise another, in consideration of his marrying his daughter, to give him as much as he should give to any of his daughters, and afterwards dies, leaving another of his daughters a sum of money, an action lies against his administrator or executor; 3 Bulst. 248; 1 Vin. Abr. 287, pl. 3.

A promise by a father after his daughter's marriage to pay a sum of money to her husband, is a good promise; 2 Leon. 111; Cro. Eliz. 69; see also Dyer, 272 b, pl. 32, in margin. A promise by a man to pay a woman a sum of money if he marry any body but herself, is considered a restraint upon

one E. F., he the defendant promised the plaintiff to pay him the sum of £—— whenever after such marriage he the defendant should be thereunto requested; and the plaintiff saith that he, confiding in the said promise of the defendant, afterwards, to wit, on &c., (c) did marry the said E. F., whereof the defendant afterwards, to wit, on &c., had notice; yet the defendant, not regarding his said promise, hath not yet paid the said sum of money, or any part thereof, to the plaintiff, although he the defendant afterwards, and before the commencement of this suit, to wit, on &c., was requested by the plaintiff to pay him the same, but the defendant to pay the same or any part thereof to the plaintiff hath hitherto wholly refused, and still doth refuse. [*Add an account stated, if there be evidence to support it, and conclude as ante, 36.*]

TO PAY MONEY
IN CONSIDERA-
TION OF
MARRIAGE.

XVIII. TO PAY MONEY FOR SERVICES, &c.

XVIII. TO PAY
MONEY FOR
SERVICES.

For that whereas heretofore, to wit, on &c. [*day of retainer, or about it*], in consideration that the plaintiff, at the request of the defendant, would enter into the service of the defendant as an hired servant, and serve the defendant in that capacity, he the defendant promised the plaintiff during the continuance of such service and employment to pay him the plaintiff for such service certain wages, after the rate of £—— per annum, and certain board wages for his support and maintenance during such service, after the rate of —— shillings per week. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, enter into the service of the defendant, and served the defendant in the capacity aforesaid for a long space of time, to wit, for the space of —— weeks then next following, and that the board wages of the plaintiff during the time aforesaid, and after the rate aforesaid, amounted to a large sum of money, to wit, the sum of £——, whereof the defendant afterwards, to wit, on &c. [*any day before the commencement of the suit*], had notice. [*Add a count for wages, if any be due, as ante, 52, account stated, and breach, as ante, 36.*]

Special count
for board wages
as an hired ser-
vant. (d)

For that whereas before and at the time of the making of the promise of the defendant hereinafter next mentioned, he the defendant was one of the

For a reward
defendant ad-
vertised he
would give, in
consideration of
any person's re-
taking one who
had escaped
out of his cus-
tody. (e)

marriage, and therefore void; 5 Burr. 2225. Upon a promise to a father to give a sum of money with his daughter in marriage, the daughter may have the action, for she is the meritorious cause of action; Bull. Ni. Pri. 123. Promises to pay money in consideration of marriage must be in writing and signed, by the Statute of Frauds, 29 Car. 2, c. 3, s. 4. But mutual promises to marry are not within the provisions of this act; Stra. 34; see 1 Chit. Coll. Stat. 371, n. (1). Letters from parents, or persons standing in loco parentis, containing promises of provisions in consideration of marriage, if explicit in their terms, have been held to satisfy the statute; 2 Vent. 361; 2 Prec. Ch. 560; 2 Vern. 600, 602.

Form of Declaration.—An inducement of a discourse having taken place respecting the marriage is unnecessary, and is usually omitted in modern pleadings; a promise to the plaintiff must be shown in express terms; an allegation that the defendant asserted and pub-

lished that he would give £100 to whoever should marry his daughter, is too indefinite and uncertain; 1 Rol. Abr. 6 M. pl. 1; Cro. Jac. 4. The marriage need not be stated to have taken place *ad instantiam defendantis*, for that will be intended; Cro. Car. 194. *Indebitatus assumpsit* will not lie; 1 Vent. 268.

(c) The words "at the special instance and request of the defendant," are unnecessary here; Cro. Car. 194.

(d) See precedents for wages, Thomp. Ent. 25; Pl. A. 49; 3 Burr. 1778; 1 Saund. 264; 2 Id. 346; 4 East, 516; 4 Esp. Rep. 75; 7 T. R. 241; 2 B. & P. 116; 3 Nev. & Man. 117. As to the recovery of wages and remuneration in general, see Bac. Ab. tit. Master and Servant, H.; Burn's J. tit. Servants; ante, 52, note.

(e) See other forms, 2 Wentw. 499; 3 Id. 30, 31, where see form of advertisement and notes as to the plaintiff's having recovered. An advertisement or general promise of a re-

TO PAY MONEY
FOR SERVICES.

bailiffs of the sheriff of Middlesex; and whereas also before the time of the making of the said promise one E. F. had been arrested and was in custody of the defendant as such bailiff as aforesaid for debt. And whereas also, before the time of the making of the said promise, the said E. F. had escaped out of the custody of the defendant, so being such bailiff as aforesaid, and the defendant was desirous of apprehending and retaking the said E. F.; and thereupon afterwards, to wit, on &c., in consideration that any person (f) would apprehend the said E. F., or by private information or otherwise be the means of apprehending or causing him to be apprehended and delivered into the custody of the defendant, he the defendant promised, upon such apprehending and delivery of the said E. F. into the custody of him the defendant, to pay to such person who should apprehend or cause to be apprehended the said E. F. a reward of £100. And the plaintiff avers that afterwards, to wit, on &c., he the plaintiff took and apprehended the said E. F., and afterwards, to wit, on &c. last aforesaid, delivered him into the custody of the defendant, by reason whereof the defendant then became liable to pay and ought to have paid to the plaintiff the aforesaid reward of £100. [Add a count upon an account stated, and breach, as ante, 36.]

For a reward
advertised for
discovering an
offender. (g)

For that whereas the defendant heretofore, to wit, on &c. [*day of publication, or about it*], printed and published a certain advertisement, stating [*here set out the advertisement in the past tense, as thus:*] that one A. S. had then lately defrauded the defendant and other people of money, wearing apparel, and table linen and other things of value to a great amount, and the defendant did thereby then promise, that if any person would discover the said A. S. so that she might be brought to justice, such person should receive £20 reward of the defendant. And the plaintiff saith that he, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, did discover the said A. S. to the defendant; and the said A. S. afterwards, to wit, on the day and year aforesaid, was committed to the custody of the keeper of the gaol at [Worcester] to answer for the said offence, whereof the defendant afterwards, to wit, on the day and year

ward to any one who will apprehend a felon, or do any other act for the defendant, should not, in general, be declared upon as a promise to the particular plaintiff, for there is no original privity between the parties themselves; Rol. Ab. 6, M. pl. 1; Noy, 11, where a similar advertisement promised a reward to the person who would give information respecting a lost child, so that it might be restored to its parents, and a person communicated his suspicions on the subject to a third person, who gave the information and received the reward accordingly; it was held, that the person who had so received the reward was not liable to repay the whole or any portion of it to the person from whom he originally received his information; 1 M. & S. 108. When the reward was advertised to be paid to any person who should apprehend, or cause to be apprehended, &c., and one person apprehended the offender, and another procured his apprehension, it was held that they were both entitled to be remunerated; 3 Wentw. 30. But where a party, who

had been robbed of bank notes, put forth a handbill wherein it was stated, that "who-soever would give information whereby the same might be traced, should, on conviction of the parties, receive a reward of £20," it was held, that the only person entitled to the reward was he who first gave information by which the notes were traced to the robbers so as to insure their conviction, and that it was not necessary the information should be given to the party robbed, since if it were given to a person authorized to receive it and to act upon it in the apprehension of the offenders, as to a constable, it was sufficient; *Lancaster v. Walsh*, 4 M. & W. 16.

The 7 & 8 G. 4, c. 29, s. 59, prohibits the advertising a reward for stolen goods with no questions asked, &c., under a penalty of £50, and full costs.

The 7 G. 4, c. 64, s. 28, allows rewards in certain cases. See Burn's J. tit. Reward.

(f) See note, *supra*.

(g) See a form, 3 Wentw. 30, and the notes to the preceding form.

aforesaid, had notice, and by reason of the premises the defendant became liable to pay the said sum of £20 to the plaintiff, when he the defendant should be thereunto afterwards requested. [*Add an account stated, if there be any evidence to support it, and conclude as ante, 36.*]

**TO PAY MONEY
FOR SERVICES.**

See a form in England v. Davidson, 11 A. & E. 856.

For a reward,
&c. at the suit of
a constable.

For that whereas, before the making of the promise of the defendant hereinafter next mentioned, to wit, on &c., the defendant had supposed that divers goods and chattels of the defendant had been feloniously taken and carried away from a certain dwelling-house of the defendant, and thereupon heretofore, to wit, on &c. aforesaid, in consideration of the premises, and that the plaintiff, at the request of the defendant, would apprehend the said supposed offenders, so that the property of the defendant should be recovered, he the defendant promised the plaintiff(i) therefore to pay him as a reward the sum of £20. And the plaintiff saith that he, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, apprehended and took into custody the said offender, to wit, one E. F. for the said felony; and the said E. F. was afterwards, to wit, on the day and year aforesaid, in due course of law tried for the said felony, and was, upon the said trial, upon the evidence of the plaintiff, found guilty thereof, and duly sentenced to be punished according to law for his said offence; and the said property of the defendant was then restored to the defendant, and he, by means of the premises, then recovered the same. Of all which said premises the defendant afterwards, to wit, on &c. last aforesaid, had notice. Yet the defendant, not regarding his said promise, hath not (although he was afterwards, to wit, on &c. last aforesaid, requested by the plaintiff so to do,) as yet paid the said reward of £20, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do. [*Add an account stated, if there be any evidence to support it, and conclude as ante, 36.*]

On promise to
reward plaintiff
if he would ar-
rest a felon.(h)

For that whereas, before and at the time of the making of the promise of the defendant hereinafter mentioned, the plaintiff was a schoolmaster, and thereupon, heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would admit and receive one L. into the school of the plaintiff, and would instruct the said L. in reading, writing and arithmetic, and other necessary and useful accomplishments and qualifications, for reward to the plaintiff in that behalf, the defendant promised the plaintiff to continue the said L. at the said school, to be instructed by the plaintiff as aforesaid, until the expiration of a quarter's notice of his the defendant's intention to take the said L. away from the said school.(l) And the plaintiff avers, that he, confiding in the said promises of the defendant, did, afterwards, to wit, on the day and year aforesaid, admit and receive the said L.

By a school-
master, against
the father of a
pupil, for taking
him away from
the school with-
out giving a
quarter's no-
tice.(k)

(h) See precedent and note, ante, 189, n. (a).

(i) *Quere*, see ante 189, 190, n.

(k) Where a child at school, for whom payment had been made quarterly, was sent home for illness four days after the commencement of a quarter, and did not return, it was held that the master was entitled to a

whole quarter's schooling, although there was no express contract for a quarter's notice, or a quarter's pay; and although the school was a day-school, at which the child was the only boarder; 5 Bingh. 132.

(l) This should be described as in the plaintiff's terms, which are usually contained in a printed prospectus.

**TO PAY MONEY
FOR SERVICES.**

into the said school of the plaintiff, and did instruct the said L. in reading, writing and arithmetic, and other necessary and useful accomplishments and qualifications, for a certain space of time, to wit, for [a quarter] of a year then next following, and hath always hitherto been ready and willing to instruct the said L. as aforesaid, whereof the said defendant hath always had notice; yet the defendant, not regarding his said promise, afterwards, and before the expiration of [half] a year after the said L. had been so admitted and received as aforesaid, to wit, on &c. [*day of removal, or about it*], wrongfully and injuriously took away the said L. from the said school of the plaintiff, before the expiration of a quarter's notice given by the defendant to the plaintiff of the defendant's intention to take the said L. away from the said school, and without giving the plaintiff any such notice as aforesaid, and hath thence hitherto wholly neglected and refused to continue the said L. at the said school to be instructed by the plaintiff, whereby the plaintiff hath wholly lost and been deprived of all the benefits, profits and advantages which he otherwise might and would have derived and acquired from instructing the said L. as aforesaid. [*Before Reg. Gen. Hil. T. 4 W. 4, prohibiting a second count, it was usual to add a second count on an executed consideration, and a common count, as ante 62, for work and labour as a school-master, and a count for work and labour generally, board and necessaries, money paid, account stated, and breach, but now there can only be one special count, or one common count, and the account stated. Conclude as ante, 36.*]

**XIX. RELATING TO SALES
OF GOODS.**

For not delivering a bill of exchange in payment for goods sold. (m)

XIX. RELATING TO SALES OF GOODS AND PERSONALTY.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would sell and deliver to him the defendant a certain quantity of goods, to wit, [100 sacks of malt] at a certain rate or price, then agreed upon between the plaintiff and the defendant, to wit, at the rate or price of — for each and every of the said sacks of malt, (n) amounting in the whole to a large sum of money, to wit, the sum of £—, he, the defendant, promised the plaintiff to pay him for the said goods, by accepting a bill of exchange, to be drawn by the plaintiff upon the defendant, and payable in [four] months from the delivery of the said malt (o) to the defendant, whenever, after such delivery, he the defendant should be thereunto requested. And the plaintiff in fact saith, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the

(m) See other forms, 16 East, 130; 3 Campb. 329. When necessary to declare specially, see ante, vol. i. chapter "Declarations;" see also ante, 46, 47, n. (h). By thus declaring specially, a set-off may be avoided. How to declare in such a case, see 2 Marsh. 41; 6 Taunt. 340. When goods have been sold on a credit not elapsed at the time of declaring, and on the terms that the defendant should deliver a bill of exchange to the plaintiff, or accept a bill in his favour, it is necessary to declare specially for not delivering or accepting the bill, as in the above precedent; 4 East, 147; 3 B. & P. 582; 2 Campb. 582; 3 Campb. 329. But if the credit has elapsed at the time the action was commenced, then

a common count suffices; 4 East, 75; *Helps v. Winterbottom*, 2 Bar. & Ad. 431. And so, if credit be given after a sale for ready money as a mere voluntary act, it may be revoked, and the vendor may sue under the common counts for the price; 1 Esp. Rep. 430. As to when interest is recoverable, see 13 East, 98; and 3 & 4 W. 4, c. 42.

(n) See 6 Taunt. 108; 13 East, 102; 2 B. & P. 425.

(o) Sometimes the understanding is from the date of the contract, 2 Marsh. 41; 6 Taunt. 340; the contract must be described precisely according to the agreement of the parties.

day and year aforesaid, sell and deliver the said quantity of goods to the defendant on the terms aforesaid. [*If the defendant has not paid for any part of the goods, omit the following words in this form between brackets.*] [And although the defendant, in part performance of his said promise, afterwards, to wit, on the day and year aforesaid, paid to the plaintiff, by accepting a certain bill of exchange, for a part of the said price of the said goods, to wit, the sum of £100;] and although the plaintiff afterwards, and before the expiration of four months from the delivery of the said goods as aforesaid, to wit, on the day and year aforesaid, did draw a certain bill of exchange upon the defendant, and bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, for the [residue of the] said price of the said goods, to wit, the sum of £——, and payable in four months from the day and year aforesaid, being four months from the delivery of the said goods as aforesaid; and the plaintiff then requested (p) the defendant to pay the plaintiff the [residue of the] price of the said goods, by accepting the said last-mentioned bill of exchange, so drawn as aforesaid; yet the defendant, not regarding his said promise, did not nor would, when he was so requested as aforesaid, or at any time before or afterwards, pay the plaintiff the [residue of the] said price of the said goods, or any part thereof, by accepting such bill of exchange as aforesaid, or otherwise howsoever, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do; and by reason thereof he the plaintiff hath lost and been deprived of the use and benefit of the said bill of exchange, which the defendant so ought to have accepted as aforesaid. [*A count for the price of the same goods to be paid in money will not be allowed, R. H. T. 4 W. 4.*]

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant a certain quantity of goods, to wit, &c. [*set them out shortly*] on the terms that he the defendant should purchase the same at a reasonable price, [*or if a fixed price be named, say,* "at and for a certain price, to wit, the sum of £——, for &c."] or return the same to the plaintiff, he the defendant promised the plaintiff to purchase the said goods of him, and to pay him the reasonable [*or "the said"*] price thereof, or to return and re-deliver the said goods to him within a reasonable time then next following; and the plaintiff in fact saith, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, deliver to the defendant the said quantity of goods on the terms aforesaid, and was always ready and willing to sell the said goods to the defendant at a reasonable [*or "the said"*] price, to wit, the price of, &c. whereof the defendant then had notice; yet the plaintiff in fact saith, that although a reasonable time for the defendant's purchasing or returning the said goods to the plaintiff as last aforesaid hath long since elapsed, yet the defendant, not regarding

For not paying for or re-delivering goods delivered to defendant on terms of sale and return. (q)

(p) See *Reed v. Mestee*, Com. Cont. 181; *Beck v. Owen*, 5 T. R. 409; *Bowdell v. Parsons*, 10 East, 364; where by the express terms of a contract a request is required, or where it is to be implied from the nature of the contract, it must be alleged and proved if traversed; *Radford v. Smith*, 3 M. & W. 258.

(q) As to conditional sales of property, see 3 Chitty's Com. Law. 274. If goods are de-

livered on the terms of sale and return, and the person receiving them do not return them in a reasonable time, the value of them may be recovered in an action for goods sold and delivered; *Peake's Rep.* 56; see also 16 East, 46; *Bianchi v. Nash*, 1 M. & W. 545; *ante*, vol. i. It is usual, however, and safest to declare specially as above.

RELATING TO
SALES OF
GOODS.

his said promise, hath not, although often requested so to do, paid the plaintiff the said price of the said goods, or returned or re-delivered the same, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. [*Add an account stated, and breach as ante*, 36.

For not accepting goods sold.
(r)

For that whereas heretofore, to wit, on &c. [*day of sale, or about it*], the defendant bargained for and bought of the plaintiff, and the plaintiff, at the request of the defendant, then sold to the defendant a large quantity of goods, [*to wit, ten loads of wheat,*] at the rate or price of [*£— for each and every load thereof,*] to be delivered by the plaintiff to the defendant [*in a week then next following, at —,*] and to be paid for by the defendant to the plaintiff on the delivery thereof as aforesaid, and in consideration thereof, and that the plaintiff, at the like request of the defendant, had then promised the defendant to deliver the said goods to the defendant in the time and at the place aforesaid, the defendant then promised the plaintiff to accept the said wheat of and from him the plaintiff, and to pay him for the same on the delivery thereof to him the defendant as aforesaid. And although the plaintiff afterwards, and within [*a week*] next after the making of the said promise of the defendant, to wit, on &c., was ready and willing and then tendered and offered to deliver the said goods to the defendant, and then requested the defendant to accept the same, and to pay him for the same as aforesaid; (s) yet the defendant, not regarding his said promise, did not nor

(r) See the forms in index to 2 Wentw. 193; Morg. 126; Lil. Ent. 17, 18; 9 Barn. & Cres. 145, and the following forms; and see necessity for this count, *Atkinson v. Bell*, 8 Barn. & Cres. 277, observed upon in *Laythorp v. Bryant*, 1 Bing. N. C. 430.

This count, or the common counts for goods bargained and sold cannot be supported, unless there has been an actual sale of the goods, and unless the property in the goods has become vested in the defendant. Therefore this count, or at all events the common count for goods bargained and sold will not suffice, where goods have been ordered to be made for the defendant, and the property therein has not been vested in him by any act subsequent to the completion of the order, such as assenting to an appropriation made to him by the plaintiff of the goods. In such case the declaration must be special, as in the next form, *post*, 195; see 8 Barn. & Cres. 277; 6 Barn. & Cres. 388. As to when the goods may be considered as having vested in the defendant, see 6 Barn. & Cres. 388; 5 B. & A. 942.

On the other hand, where the goods have become vested in the defendant, but have not been delivered, the above special count is maintainable, and unless the plaintiff proceeds for special damages arising from the not accepting the goods, as for warehouse room, re-housing, &c. or the like, the plaintiff may recover the price under the common count for goods bargained and sold, as *ante*, 44; *id.* 4 Co. 93; *Skia*. 647; *Holt's Rep.* 94; *Shep. Touch.* 225; *Peake*, 41; 7 T. R. 67.

The plaintiff should declare specially where the goods have been resold in pursuance of the original agreement between the parties, or

where the contract has been rescinded by the defendant's refusal to complete it, see 6 Taunt. 102; 1 Marsh. 514, S. C.; *Peake*, C. N. P. 42; though it should seem, from the cases in 4 Esp. Rep. 251; 1 East, 194; 1 Ves. jun. 530; 7 T. R. 67, that the plaintiff may in such case recover on the common count for goods bargained and sold. It seems the vendor may resell the goods if the vendee makes default and refuses to complete the purchase, so that the sale has become rescinded; 1 Salk. 113; 4 B. & C. 945; *Bul. N. P.* 50; 6 Mod. 162; see 6 M. & S. 1.

The plaintiff must declare specially if the contract were not to pay in money, but by a bill of exchange that would not have become due; see form, *ante*, 192.

In all cases for not accepting goods, if there were a special agreement, it is now advisable to declare thereon.

As to the damages in an action for not accepting goods at a future day, and at a named price, the proper measure of the damages will be the difference between the price which the defendant contracted to pay, and the market price at the time when the contract was broken; 9 B. & C. 145. In an action for not accepting goods to be paid for by a bill, the plaintiff is entitled to interest from the time the bill, if given, would have become due; 3 Campb. 480.

(s) Where it is the duty of the vendor to tender the goods, such tender must be averred and proved; see 5 East, 107. But if by the terms of the contract it were not incumbent on the vendor to tender the goods at any particular place, but on the vendee to fetch the goods away from the plaintiff's premises, as is generally intended when it is not otherwise

would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, accept the said goods, or any part thereof, of or from the plaintiff, or pay him for the same as aforesaid, but then wholly neglected and refused so to do. *[If the plaintiff was not to deliver the goods at any particular time or place, then alter the count accordingly. If there has been any special damage from a re-sale, or if there have been any expense in re-housing the goods, here state such damage, as post, 197, 198. A count for goods bargained and sold cannot be added, R. H. T. 4 W. 4.]*

RELATING TO
SALES OF
GOODS.

For that whereas heretofore, to wit, &c. *[day of contract, or about it]*, in consideration that the plaintiff, at the request of the defendant, would manufacture and make for him certain chattels, to wit, *[twelve chairs]* at and for a certain price, to wit, the sum of £—, *[or if no price named, say, "at and for a reasonable price for the same,"]* and would deliver the same to him when completed, *[if there were any terms as to the time or place of delivery, state them accordingly,]* the defendant then promised the plaintiff to accept the said chattels of the plaintiff when so manufactured and made, and pay him for the same the price aforesaid on the delivery thereof; and the plaintiff avers, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, manufacture and make the said chattels at and for the said price, to wit, at and for the sum of £—, and afterwards, to wit, on the day and year aforesaid, was ready and willing and then offered to deliver the same to the defendant, and requested him to accept the same, and of all which said premises the defendant then had notice; yet the defendant, not regarding his said promise, did not nor would then, or at any other time, accept the said chattels of the plaintiff, or pay him the said price thereof, or any part thereof, but he so to do hath hitherto wholly neglected and refused, and still neglects and refuses. *[Add an account stated, if there be any evidence to support it, and conclude as ante, 36.]*

For not accept-
ing goods made
for defendant.
(t)

See Hibbenwhite v. M'Morine, 6 M. & W. 200; *Steward v. Cauty*, 8 M. & W. 160.

For not accept-
ing and paying
for shares in a
railroad.

For that whereas the plaintiff heretofore, to wit, on &c., put up and exposed to sale by public auction in lots, amongst other things, a large quantity of goods, to wit, *[hams,]* then lying and being in certain piles at a certain warehouse, situate and being at &c. *[as in the particulars of sale,]* under and subject to the following conditions of sale, that is to say, that the highest, &c. *[here set out the conditions of sale,]* as by the said conditions of sale, reference being thereunto had, will, amongst other things, more fully appear,

For not taking
away (within
a specified
time) goods
sold at a public
auction. (u)

agreed, (5 T. R. 409,) the contract should be stated accordingly, and the defendant's engagement to fetch away within a specified time, or a reasonable time, should be stated, and in such case it will be sufficient to aver the plaintiff's readiness to deliver; 1 East, 203; 2 B. & P. 447; 7 T. R. 129; 1 Marsh. 412.

(t) As to the utility of this count, where the contract is not strictly a contract for goods sold, see 8 Barn. & Cress. 277, ante, 194, n. (r). If there has been any special agreement between the parties the declaration should be

framed thereon.

(u) Where goods are bought at a public auction, and one of the conditions of sale is, that the goods shall be taken away at the buyer's expense within fourteen days, and afterwards a bought-note is entered into, with this clause "fourteen days for receiving and delivering;" the meaning of the two contracts taken together is, that fourteen days shall be allowed to the purchaser only, and the vendor is bound at all times to be ready to deliver; 1 Marsh. 514.

RELATING TO
SALES OF
GOODS.

of all which said premises the defendant, before and at the time when the said goods were so put up and exposed to sale as aforesaid, to wit, on the day and year aforesaid, had notice, and thereupon afterwards, to wit, on the day and year first aforesaid, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised &c., [*here insert mutual promises, as ante, 194.*] And the plaintiff in fact saith, that afterwards, to wit, on the day and year first aforesaid, the defendant became and was the highest bidder for and declared the buyer of a certain lot of goods called [Lot 2,] parcel of the said goods so put up and exposed for sale, under and subject to the said conditions, consisting of divers, to wit, [eighteen hams,] at and for a certain sum or money, to wit, the sum of £—, then bid by the defendant for the same,* and which said lot of hams, at the time the same was purchased by the defendant as aforesaid, was and from thence continually, until and upon and after the said — day of —, remained and continued in the said warehouse; and although the plaintiff hath always, from the time of the said putting up and exposing to sale of the said goods as aforesaid, hitherto been ready and willing (x) to suffer and permit, and would have suffered and permitted, the defendant to take and clear away the said goods so purchased by him as aforesaid from the said warehouse, on payment of the said purchase-money for the same, together with the sum of £— for the said lot, [and also the further sum of £—, for the charges of the delivery of the said lot to the defendant, the same being a reasonable sum in that behalf]; and the said goods were during all that time lotted out for him the defendant; and although the plaintiff hath always, from the time of making his said promise, hitherto well and truly performed and fulfilled the said conditions of sale in all things therein contained on his part, as the seller of the said goods; yet the defendant, not regarding his said promise, did not nor would (although often requested so to do,) on or before the — day of—, or at any time afterwards, take or clear away the said goods so purchased by him from the said warehouse, or pay the said purchase-money for the same, together with the sum of £— for the said lot, and the said sum of £—, so being the reasonable charge of delivery of the said lot to the defendant as aforesaid, or any or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, whereby the plaintiff hath not only lost and been deprived of the benefit of the said sale, but, in order to take care of the said lot, hath been forced and obliged to stow, place, and keep the same in the said warehouse. (y)

The like where,
according to
express condi-
tions of sale,
there has been
a resale.

Proceed nearly the same as in last precedent to the asterisk, and then as follows:—And although the defendant, in pursuance of the said conditions of sale, ought to have cleared away and paid for the said lots or parcels of the said goods within the space of one month from the said sale, and although the defendant did, during the space of one month, to wit, on &c., clear away and pay for some, to wit, — of the said lots of goods, yet the plaintiff in fact saith, that the defendant (although often requested) did not

(x) The time allowed for clearing away the goods is only for the benefit of the purchaser, and the vendor must at all times be

ready to deliver; 1 Marsh. 514; but see Salk. 112.

(y) See 3 Campb. 427; 4 Esp. Rep. 2.

nor would at any time during the said space of one month, or at the expiration thereof, clear away or pay for the residue of the said lots of goods, or any part thereof, according to the said conditions of sale and his said promise; but on the contrary thereof, he the defendant suffered and permitted the residue of the said lots of goods to remain uncleared, without paying for the same, at and after the expiration of the said space of one month, (being the time above limited for clearing away the same,) and thereupon afterwards, and after the expiration of the said space of one month, and whilst the residue of the said lots of goods remained uncleared and unpaid for as aforesaid, to wit, on &c. [*day of resale or about it,*] he the plaintiff, according to the said conditions of sale, and in pursuance thereof, did re-sell the residue of the said lots of goods (so remaining uncleared and unpaid for as aforesaid,) that is to say, by public sale, at and for certain sums of money, amounting in the whole to a much less sum of money, to wit, the sum of £—, [*a sum about the amount of actual loss,*] less than the amount of the said sum of money so as aforesaid bid by the defendant for the same, and thereby there was a deficiency upon such re-sale to a large amount, to wit, to the amount of the said sum of £—, over and besides the charges attending such re-sale, amounting to a certain other sum of money, to wit, the sum of £—, and making, together with the said sum of £—, the sum of £—. Of all which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and was then requested by the plaintiff to pay him the said sum of £—, and which said sum of £—, he the defendant then ought to have paid to the plaintiff according to the said conditions of sale and his said promise.

For that whereas heretofore, to wit, on &c., the plaintiff at the request of the defendant bargained with the defendant to buy of the defendant, and the defendant then sold to the plaintiff a large quantity of goods, to wit, [ten loads of wheat,] at the rate or price of [£—] for each and every load

For not deliver-
ing goods with-
in a specified
time. (s)

(s) See the old Forms, 1 Lil. Ent. 16 to 19; 1 Rich. C. P. 470, 542; Plead. Ass. 135, 223; Morg. 160, 161, 163, 165; Clift. 97, pl. 62; Plow. 180; Herne, 131; 2 Wentw. 189; and the modern precedents and notes, *post*, 198, 199, &c. A special count is necessary; 3 Price, 68. If there was a special written agreement, then declare thereon, stating mutual promises. See a Form, 1 East, 203, which, with the addition of an averment of notice of the plaintiff's readiness to pay, will be found useful. It was advisable in most cases in one count to set out the whole contract; in a second, to state the contract to be to deliver on request, averring a particular request; and in a third count, to state the contract to be to deliver within a reasonable time, averring that a reasonable time had elapsed. In each count a readiness to pay the price must have been alleged; 1 East, 203; 2 B. & P. 447; 2 Saund. 352, note 3. When the contract is to deliver on request, or a request is to be implied from the nature of the contract, a request must be alleged and proved if traversed; *Back v. Owen*, 5 T. R. 409; *Radford v. Smith*, 3 M. & W. 258; or else it must be shown that the defendant has in-

capacitated himself from delivering the goods, as by his having resold them or the like; see 5 B. & Ald. 712; 1 D. & R. 361, S. C.; 10 East, 359; or else that defendant has discharged the plaintiff from completing the sale. It is not necessary to set out more of the contract than relates to the breach, 3 Price, 68; *ante*, vol. i.; but the contract must be set out correctly, and a variance might be fatal; 2 Campb. 328; *ante*, vol. i.

An agreement to sell a certain quantity of goods, expected by a particular vessel, on arrival, is a conditional contract, dependent on the arrival of the goods. No action therefore will lie for the non-delivery of the goods, if the ship arrive without them; 2 Campb. 327, n.; 3 Id. 274, S. P. So where the agreement is to sell all the hemp, not exceeding three hundred tons, which shall be shipped by the agent of a particular concern, and the agent only ships seventy-one tons for the vendors, they are not liable to an action for non-delivery of the residue of the three hundred tons; 2 Campb. 56. But if the engagement be absolute that the goods shall be shipped, an action may be supported for neglecting to do so, from whatever cause the

RELATING TO
SALES OF
GOODS.

thereof, (a) [*or, if no price named, say, "at and for a reasonable price,"*] to be delivered by the defendant to the plaintiff [in a week then next following, at —, (b)] and to be paid for by the plaintiff to the defendant on the delivery thereof as aforesaid; and in consideration thereof, and that the plaintiff, at the like request of the defendant, had then promised the defendant to accept and receive the said goods and to pay him for the same at the rate or price aforesaid, he the defendant then promised the plaintiff to deliver the said goods to the plaintiff as aforesaid; and although the said time for the delivery of the said goods as aforesaid hath long since elapsed, (c) and the plaintiff hath always been ready and willing (d) to accept and receive the said goods, and to pay (e) for the same at the rate or price aforesaid, whereof the defendant hath always had notice; yet the defendant, not regarding his said promise, did not nor would within the time aforesaid, or at any time afterwards, deliver the said goods or any part thereof to the plaintiff, but wholly neglected and refused so to do, whereby the plaintiff hath lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from the delivery of the said goods to the plaintiff as aforesaid.

For not delivering goods at a particular place. (f)

For that whereas heretofore, to wit, on &c. [*day of sale, or about it*], the plaintiff, at the request of the defendant, bargained for and agreed to buy of the defendant certain — goods, to wit, [— quarters of oats,] upon the following terms, that is to say, that [*here set out the terms of the contract of sale, and which may be thus:*] [such oats should be of fair quality and colour, and of the weight of — pounds per bushel, and should be

circumstance has arisen; 2 Campb. 57, n.; 10 East, 530. Though there may have been a sufficient *delivery* of the goods within the statute against frauds, the vendors may, nevertheless, be liable to this action. Thus, where upon the purchase of wine, the vendor's clerk cut the spills from the casks, and marked them with the purchaser's initials, the delivery was held to have been sufficient to take the case out of the statute against frauds, 1 Camp. 235, n.; but the delivery not having been perfected, it was held to be no bar to an action for not delivering the goods according to contract; *Id. ibid.* A delivery of goods by the vendor, on behalf of the vendee, to a carrier not named by the vendee, he having given general directions to the vendor to send the goods by a carrier, is a delivery to the vendee; 3 B. & P. 582.

Evidence.—If a written contract for the sale of goods specifies no time for delivering them, the defendant in this action cannot give parol evidence that it was a condition of sale, that the goods should be taken away immediately, or that by the usage of trade, where goods sold are to be delivered at a distant day, the time is always mentioned in the written contract; 3 Campb. 426.

(a) The price of the goods must be stated; 13 East, 103; 2 B. & P. 425. Where there is a given latitude as to the price, that the goods shall not exceed such a sum, the declaration may aver that it was for a reason-

able price; 6 Taunt. 108.

(b) This must be stated accurately. Where on an agreement to sell goods on the arrival of a ship, a variance was made in the name of the ship, it was held fatal; 2 Campb. 328.

The *damages* are to be calculated according to the market price of the same kind of goods on the day on which the contract ought to have been performed; 2 B. & C. 624; 4 D. & R. 161; 8 Taunt. 640; 9 Barn. & Cres. 145.

(c) If the contract be to deliver goods generally and not in any named time, a special request to deliver must be averred, 6 T. R. 409; or else it must be shown defendant has incapacitated himself from completing the agreement by reselling, &c.; 10 East, 359; 5 B. & Ald. 712; 1 D. & R. 361, S.C.

(d) In support of the averment that the plaintiff was ready and willing to accept the goods and pay for the same, it will not be necessary to prove a tender of the money; 1 East, 203; 2 B. & P. 447. A *demand* of delivery would be sufficient proof of this readiness; 3 Price, 68; 1 Marsh. 412; 7 Taunt. 318.

(e) It is not necessary to state or prove an offer to pay; 1 J. B. Moore, 56; 1 East, 203; 1 Marsh. 512; 2 B. & P. 447.

(f) See the notes to the preceding form, ante, 197. The delivery should be within the ordinary hours of business; *Startup v. MacDonald*, 2 M. & Gr. 396.

delivered for the plaintiff within a reasonable time, free of expense to him, on board some ship or vessel in the river —, to be carried and conveyed in such ship or vessel from thence to —, at a freight not exceeding — shillings per quarter, and that the plaintiff should pay the defendant for the said oats at and after the rate of £— for each and every quarter thereof]; and thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, had then promised the defendant to accept a delivery and shipment in the said river — of the said goods, and to pay the defendant for the same at the rate in that behalf aforesaid, the defendant, on the day and year aforesaid, promised the plaintiff that he the defendant would, within a reasonable time then next following, procure to be delivered and shipped for the plaintiff in manner aforesaid the said goods to be so carried and conveyed as aforesaid; and although a reasonable time for that purpose hath long since elapsed, and the plaintiff was always during that time, and until the commencement of this action, ready and willing to have accepted a delivery and shipment of such goods as aforesaid, and to have paid (g) the defendant for the same at the rate in that behalf aforesaid, whereof the defendant then had notice; yet the defendant, not regarding his said promise, did not nor would, (although often requested so to do,) within such reasonable time as aforesaid, or at any time since, procure to be delivered or shipped for the plaintiff in manner aforesaid, or otherwise, the said goods or any other goods whatsoever, but on the contrary thereof the defendant hath hitherto wholly refused and still refuses so to do; by means and in consequence whereof the plaintiff hath been deprived of divers great gains and profits, which he might and would otherwise have acquired to himself by reselling the said goods at much higher and advanced prices. [In *Chitty on Pleading*, 5th ed. 271, a second count was added for not delivering within a reasonable time.

After framing the special count for non-delivery, as ante, 197, 198, proceed as follows:—And the plaintiff further saith, that after the making of the said contract with the defendant, to wit, on &c., and on divers other days between that day and the commencement of this suit, he the plaintiff, confiding in the said promise of the defendant, did make divers bargains and agreements with divers persons for the sale to them respectively of divers parts and parcels of such goods as aforesaid, to wit, with one E. F. for the sale to him of one hundred hogsheads of crushed sugar, and with one G. H. for the sale to him of &c., and with one J. K. for the sale of &c., and for want of the said sugar, which the defendant so ought to have delivered to the plaintiff as aforesaid, he the plaintiff was forced and obliged to deliver to them the said persons respectively divers quantities, amounting in the whole to — hogsheads of certain other sugar of the plaintiff of much greater value, to wit, of £— more than the value of the said sugar which the defendant ought to have delivered to the plaintiff as aforesaid; and thereby the plaintiff hath sustained great loss, to wit, a loss amounting to the sum of £—.

Special damage, that plaintiff relying on defendant's promise, entered into several sub-contracts of sale, which, in consequence of defendant's non-performance, he was unable to fulfil, without purchasing goods elsewhere at increased prices.

(g) There is no necessity to aver an actual tender of the money; 1 East, 203; 2 B. & P. 447; 1 J. B. Moore, 56; ante, 198, n. (d).

RELATING TO
SALES OF
GOODS.

Against a party who had sold plaintiff a mare, and promised, if she proved unsound, to provide another, or return the money. (h)

For that whereas heretofore, to wit, on &c. [*day of bargain, or about it*], in consideration that the plaintiff, at the request of the defendant, would buy of him a certain mare at and for a large sum of money, to wit, the sum of £—, he the defendant then promised the plaintiff that the said mare was sound and without blemish, and that if she should prove unsound, he the defendant would, on the same being returned to him, provide the plaintiff with another mare or horse that was sound and unblemished in lieu thereof, or repay him the said sum of £—; and the plaintiff saith, that he, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, did buy the said mare of the defendant at and for the said price or sum of £—, and did then pay to the defendant the said sum of £— for the same; and the plaintiff further saith, that the defendant, not regarding his said promise, thereby deceived the plaintiff in this, that the said mare, at the time of the making of the said promise of the defendant, was not sound, but was unsound and blemished, whereupon the plaintiff afterwards, to wit, on &c. aforesaid, returned the said mare to the defendant, and who then accepted and took back the same; and the plaintiff further saith, that the defendant afterwards, to wit, on &c. aforesaid, gave and delivered to the plaintiff another mare in lieu of the said mare so returned to him as aforesaid; and the defendant, again disregarding his said promise, again deceived the plaintiff in this, that the said mare so given and delivered to the plaintiff in lieu of the said first-mentioned mare so returned to and accepted back by the defendant as aforesaid, was not sound at the time of the said delivery thereof to the plaintiff, but was then unsound and blemished; whereupon the plaintiff afterwards, to wit, on &c. aforesaid, returned the said last-mentioned mare to the defendant, and then requested the defendant to provide the plaintiff with another mare or horse, which was sound and unblemished, or repay him the said sum of money so paid by the plaintiff, according to the said promise of the defendant; and the plaintiff further says, that although the defendant did accept and take back the said last-mentioned mare so returned to him as aforesaid, yet the defendant, not further regarding his said promise, hath not yet delivered to the plaintiff a sound mare or horse, or any mare or horse whatsoever, in lieu of the said last-mentioned mare so returned to the defendant as last aforesaid, or repaid to the plaintiff the said sum of £— so paid to the defendant for the said first-mentioned mare, or any part thereof; but to provide the plaintiff with a sound mare or horse, in lieu of the said last-mentioned mare so returned to the defendant as last aforesaid, or with any other mare or horse, or to repay the plaintiff the said sum of £— so paid to the defendant as aforesaid, he the defendant hath hitherto wholly refused, and still refuses so to do. [*Add account stated, and conclude as ante, 36.*]

XX. RELATING
TO CONTRACTS
OF EXCHANGE.

On a promise to pay money in consideration of the exchange of horses. (i)

XX. RELATING TO CONTRACTS OF EXCHANGE.

For that whereas heretofore, to wit, on &c. [*day of contract, or about it*], in consideration that the plaintiff, at the request of the defendant, would

(h) See a form, 3 Wentw. 3.
(i) See a form, Morg. 141. For the distinction between a sale and an exchange, see

2 Bla. Com. 446; 3 Salk. 157. The common law principles affecting contracts of sale are also applicable to those of exchange; see

deliver to the defendant a certain horse of the plaintiff of great value in exchange for a certain horse of the defendant, he the defendant promised the plaintiff to deliver the said horse of the defendant to the plaintiff, and to pay him a certain sum of money, to wit, the sum of £——, in exchange for the said horse of the plaintiff. And the plaintiff avers, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, deliver to the defendant the said horse of the plaintiff on the terms aforesaid. And although the defendant, in part performance of his said promise, did then deliver to the plaintiff the said horse of the defendant in exchange for the said horse of him the plaintiff; yet the defendant, not further regarding his said promise, hath not (although often requested so to do) as yet paid to the plaintiff the said sum of £——, or any part thereof, but hath hitherto wholly neglected and refused and still wholly neglects and refuses so to do.

RELATING TO
CONTRACTS OF
EXCHANGE.

XXI. RELATING TO CONTRACTS OF LOAN.

For that whereas the plaintiff, at the time of the making of the promise of the defendant hereinafter mentioned, was possessed of and lawfully entitled to a certain interest or share, to wit, £—— in the joint stock of annuities, commonly called [consolidated bank long annuities], transferable at the bank of England, the said £—— consolidated bank long annuities, then standing in the name of the plaintiff in the books of the governor and company of the Bank of England by them kept for that purpose; and

XXI. RELATING TO CONTRACTS OF LOAN.

For not replacing stock which plaintiff sold out of the bank annuities to advance to the defendant, nor paying the dividends. (k)

2 Bla. Com. 323, 446; Chit. jun. Contr. 3d ed. 373, &c. But it is not settled whether the statute against frauds, 29 Car. 2, c. 3, sect. 17, relates to the contract of exchange. Upon an agreement between two traders to exchange goods for goods, after a balance is struck between them, such balance is to be paid in money; 1 Stark. 185. Where two traders agree to deal with each other by way of barter, if one refuses to account, the other may arrest for the whole value of the goods; 5 Taunt. 269. But in an action on an agreement to exchange horses, the plaintiff should show a demand before action brought; *Back v. Owen*, 5 Term R. 409.

The contract should, in general, be declared on specially; 1 Hen. Bla. 287; Holt, C. N. P. 179. It should seem, however, that an *indebitatus* count, stating that defendant was indebted in a certain horse or divers horses, &c., and in a certain sum, to wit, the sum of &c. would suffice; see the form, *ante*, and 6 Bar. & C. 385. And in a case, where A. agreed to give a horse, warranted sound, in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, pretending that A.'s horse was unsound, it was held that it might be recovered on an *indebitatus* count for horses sold and delivered; *Sheldon v. Car*, 3 Bar. & Cres. 420; 5 D. & R. 277, S. C.

(k) As to contracts to replace stock, see 3 T. R. 418; 8 East, 304; 11 East, 616.

See a form for not accepting stock, 4 East, 607, and 5 East, 107. Stock in the public funds cannot be recovered in an action of *indebitatus assumpsit* as money lent, but the lender must declare specially upon the promise to replace it; 5 Burr. 2589; 2 Bla. Rep. 684, S. C.; 1 East, 1; 4 T. R. 687. So an agreement to pay a per centage on the day on which any money should be received by the defendant, through the medium of the plaintiff's information, does not entitle the plaintiff to the stipulated reward upon the transfer of stock; 1 East, 1.

On a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, and interest from that time; 2 Taunt. 257; 2 East, 211; 8 Taunt. 450; Chit. jun. on Contracts, 3d edit. 872.

If the lender oblige the borrower to take stock at a rate exceeding the market price, it is usury; 1 Esp. Rep. 11; 11 East, 616. And where the lender of stock reserved to himself the dividends by way of interest, and the option of deciding, at a future day, whether he would have the stock replaced, or the sum produced by the sale of it repaid to him in money, with 5 per cent. interest, it was held that this bargain was usurious, and that it made no difference whether the whole of the agreement was contained in one instrument, or whether the lender procured the execution of two instruments, by one of which he might compel the replacing of the stock,

DECLARATIONS IN ASSUMPSIT.

RELATING TO
CONTRACTS OF
LOAN.

thereupon, heretofore, to wit, on &c. [*day of transfer, or about it,*] in consideration that the plaintiff, at the request of the defendant, would sell and dispose of his said interest or share in the said consolidated bank long annuities, and would then lend and advance the produce thereof to the defendant, he the defendant then promised the plaintiff to replace in the name of the plaintiff in the books of the governor and company of the Bank of England, by them kept for that purpose, the said sum of £—— consolidated bank long annuities aforesaid, in [nine months then next following,] and until the said £—— consolidated bank long annuities should be replaced, to pay unto him the plaintiff the amount of the interest, dividends or produce which he the plaintiff would have been entitled to in case the said consolidated bank long annuities of the plaintiff had remained and continued standing in the books of the said governor and company of the Bank of England, in the name of the plaintiff; and the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, &c. aforesaid, sell and dispose of his said interest or share in the said consolidated bank long annuities, and did then lend and advance the produce thereof, that is to say, the sum of £——, to the defendant; and the plaintiff further saith, that although [nine months from the making of the said promise of the defendant] have long since elapsed, and although afterwards, to wit, on &c., he the plaintiff requested (1) the defendant to replace in the name of the plaintiff in the said books of the governor and company of the Bank of England the said sum of £—— consolidated bank long annuities, according to the said promise of the defendant; yet the defendant, not regarding his said promise, did not nor would, [in nine months after the making of his said promise,] or at any time since, replace in the name of the plaintiff in the books of the governor and company of the Bank of England the said sum of £—— consolidated bank long annuities, or any part thereof, but hath hitherto wholly neglected and refused and still neglects and refuses so to do; and the said consolidated bank long annuities still remain wholly unreplaced as aforesaid. And the plaintiff further saith, that if the said consolidated bank long annuities of the plaintiff had remained and continued standing on the books of the said governor and company of the Bank of England, in the name of the plaintiff, the interest, dividends or produce thereof would have amounted in the whole to a large sum of money, to wit, the sum of £—— [*state enough*], whereof the defendant afterwards, to wit, on the &c. last aforesaid, had notice; nevertheless the defendant, further disregarding his said promise, hath not (although often requested so to do) as yet paid to the plaintiff the amount of the said interest or produce, or any part thereof, but hath hitherto wholly neglected and refused and still neglects and refuses so to do. [*Add account stated and breach, as ante, 36.*]

Non-payment of
the dividends
that would have
accrued.

FOR NOT
DISCOUNTING A
BILL.
For not discounting a bill

For that whereas heretofore, to wit, on &c. [*date of bill*], in consideration that the plaintiff at the request of the defendant would indorse and deliver

by the other the payment of the money and interest; 3 B. & Cres. 278; and see *Parker v. Ramsbottom*, 3 B. & Cres. 257; 6 D. & R. 138, S. C. What is not usury on the loan of stock; 8 Chit. Com. Law, 411; 3 T. R. 531; 8 T. R. 162; 8 East, 304; 1

Chit. Col. Stat. 1091, "Usury." See a declaration in case against the Bank of England for not transferring stock, *Coles v. Bank of England*, 10 A. & E. 437.

(1) Such request would seem unnecessary; *Radford v. Smith*, 3 M. & W. 258.

to the defendant a certain bill of exchange, bearing date heretofore, to wit, the day and year aforesaid, and drawn by the plaintiff upon one E. F., and whereby he the plaintiff requested the said E. F., [two] months after the date thereof, to pay to his the plaintiff's order the sum of £—, to be discounted by the defendant for the plaintiff; and also in consideration that the plaintiff had then agreed to pay and allow to the defendant a certain sum of money, for interest or discount upon the said sum of £— in the said bill of exchange specified, to wit, at and after the rate of £5 per cent. until the said bill of exchange would become due and payable; [and also in consideration that the plaintiff had then agreed to take, accept and receive of and from the defendant, in part of the said sum of money in the said bill of exchange specified, between £— and £— worth of certain goods and merchandise], [*omit this statement between the brackets, if not according to fact*], he the defendant then promised the plaintiff to discount the said bill of exchange by delivering to the plaintiff, in part of the said sum of money in the said bill of exchange specified, between £— and £— worth of certain goods and merchandise, and advancing and paying the plaintiff the residue of the said sum of money in the said bill of exchange specified, within a certain time, which long since elapsed [*let these averments agree with the facts.*] And the plaintiff saith that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, indorse and deliver the said bill of exchange to the defendant, and hath always hitherto been ready and willing to pay and allow to the defendant the said sum of money for interest or discount as aforesaid, and to take, accept and receive of and from the defendant, in part of the said sum of £— in the said bill of exchange specified, between £— and £— worth of goods and merchandise as aforesaid; whereof the defendant then and always afterwards had notice. And although the defendant did on the day and year aforesaid, in part performance of his said promise, in part discount the said bill of exchange, by advancing and paying to the plaintiff a certain sum, to wit, the sum of £—, part of the said sum of money in the said bill of exchange specified, yet the defendant, not further regarding his said promise, did not nor would, although he was afterwards, to wit, on &c. aforesaid, requested by the plaintiff so to do, within such time as aforesaid, or at any time afterwards, deliver to the plaintiff between £— and £— worth of goods and merchandise, or any goods and merchandise whatsoever, in part of the said sum of money in the said bill of exchange specified, or pay and advance to the plaintiff the residue of the said sum of money in the said bill of exchange specified, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do; and the residue of the said sum of money in the said bill specified, to wit, the sum of £—, still remains wholly due, unpaid and unsatisfied, to the plaintiff. And the defendant then unlawfully converted and disposed of the said bill of exchange to his own use. [*Add account stated, and breach, as ante, 86.*]

RELATING TO
CONTRACTS OF
LOAN.

of exchange,
which the de-
fendant had
promised him-
self to discount.
(m)

(m) See 1 New Rep. 433; 6 East, 333, post, for not accounting for the proceeds of a bill delivered to defendant to get discounted.
2 Westw. 482; see a form of declaration,

RELATING TO
CONTRACTS OF
LOAN.

Non-payment of
the dividends
that would have
accrued.

thereupon, heretofore, to wit, on &c. [*day of transfer, or about it,*] in consideration that the plaintiff, at the request of the defendant, would sell and dispose of his said interest or share in the said consolidated bank long annuities, and would then lend and advance the produce thereof to the defendant, he the defendant then promised the plaintiff to replace in the name of the plaintiff in the books of the governor and company of the Bank of England, by them kept for that purpose, the said sum of £—— consolidated bank long annuities aforesaid, in [nine months then next following,] and until the said £—— consolidated bank long annuities should be replaced, to pay unto him the plaintiff the amount of the interest, dividends or produce which he the plaintiff would have been entitled to in case the said consolidated bank long annuities of the plaintiff had remained and continued standing in the books of the said governor and company of the Bank of England, in the name of the plaintiff; and the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, &c. aforesaid, sell and dispose of his said interest or share in the said consolidated bank long annuities, and did then lend and advance the produce thereof, that is to say, the sum of £——, to the defendant; and the plaintiff further saith, that although [nine months from the making of the said promise of the defendant] have long since elapsed, and although afterwards, to wit, on &c., he the plaintiff requested (1) the defendant to replace in the name of the plaintiff in the said books of the governor and company of the Bank of England the said sum of £—— consolidated bank long annuities, according to the said promise of the defendant; yet the defendant, not regarding his said promise, did not nor would, [in nine months after the making of his said promise,] or at any time since, replace in the name of the plaintiff in the books of the governor and company of the Bank of England the said sum of £—— consolidated bank long annuities, or any part thereof, but hath hitherto wholly neglected and refused and still neglects and refuses so to do; and the said consolidated bank long annuities still remain wholly unreplaced as aforesaid. And the plaintiff further saith, that if the said consolidated bank long annuities of the plaintiff had remained and continued standing on the books of the said governor and company of the Bank of England, in the name of the plaintiff, the interest, dividends or produce thereof would have amounted in the whole to a large sum of money, to wit, the sum of £—— [*state enough*], whereof the defendant afterwards, to wit, on the &c. last aforesaid, had notice; nevertheless the defendant, further disregarding his said promise, hath not (although often requested so to do) as yet paid to the plaintiff the amount of the said interest or produce, or any part thereof, but hath hitherto wholly neglected and refused and still neglects and refuses so to do. [*Add account stated and breach, as ante, 36.*]

FOR NOT
DISCOUNTING A
BILL.
For not discounting a bill

For that whereas heretofore, to wit, on &c. [*date of bill*], in consideration that the plaintiff at the request of the defendant would indorse and deliver

by the other the payment of the money and interest; 3 B. & Cres. 278; and see *Parker v. Ramsbottom*, 3 B. & Cres. 257; 6 D. & R. 138, S. C. What is not usury on the loan of stock; 8 Chit. Com. Law, 411; 3 T. R. 531; 8 T. R. 162; 8 East, 304; 1

Chit. Col. Stat. 1091, "Usury." See a declaration in case against the Bank of England for not transferring stock, *Coles v. Bank of England*, 10 A. & E. 437.

(1) Such request would seem unnecessary; *Radford v. Smith*, 3 M. & W. 258.

to the defendant a certain bill of exchange, bearing date heretofore, to wit, the day and year aforesaid, and drawn by the plaintiff upon one E. F., and whereby he the plaintiff requested the said E. F., [two] months after the date thereof, to pay to his the plaintiff's order the sum of £—, to be discounted by the defendant for the plaintiff; and also in consideration that the plaintiff had then agreed to pay and allow to the defendant a certain sum of money, for interest or discount upon the said sum of £— in the said bill of exchange specified, to wit, at and after the rate of £5 per cent. until the said bill of exchange would become due and payable; [and also in consideration that the plaintiff had then agreed to take, accept and receive of and from the defendant, in part of the said sum of money in the said bill of exchange specified, between £— and £— worth of certain goods and merchandise], [*omit this statement between the brackets, if not according to fact*], he the defendant then promised the plaintiff to discount the said bill of exchange by delivering to the plaintiff, in part of the said sum of money in the said bill of exchange specified, between £— and £— worth of certain goods and merchandise, and advancing and paying the plaintiff the residue of the said sum of money in the said bill of exchange specified, within a certain time, which long since elapsed [*let these averments agree with the facts.*] And the plaintiff saith that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, indorse and deliver the said bill of exchange to the defendant, and hath always hitherto been ready and willing to pay and allow to the defendant the said sum of money for interest or discount as aforesaid, and to take, accept and receive of and from the defendant, in part of the said sum of £— in the said bill of exchange specified, between £— and £— worth of goods and merchandise as aforesaid; whereof the defendant then and always afterwards had notice. And although the defendant did on the day and year aforesaid, in part performance of his said promise, in part discount the said bill of exchange, by advancing and paying to the plaintiff a certain sum, to wit, the sum of £—, part of the said sum of money in the said bill of exchange specified, yet the defendant, not further regarding his said promise, did not nor would, although he was afterwards, to wit, on &c. aforesaid, requested by the plaintiff so to do, within such time as aforesaid, or at any time afterwards, deliver to the plaintiff between £— and £— worth of goods and merchandise, or any goods and merchandise whatsoever, in part of the said sum of money in the said bill of exchange specified, or pay and advance to the plaintiff the residue of the said sum of money in the said bill of exchange specified, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do; and the residue of the said sum of money in the said bill specified, to wit, the sum of £—, still remains wholly due, unpaid and unsatisfied, to the plaintiff. And the defendant then unlawfully converted and disposed of the said bill of exchange to his own use. [*Add account stated, and breach, as ante, 36.*]

RELATING TO
CONTRACTS OF
LOAN.

of exchange,
which the de-
fendant had
promised him-
self to discount.
(m)

(m) See 1 New Rep. 433; 6 East, 338, post, for not accounting for the proceeds of a bill delivered to defendant to get discounted.
2 Westw. 432; see a form of declaration,

RELATING TO
CONTRACTS OF
LOAN.

Non-payment of
the dividends
that would have
accrued.

FOR NOT
DISCOUNTING A
BILL.
For not dis-
counting a bill

thereupon, heretofore, to wit, on &c. [*day of transfer, or about it,*] in consideration that the plaintiff, at the request of the defendant, would sell and dispose of his said interest or share in the said consolidated bank long annuities, and would then lend and advance the produce thereof to the defendant, he the defendant then promised the plaintiff to replace in the name of the plaintiff in the books of the governor and company of the Bank of England, by them kept for that purpose, the said sum of £—— consolidated bank long annuities aforesaid, in [nine months then next following,] and until the said £—— consolidated bank long annuities should be replaced, to pay unto him the plaintiff the amount of the interest, dividends or produce which he the plaintiff would have been entitled to in case the said consolidated bank long annuities of the plaintiff had remained and continued standing in the books of the said governor and company of the Bank of England, in the name of the plaintiff; and the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, &c. aforesaid, sell and dispose of his said interest or share in the said consolidated bank long annuities, and did then lend and advance the produce thereof, that is to say, the sum of £——, to the defendant; and the plaintiff further saith, that although [nine months from the making of the said promise of the defendant] have long since elapsed, and although afterwards, to wit, on &c., he the plaintiff requested (1) the defendant to replace in the name of the plaintiff in the said books of the governor and company of the Bank of England the said sum of £—— consolidated bank long annuities, according to the said promise of the defendant; yet the defendant, not regarding his said promise, did not nor would, [in nine months after the making of his said promise,] or at any time since, replace in the name of the plaintiff in the books of the governor and company of the Bank of England the said sum of £—— consolidated bank long annuities, or any part thereof, but hath hitherto wholly neglected and refused and still neglects and refuses so to do; and the said consolidated bank long annuities still remain wholly unreplaced as aforesaid. And the plaintiff further saith, that if the said consolidated bank long annuities of the plaintiff had remained and continued standing on the books of the said governor and company of the Bank of England, in the name of the plaintiff, the interest, dividends or produce thereof would have amounted in the whole to a large sum of money, to wit, the sum of £—— [*state enough*], whereof the defendant afterwards, to wit, on the &c. last aforesaid, had notice; nevertheless the defendant, further disregarding his said promise, hath not (although often requested so to do) as yet paid to the plaintiff the amount of the said interest or produce, or any part thereof, but hath hitherto wholly neglected and refused and still neglects and refuses so to do. [*Add account stated and breach, as ante, 36.*]

For that whereas heretofore, to wit, on &c. [*date of bill*], in consideration that the plaintiff at the request of the defendant would indorse and deliver

by the other the payment of the money and interest; 3 B. & Cres. 278; and see *Parker v. Ramsbottom*, 3 B. & Cres. 257; 5 D. & R. 138, S. C. What is not usury on the loan of stock; 3 Chit. Com. Law, 411; 3 T. R. 531; 3 T. R. 162; 4 East, 304; 1

Chit. Col. Stat. 1091, "Usury." See a declaration in case against the Bank of England for not transferring stock, *Coles v. Bank of England*, 10 A. & E. 437.

(1) Such request would seem unnecessary; *Radford v. Smith*, 3 M. & W. 258.

to the defendant a certain bill of exchange, bearing date heretofore, to wit, the day and year aforesaid, and drawn by the plaintiff upon one E. F., and whereby he the plaintiff requested the said E. F., [two] months after the date thereof, to pay to his the plaintiff's order the sum of £—, to be discounted by the defendant for the plaintiff; and also in consideration that the plaintiff had then agreed to pay and allow to the defendant a certain sum of money, for interest or discount upon the said sum of £— in the said bill of exchange specified, to wit, at and after the rate of £5 per cent. until the said bill of exchange would become due and payable; [and also in consideration that the plaintiff had then agreed to take, accept and receive of and from the defendant, in part of the said sum of money in the said bill of exchange specified, between £— and £— worth of certain goods and merchandise], [*omit this statement between the brackets, if not according to fact*], he the defendant then promised the plaintiff to discount the said bill of exchange by delivering to the plaintiff, in part of the said sum of money in the said bill of exchange specified, between £— and £— worth of certain goods and merchandise, and advancing and paying the plaintiff the residue of the said sum of money in the said bill of exchange specified, within a certain time, which long since elapsed [*let these averments agree with the facts.*] And the plaintiff saith that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, indorse and deliver the said bill of exchange to the defendant, and hath always hitherto been ready and willing to pay and allow to the defendant the said sum of money for interest or discount as aforesaid, and to take, accept and receive of and from the defendant, in part of the said sum of £— in the said bill of exchange specified, between £— and £— worth of goods and merchandise as aforesaid; whereof the defendant then and always afterwards had notice. And although the defendant did on the day and year aforesaid, in part performance of his said promise, in part discount the said bill of exchange, by advancing and paying to the plaintiff a certain sum, to wit, the sum of £—, part of the said sum of money in the said bill of exchange specified, yet the defendant, not further regarding his said promise, did not nor would, although he was afterwards, to wit, on &c. aforesaid, requested by the plaintiff so to do, within such time as aforesaid, or at any time afterwards, deliver to the plaintiff between £— and £— worth of goods and merchandise, or any goods and merchandise whatsoever, in part of the said sum of money in the said bill of exchange specified, or pay and advance to the plaintiff the residue of the said sum of money in the said bill of exchange specified, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do; and the residue of the said sum of money in the said bill specified, to wit, the sum of £—, still remains wholly due, unpaid and unsatisfied, to the plaintiff. And the defendant then unlawfully converted and disposed of the said bill of exchange to his own use. [*Add account stated, and breach, as ante, 36.*]

RELATING TO
CONTRACTS OF
LOAN.

of exchange,
which the de-
fendant had
promised him-
self to discount.
(m)

(m) See 1 New Rep. 433; 6 East, 333, post, for not accounting for the proceeds of a bill delivered to defendant to get discounted.
2 Westw. 483; see a form of declaration,

XXII. ON
WARRANTIES.

On a warranty
of a horse, &c.
to be sound,
&c. (a)

XXII. ON WARRANTIES.

For that whereas heretofore, to wit, on &c. [*day of sale, or about it*], in consideration that the plaintiff, at the request of the defendant, would buy

(a) As to actions for breaches of warranties in general, see 1 Vin. Abr. tit. Actions, Case, Deceit, P. b. 1; Com. Dig. Action on the Case for a Deceit, A. 8; 2 East, 446; Selw. N. P. 10th edit. 642; Chit. jun. Contracts, 3d edit. 447 to 468, &c. See old precedents, Morgan, 266; Herne, 92. It was formerly more usual to declare in case than in assumpsit; Dougl. 18; but of late assumpsit has been most usual. See 2 East, 451, 452. See the forms in case, *post*, and 3 Wils. 40; and see a declaration in case and law relating to warranties, *Bywater v. Richardson*, 1 Adol. & El. 508. If there was no warranty, but a written contract, and a false representation, the declaration should be in case for the deceit; 4 Camp. 22; 12 East, 11; and see further for precedent and law, *post*, Case; and in some cases, though there be a warranty and stipulation that vendor will take the article back, yet vendee may sue for the deceit; 2 Stark. 162.

A warranty on the sale of a personal chattel, as to the right thereto, is in general implied; 2 Bla. Com. 451; 3 Id. 166; 3 T. R. 57; Peake, C. N. P. 94; Cro. Jac. 474; 1 Rol. Abr. 90; 1 Salk. 210; Dougl. 18; though not as to the right of real property (Dougl. 654; 2 B. & P. 13; 3 B. & P. 166), if a regular conveyance has been executed; 6 T. R. 626. A warranty, however, of the soundness, goodness, quality or value of a horse, or other personality is not implied on the sale or exchange thereof; 3 Campb. 351; 2 East, 314; 2 Bla. Com. 451; 3 Bla. Com. 165; 2 Rol. Rep. 5; F. N. B. 94. If a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible to him on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed; *Brown v. Edgington*, 2 M. & Gr. 279; *Gray v. Cox*, 4 B. & C. 108; 6 D. & R. 200; 1 C. & P. 187; *Leing v. Fidgeon*, 6 Taunt. 108; *Bluett v. Osborne*, 1 Stark. 384; *Jones v. Bright*, 5 Bing. 633. But there is an implied warranty that goods are of a merchantable quality where the vendee has had no opportunity before or at the time of the sale of inspecting them; 4 Campb. 144; and if sold for a particular purpose, the vendor thereby warrants it fit for that purpose; *id. ibid.* But if a man sell a horse generally, he warrants no more than that it is a horse; but if the vendee asks for a carriage-horse, or a horse to carry a female, or a timid and infirm rider, he who sells undertakes, on every principle of honesty, that it is fit for the purpose indicated; see per Best, C. J., 5 Bing. 544. So if beer be sold to be con-

sumed at Gibraltar, the sale is an affirmation that it is fit to go so far; 4 Campb. 169; 6 Taunt. 108. And in the case in 4 B. & C. 115; 6 D. & R. 208, S. C., Abbott, C. J., observed, "That on the trial it occurred to him, if a person sold a commodity for a particular purpose, he must be understood to warrant it *reasonably fit and proper for such purpose*, and that he was still strongly inclined to adhere to that opinion," but some of his learned brothers thought differently. A warranty may be implied from the production of a sample in a parol sale by sample; 4 Campb. 22, 144, 169; 4 B. & A. 387; 3 Stark. 32, and see note; and if the bulk of the goods do not correspond with the sample, it would be a breach of the warranty. If the contract describe the goods as of a particular denomination, there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract; 4 Campb. 144; 3 Chit. Com. Law, 303; 1 Stark. 504; 4 Taunt. 853; 5 B. & A. 240. In all contracts for the sale of provisions there is an implied contract they shall be *wholesome*; 1 Stark. 384; 2 Campb. 391; 3 Campb. 286. If goods are ordered to be *manufactured*, a stipulation that they shall be proper is also implied; 4 Campb. 144, 169; 6 Taunt. 108; 5 Bing. 553; 3 M. & P. 155, S. C.; especially if for a foreign market; 4 Campb. 169; 6 Taunt. 108. See a form, *post*, 207. An implied warranty will arise from the non-observance of an usage in specifying defects; 4 Taunt. 847; Holt, C. N. P. 95; and see 4 B. & C. 110, 114.

A simple affirmation or assertion by the vendor as to the value or quality of the goods does not amount to a warranty unless it be made and received as such, although the purchaser may have bought the goods on the faith of such recommendation; Cro. Jac. 4; Rol. Ab. 101; Chit. jun. Contr. 3d ed. 452; and in many cases the positive recommendation of the seller is not, from the nature of the case, to be regarded as a warranty, but merely as an expression of his belief and opinion on a matter of which he could have no certain knowledge, and on which the purchasers were generally capable of forming an opinion; Chit. jun. Contr. 3d ed. 453. Thus where the defendant, not knowing the age of a horse, but having a written pedigree which he received with him, sold him as a horse of the age stated in the pedigree, at the same time stating that it was his source of information, Lord Kenyon held that this was no warranty; Peake's Rep. 123; 2 Esp. 572; and see 5 B. & Ald. 240; Chit. jun. Contr. 3d ed. 453; 1 Bing. 344. In the case in 4 Car. & P. 45, it was decided that if a person at the time of selling a horse say, "I never warrant, but he is sound as far as I know," this is a qualified warranty, and may be sued on even in *assumpsit*, showing that

of the defendant a certain horse [or "dog" &c.] at and for a certain price or sum of money, to wit, the sum of £—, to be therefore paid by the plaintiff for the same, he the defendant promised the plaintiff that the said horse

the plaintiff knew of the unsoundness. *Sed quare.*

A general warranty will not extend to indemnify against defects that are plain and obvious to the senses of the purchaser. As if a horse be warranted perfect, and wants an ear, or a tail, &c.; 2 Bla. Com. 165; 1 Salk. 211. But if on the sale of a horse the seller agree to deliver it sound and free from blemish at the expiration of a specified period, the warranty is broken by a fault in the horse when delivered, although such defect existed, and was patent or obvious at the time of the sale; 2 Bing. 183. As to a sale of goods with all faults, see 5 B. & Ald. 240; 3 Camp. 154.

Where a horse has been warranted sound, any infirmity rendering it unfit for immediate use is an unsoundness; it is not necessary the infirmity should be of a permanent nature; 1 Stark. 127; and a warranty of soundness is broken if the disease existed in the constitution of the animal at the time of the sale, although its fatal appearance could not be discovered, and did not appear until two months afterwards; 1 R. & M. 136. A cough of a permanent nature is an unsoundness; 2 Chit. Rep. 425. A *snarled* horse is unsound; 1 R. & M. 290. So is a horse affected with a bone spavin in the hock; 7 C. & P. 85; or a chest-foundered horse; 8 B. Moore, 32. But *crib biting*, *Holt*, C. N. P. 630, or *roaring*, 2 Campb. 623, do not of themselves constitute an unsoundness; but if the roaring be of such a nature as to incommode the horse when pressed to its speed, it is an unsoundness; 2 Stark. 81. It is a disputed question whether thrushes, splints, or quidding, be an unsoundness; 2 Campb. 524; *Margetson v. Wright*, 8 Bing. 454. Defective formation or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time, (*e. g.* curby hocks), is not an unsoundness; see *Brown v. Elkington*, 8 M. & W. 132; *Dickenson v. Follett*, 1 Mood. & Rob. 289. A temporary lameness, rendering a horse less fit for present use, is a breach of a warranty of soundness; *Elton v. Brogden*, 4 Camp. 281. The question of unsoundness is for the opinion of a jury; 7 Taunt. 153; 8 J. B. Moore, 32.

When a horse is warranted sound, and turns out otherwise, the purchaser has no right to return him unless the warranty was *fraudulent*; or there was an express agreement authorizing the return; see *Street v. Blay*, 2 B. & Adol. 456.

If not otherwise stipulated, an action for the breach of warranty may be supported without returning the horse, or even giving notice of the unsoundness, and although the purchaser have resold the horse; 1 Hen. Bla. 17; 1 T. R. 136; 2 T. R. 745; 9 B. & Crea. 265; and see 4 Man. & Ry. 208. But unless the horse is returned as soon as the de-

fect is discovered, or if the horse has been long worked, the purchaser cannot recover back the purchase-money on the count for money had and received; 1 T. R. 136; 5 East, 449; 7 East, 274; 2 Camp. 410; 1 New Rep. 260; and in all cases the vendee should object within a reasonable time, otherwise a strong presumption arises that the article, at the time of the sale, corresponded with the warranty, and the plaintiff is called upon to give the strictest proof of the breach; 9 B. & C. 265; 1 J. B. Moore, 106; 1 H. Bla. 19. A contract cannot be rescinded on the ground of a breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case, or unless both parties have consented to rescind it; or there was fraud; 2 B. & Ad. 456; 1 Cr. & M. 209; but see 2 Bing. N. C. 724.

When the purchaser has not returned the goods, or endeavoured to do so, within a reasonable time after the sale, on account of the breach of the warranty; or cannot return the goods or horse in the same state by reason of doctoring, &c.; 3 Esp. 82; 5 East, 452; he has no defence to an action by the vendor for the price, but must proceed in a cross action on the warranty; 1 T. R. 136; 5 East, 449; 7 Id. 274; 2 Campb. 410; 1 N. R. 260; 3 Esp. Rep. 82; 4 Esp. Rep. 95; and it seems, if the vendee has accepted a bill, or given any other security, the breach of warranty is no defence to an action thereon, but he must proceed by cross action; 2 Taunt. 2; 1 Stark. 51; 3 Campb. 38, S. C.; 14 East, 486; 3 Stark. 175; but this seems otherwise when the purchaser has returned or endeavoured to return the goods in a reasonable time after the sale; see 2 Taunt. 2; 14 East, 484; 3 Campb. 38; Peake, C. N. P. 38; see *Street v. Blay*, 2 Bar. & Adol. 456; 4 Nev. & M. 196, S. C. In a case whereby a contract of sale of cinquofoin seed, the vendor warranted it to be new grown seed, and soon after the sale the buyer was told it did not correspond with the warranty, and he afterwards sowed part, and sold the residue, but which, being unproductive, was never paid for, it was held the buyer might defend an action for the price of the seed, by showing the breach of the warranty, and that the seed was good for nothing; *Paulton v. Lattimore*, 9 B. & C. 259.

In an action for a breach of warranty of a horse, the plaintiff cannot recover as special damages the loss of a bargain for resale of the horse, though the contract of resale at a profit had been actually completed before the unsoundness was discovered; *Clan v. Maynerd*, 6 A. & E. 519; 1 N. & P. 701.

Evidence.—A prior vendor who warranted on his sale to the defendant is not a competent witness for the defendant in action by a purchaser from him on a warranty; *Biss v. Mountain*, 1 Mood. & Rob. 302.

ON
WARRANTIES.

[*or* "dog," &c.] then was [sound (*o*)]. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, buy the said horse [*or* "dog," &c.] of the defendant, and then paid him for the same the said sum of money; nevertheless the defendant did not perform or regard his said promise, but thereby deceived and defrauded the plaintiff in this, to wit, that the said horse [*or* "dog," &c.] at the time (*p*) of the making of the said promise of the defendant was not [sound], but on the contrary thereof, was then [unsound (*q*)], whereby the said horse [*or* "dog," &c.] then became^e and was of no use or value to the plaintiff; and he the plaintiff hath been put to great charges and expense of his monies in and about the feeding, keeping and taking care of the said horse, (*r*) in the whole amounting to a large sum of money, to wit, the sum of £——.

On a warranty of soundness on the exchange of horses. (*s*)

For that whereas heretofore, to wit, on &c. [*day of contract, or about it*], in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant a certain horse of the plaintiff of great value, and would also pay to the defendant a certain sum of money, to wit, the sum of £——, in exchange for a certain mare of the defendant, he the defendant promised the plaintiff that the said mare of the defendant was then sound; and the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, deliver to the defendant the said horse of the plaintiff, and did also then pay to the defendant the said sum of £—— in exchange for the said mare of the defendant; yet the defendant did not perform or regard his said promise, but thereby deceived the said plaintiff in this, to wit, that the said mare, at the time of the making of the said promise of the defendant, was not sound, but on the contrary thereof was at that time unsound, whereby the said mare then became and was of no use or value to the plaintiff, and whereby also [*State special damage, if any, by expense of feeding &c., as supra.*]

(*o*) This form may readily be applied to any description of warranty, as that the horse was "free from vice," &c. The warranty must be described accurately, and co-extensive with the breach complained of. If any conditional or exceptional terms be used, they must be followed in setting out the contract. Therefore if a horse be warranted sound everywhere, *except* a kick on the leg, the exception must be stated; 4 B. & C. 446. What a variance; 2 D. & R. 10; 7 Taunt. 406; 1 J. B. Moore, 109; 4 B. & C. 109. See *Heming v. Parry*, 6 Car. & P. 689, where Alderson, B. observed on *Jones v. Cowley*, 6 Dowl. & Ry. 533.

(*p*) This is necessary.

(*q*) The particular description of unsoundness need not be stated, it being a rule in pleading that the breach may in general be assigned in the negative of the words of the contract; Com. Dig. Pleading, C. 45; 2 Saund. 181 b; 3 T. R. 307; 9 Co. 60 b; *ante*, vol. i.

(*r*) When not recoverable, see 2 Campb. 82; 2 Chitty's Rep. 416; and for what time,

Chesterman v. Lamb, 2 A. & E. 132. If the horse has not been tendered to the defendant, the plaintiff cannot recover damages for the expense of his keep; 1 Taunt. 566. But where there has been an express warranty, and the plaintiff, relying thereon, has resold the horse with a similar warranty, and being sued thereon by his vendee, offers the defence to his vendor, who gives no directions as to the action, the plaintiff may recover the costs of his defence as part of the damages occasioned by the breach of warranty; 7 Taunt. 153; 1 J. B. Moore, 106; 1 R. & M. 436; 8 Taunt. 535.

(*s*) When not necessary, see 9 East, 349. Generally speaking, as in a contract of sale, there is no implied warranty in the exchange of one commodity for another; 3 Campb. 361; see *ante*, 204. In a contract for the exchange of a watch for candlesticks warranted silver, the owner of the watch cannot recover it back, though the warranty be false; 3 Campb. 299; see a precedent, *ante*, 200, for not paying money on an exchange of horses.

For that whereas heretofore, to wit, on &c., [*day of sale, or about it*], in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to buy of him divers goods and merchandize, to wit, &c. [*here describe the goods generally*] for certain large prices then agreed upon by and between the plaintiff and the defendant, amounting to a large sum of money, to wit, the sum of £—, to be consigned to parts beyond the seas, to wit, from London to the East Indies, he the defendant then promised the plaintiff to furnish such goods and merchandize as aforesaid properly preserved and packed up for the East Indies aforesaid, and to pack them properly for the said voyage. And the plaintiff in fact says, that although he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, buy of the defendant a large quantity of goods and merchandize as and for the same goods and merchandize so agreed to be bought as aforesaid, and which the defendant then supplied and furnished to the plaintiff as and for such goods and merchandize; yet the defendant, not regarding his said promise, did not nor would, although often requested so to do, furnish such goods and merchandize as aforesaid fit to be sent to the East Indies as aforesaid, or pack them properly for the said voyage, according to his said promise, but wholly neglected so to do, and therein made default; and then so negligently and improperly conducted and behaved himself in and about the furnishing and packing of the said goods and merchandize, that the same by reason thereof were then and continually afterwards wholly unfit for the purpose aforesaid, and thereby the plaintiff not only lost all the benefit, profit and advantage, which he otherwise might and would have derived and acquired from the purchase of the said goods and merchandize, but also was put to great expense of his monies, to wit, £— in and about the shipping and conveying of the same to the East Indies aforesaid, and in and about other expenses relating to the same; and was also put to great expense, loss and inconvenience in and about the sale and disposal of the said goods and merchandize, and sustained great loss and

ON
WARRANTIES.

For not furnishing and packing good hams for a foreign market.
(^t)

(^t) See *ibide*, ante, 204. See other forms, 1 Westw. 482; 1 Campb. 190; 2 East, 314. Upon a parol sale of goods by sample, an implied warranty arises that they shall correspond with the sample; 4 B. & A. 387; 3 Stark. 32, and notes; 4 Campb. 22. But this is not so in a written sale by sample; 4 Campb. 144, 169; 2 Campb. 22. And upon a sale of goods by sample, the law does not raise an implied warranty that the goods should be merchantable, though a fair merchantable price were given; and if there be a latent defect then existing, unknown to the seller, and without fraud on his part, the seller is not answerable, though the goods turn out to be unmerchantable; and the contract is satisfied if the sample answers fairly to the commodity in bulk; 2 East, 314. If the goods do not correspond with the sample, the vendor is not bound to complete the purchase on being allowed a compensation for the inferiority, notwithstanding a usage in the trade to that effect; 1 Campb. 113. Where a purchaser finds that the commodity does not accord with the order, and is unfit for his purpose, he should immediately return it, or

give notice to the vendor to take it back; 1 Campb. 193; 7 Ves. 247. And after an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover the full price agreed upon, he cannot maintain a cross action on the ground of the goods being of a bad quality and unfit for the purpose for which they were ordered; 1 Campb. 190, *semble*. In an action for the price of goods ordered by defendant, which are sent to the purchaser, and immediately returned, it lies upon the plaintiff to show that the articles corresponded with the order given; 1 Campb. 180. If the goods delivered are generally the same as those contracted for, and have been paid for by the purchaser, the price cannot be recovered back in an action for money had and received, as upon a failure of consideration, however bad their quality may be, and although they are quite unfit for use; 2 Id. 416; but see 2 Bing. N. C. 724.

ON
WARRANTIES.

damage on account of his not being able to sell or dispose of the same there or elsewhere. [*There was a second count for selling goods as fit for the East Indies, but sending goods unfit for that purpose, see 4 Bar. & Cres. 108 ; 6 Dowl. & R. 200, S. C. ; 5 Bing. 533. There was also a third count, like the second, excepting that it was on an executed consideration, see 2 Chitty on Pleading, 5th ed. 284. But now there can only be one special count, with an account stated.*]

For a false warranty of a Bank of England note, which turned out to have been forged and invalid.

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was indebted to the plaintiff in a certain sum of money, to wit, the sum of £——, and in consideration thereof, and that the plaintiff, at the request of the defendant, would accept and receive of and from the defendant, in part satisfaction and payment and discharge of the said debt or sum of £—— a certain piece of paper as and for a certain promissory note of the Governor and Company of the Bank of England, for the payment of the sum of £—— to the bearer thereof on demand, he the defendant then promised the plaintiff that the said piece of paper was a good, true and valid promissory note of the Governor and Company of the Bank of England. And the plaintiff avers, that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, take, accept and receive of and from the defendant the said piece of paper in part satisfaction, payment and discharge of the said sum of £—— ; yet the defendant did not perform or regard his said promise, but thereby deceived and defrauded the plaintiff, in this, to wit, that the said piece of paper was not a good, true or valid promissory note of the Governor and Company of the Bank of England, but on the contrary thereof was a bad, forged and invalid note, and a piece of paper of no use or value whatever to the plaintiff, whereby the plaintiff hath lost and been deprived of the use and benefit of the said note and of the said sum of £—— therein mentioned, for which he accepted and received the same of and from the defendant as aforesaid, and hath been and is by means of the premises otherwise greatly injured and damnified. [*In general a count for the original debt as remaining unsatisfied, with the account stated, will be preferable.*]

XXIII. RELATING TO THE
SALE, USE, &c.
OF LANDS, &c.

XXIII. RELATING TO THE SALE, USE, &c. OF REAL
PROPERTY.

Suggestions respecting the mode of framing a declaration by a purchaser against a vendor, or vice versa.—In order to sustain a special count there must have been a written agreement, signed by the defendant as required by 29 Car. 2, c. 3, s. 4, although the deposit money may be recoverable under a common count for money received to plaintiff's use. As since Reg. Gen. Hil. T. 4 W. 4, reg. 5, there can be only one special count on the same transaction, though several breaches are admissible, the former practice of inserting several special counts against a vendor, (as first, for not making a good title ; and secondly, for not delivering an abstract of a title in a reasonable time,) should not be continued, and only one of those forms must be adopted, as may best apply to the existing facts ; or both of

those causes of action should be assigned as distinct breaches of the same contract, and which may certainly be readily effected by the pleader.

For that whereas the defendant heretofore, to wit, on &c. [day of sale, or about it,] caused to be put up and exposed to sale by public auction certain

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Against vendor
of an estate at
public auction,
for not making
a good title (u).

(u) See Sugden's Law of Vendors, &c. 8th edit. 206 to 240; 1 Chitty's Gen. Prac. 295, 296, 459 to 470. See Forms, 4 Taunt. 334; 6 B. & C. 71; 5 B. & Adol. 742; Plead. Assmt. 62; and see a form and law, *Hodges v. Earl of Lichfield*, 1 Bing. N. C. 492; 1 Hodges' R. 40, and decision as to what expenses recoverable, *id.* See also Chit. jun. on Contracts, 3rd edit. 307, &c.

If the vendor of an estate be not prepared to produce his title-deeds, or make a good title, at the appointed day, the purchaser, without waiting to see whether or not the vendor may ultimately be able to establish a good title, may disaffirm the contract and recover back the deposit-money from auctioneer under the count for money had and received; 4 Taunt. 334; 2 Esp. Rep. 641, 643; 4 Esp. 221.

And that form of declaring is the only remedy, and the deposit-money is all that can be recovered where there is no contract signed by the vendor or his agent, as required by the statute against frauds. If there be such a contract in writing, duly signed, then the purchaser may declare especially for the non-performance of it, and, in general, recover some damages beyond the mere deposit. See Sugden's Law of Vendors, 8th edit. 220, 221, &c. Where no precise time is fixed within which the vendor is to deduce a good title, the declaration must aver that he has been allowed a reasonable time for that purpose; *Seaton v. Rhodes*, 6 Bing. N. C. 261.

As to damages, however, a purchaser will, in general, be entitled only to nominal damages for the mere loss of his bargain, because a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title; 2 Blackst. 1078; and see 3 B. & P. 167; Palm. 364; 1 Bing. N. C. 492; 1 Hodges' R. 40; Sugden, 8th edit. 222. And where an auctioneer had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it; Sugd. 222. But in 6 B. & C. 31, where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it by auction, with a stipulation to make a good title by a day named, but which he was unable to do, as his vendor refused to convey, it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he sustained by

not having the contract carried into effect. In this case the defendant had not any title at all, either legal or equitable. Mr. Sugden observes, p. 223, "this case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood."

A purchaser is not entitled to any compensation, although he may be a loser by having sold out of the funds, which may have risen in the mean time, because he had a chance of gaining as well as losing by a fluctuation of the price; 2 Blackst. 1078. But a purchaser is in general entitled to interest on his deposit, and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that; Sugd. 8th edit. 223, 224. But where the vendee proceeds against the auctioneer, to whom the deposit was paid, he cannot recover interest unless under particular circumstances; as if when the title was not made out, the auctioneer, upon being called on to pay it over, he refused, he might be liable from that time, or, perhaps, if he actually made interest on the deposit; 7 Taunt. 592; 8 Taunt. 45; 1 J. B. Moore, 481, S. C.; 5 Esp. 1; Sugd. 8th edit. 512. But see *Harrington v. Hoggart*, 1 B. & Adol. 577. And as to when the auctioneer is not liable, see *id. ibid.*; 2 Yo. & Jerr. 549; 3 M. & P. 368. The 3 & 4 W. 4, c. 42, s. 28, enables a jury now to give a verdict for interest in all cases where there has been a written demand of such interest.

Where the plaintiff recovers under a special count on the original contract, by which he affirms the agreement, interest will be given as part of the damages for non-performance of the agreement, but where he recovers under a count for money had and received, which disaffirms the contract, and to which is mostly added a count for interest, interest may, it should seem, be recovered as damages sustained by the plaintiff, by reason of the money having been withheld from him. If, however, the original contract is void, as if it be a parol agreement for the sale of lands, the purchaser, it seems, can only recover his deposit in an action for money had and received, and will not be allowed interest; 1 B. & P. 306; and see 2 B. & P. 472.

To recover special damages, the plaintiff must declare on the original contract, and state the special damages, such as the expenses incurred in investigating the title, &c.; *Camfield v. Gilbert*, 4 Esp. R. 221; 2 Blackst. 1078; 2 Taunt. 145; *Turner v. Beaurain*, Sugd. 8th edit. 224. Clearly the expenses cannot be recovered under a count for money had and received; and Lord Ellenborough has decided, that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended

RELATING
TO THE
SALE, USE, &c
OF LANDS, &c.

Mutual pro-
mises.

Damage. (y)

tenements and premises with the appurtenances, to wit, — [describe the premises shortly, as in the particulars of sale,] upon and subject to the following amongst other conditions, that is to say, [here set out such of the conditions which may have any reference to the plaintiff's claim precisely as they appear in the particulars of sale, but in the past tense, as thus:] that the purchaser should pay to the vendor or his agent a deposit of £—— per cent. in part of the purchase-money, and should likewise pay one half of the auction-duty, and should also pay the remainder of the purchase-money, and complete the purchase on or before the —— day of —— then next, and that a good title should be made out at the expense of the vendor, and upon payment of the remainder of the purchase-money a proper conveyance at the purchaser's expense. And the plaintiff in fact saith, that on such exposure to sale, to wit, on the day and year first aforesaid, the plaintiff became and was the purchaser of the said premises, upon and according to the said conditions, for a certain price, to wit, the sum of £——, and then paid to the defendant a large sum of money, to wit, the sum of £—— as a deposit of [£10] per cent. in part of the said purchase-money, and then also paid another large sum of money, to wit, the sum of £——, as one half of the said auction-duty payable in that behalf. And thereupon afterwards, to wit, on the day and year first aforesaid, in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to perform and fulfil all things in the said conditions of sale contained on the said plaintiff's part, as such purchaser as aforesaid, to be performed and fulfilled, he the defendant promised the plaintiff to perform and fulfil all things in the said conditions of sale contained on the vendor's part to be performed and fulfilled. And the plaintiff saith, that although he, on the day and year first aforesaid, and from thence until and upon the said —— day of —— then next, was ready and willing to perform and fulfil all things in the said conditions contained on his part, as such purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase-money and to complete the said purchase, (x) whereof the defendant, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to make him a good title to the said premises; yet the defendant, not regarding his said promise, did not nor would, when he was so requested as aforesaid, or at any time before or since, make or procure to be made to the plaintiff a good title to the said premises, but hath hitherto wholly neglected and refused so to do, contrary to the said conditions of sale and the said promise of the defendant; by reason whereof he the plain-

for the purchaser's own satisfaction, as to the title which he is about to take; 4 Esp. 221; nor can the expenses of investigating the title in general be recovered from the auctioneer; Holt, C. N. P. 569.

When the action is for not making a good title, and the declaration is special, the Court will compel the plaintiff to give the defendant particulars of all objections to the title founded on matter of fact; 3 B. & P. 246.

As to when purchaser may recover back deposit where there has been a misrepresentation or concealment, see 2 Stark. 422; 1 Marsh. 206; 5 B. & A. 257; 3 B. & C. 623; and forms, *post*.

(x) Though in general the purchaser is required to tender a conveyance and the purchase-money, (Sugd. 8th edit. 231 to 233,) yet if a bad title be produced, he may maintain an action without tendering either; 5 East, 198; Sugd. 233. So where a vendor has by selling the estate incapacitated himself from executing a conveyance to the first purchaser, that renders further trouble and expense on his part unnecessary, and he may sue without tendering a conveyance or the purchase-money; 1 Esp. Rep. 189; 1 Hen. Bla. 270.

(y) As to the damages, see *ante*, 209, note (u).

tiff hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of £—— in endeavouring to procure such title as aforesaid, and to get the said purchase completed, and hath lost all gains and profits which he might and would otherwise have made and acquired from using and employing the said sums of money so paid by him as deposit and duty as aforesaid, and other monies provided and kept by him the plaintiff for the completion of the purchase.—[Add a count for money had and received, and an account stated, and conclude as ante, 36.]

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

For that whereas heretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, had then bargained with the defendant for the purchase of certain premises, with the appurtenances, at and for a large sum of money, to wit, the sum of £——, and had paid to the defendant a certain sum, to wit, the sum of £——, in part of the said purchase-money, and had also agreed to pay the residue thereof, and to accept a proper conveyance of the said premises, on or before the —— day of ——, in the year aforesaid, on having a good and valid title to the said premises made to him, he the defendant then promised the plaintiff that he the defendant would procure an abstract of a good and valid title to the said premises to be furnished to the plaintiff in due and convenient time for enabling him to get such title examined, and a proper conveyance of the said premises prepared, and the said purchase completed on or before the said —— day of ——, A. D. —— aforesaid. Yet the defendant, not regarding his said promise, did not nor would, although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, procure an abstract of a good and valid title to the said premises to be furnished to the plaintiff in due and convenient time for enabling him to let such title be examined, and a proper conveyance of the said premises prepared, and the said purchase completed, on or before the day and year last aforesaid; but therein wholly failed and made default, and the defendant then wrongfully and injuriously neglected and omitted to furnish any abstract of title to such premises as last aforesaid for a long and unreasonable time, and until an insufficient and inadequate time remained for the examination of such title, and for the preparation of a proper conveyance, and the completion of such purchase as last aforesaid by the day appointed for that purpose as aforesaid, according to the said promise of the defendant in that behalf; and the plaintiff in fact further saith, that by means and in consequence of such neglect and omission as aforesaid, the plaintiff hath been deprived of all benefit and advantage which would have arisen to him from the completion of the said purchase, and hath necessarily been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of £——, in endeavouring to procure the said title as last aforesaid, and hath lost, &c. [same damage as in last precedent.]—[Add counts for money had and received, interest, and an account stated, and breach, as ante, 36.]

Declaration
against vendor
for not deliver-
ing an abstract
of title in due
time, in breach
of the contract
implied from
selling.

For that whereas heretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, had then bargained with the defendant to purchase of him certain premises, to wit, [three houses] with the

Declaration for
not making a
good title to
premises for re-

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

residue of a term
within a reason-
able time.

appurtenances, for the residue of a certain term of years then unexpired, at and for a certain sum of money, to wit, the sum of £—, and upon certain terms then agreed upon between the plaintiff and the defendant, he the defendant promised the plaintiff to make to him a good title of the said premises for the residue of the said term within a reasonable time then next following; and although the plaintiff hath always been ready and willing to pay the said sum of money, and to perform the said purchase in all things on his part to be performed and fulfilled, whereof the defendant hath always had notice, yet the defendant, not regarding his said promise, hath not, although a reasonable time for that purpose hath long since elapsed, as yet made or caused to be made to the plaintiff a good title to the said houses for the residue of the said term, but hath hitherto wholly neglected and refused so to do; by means whereof the plaintiff hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expenses, in the whole amounting to a large sum, to wit, the sum of £—, in endeavouring to procure such title as aforesaid, and to get the said purchase completed.

Declaration
against a publi-
can on an agree-
ment to assign
his lease, and
on his implied
contract, that he
had lawful title
so to do. (s)

For that whereas the defendant, before and at the time of the making of the agreement and his promise hereinafter next mentioned, represented to the plaintiff that he was lawfully possessed for the residue and remainder of a certain term of years then next to come and unexpired therein of a certain messuage and premises, situate &c., wherein he the defendant then exercised and carried on the business of a victualler. And thereupon heretofore, to wit, on &c., by a certain agreement then made by and between the defendant and the plaintiff it was agreed as follows (that is to say), &c. [*here set out the agreement in the past tense, and state mutual promises, as ante, 168, and that defendant also promised as follows:*] and that he the defendant then had lawful right to sell and assign over the said lease of the said messuage and premises to the plaintiff, and that he would perform and fulfil the said agreement in all things on his part to be performed and fulfilled. And although the plaintiff hath always performed and fulfilled all things therein on the plaintiff's part therein to be performed and fulfilled, yet the defendant did not perform or regard the said agreement or his said promise, but thereby deceived the plaintiff in this, to wit, that he the defendant, at the time of making the said agreement and his said promise, had not lawful right to sell or assign over the lease of the said messuage and premises to the plaintiff, whereby the defendant was hindered and prevented from selling or assigning over the same, or performing the said agreement on the part and behalf of the defendant, and by means of the said several premises, he the plaintiff not only lost and was deprived of all the profits, benefits and advantages, which might and would otherwise have arisen and accrued to him from the performance of the said agreement on the part and behalf of the defendant, but was forced and obliged to and did necessarily lay out and expend a large sum of money, to wit, the sum of £—, in and about

(s) See a useful form, 2 Went. 71. A vendor always impliedly contracts that he has a good title, per Blackstone, J., 2 Sir W. Blackst. 1078, cited in 1 B. & C. 33. But

the vendor of a lease is not impliedly bound to show his lessor's title at law; 1 Ry. & Moo. 417; 3 Campb. 461.

the appraisement and valuation of the said household furniture, and endeavouring to obtain the completion of the said agreement, and hath been and is by means of the premises otherwise greatly injured and damnified.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

BY VENDOR
AGAINST
PURCHASER.
By vendor of
an estate in fee,
sold by public
auction, against
purchaser, for
not completing
purchase, and
paying the loss
on a re-sale. (a)

For that whereas the plaintiff heretofore, to wit, on &c., by one E. F., his auctioneer and agent in that behalf, caused to be put up and exposed to sale by public auction a certain messuage, orchard, garden and premises, with the appurtenances, situate (b) in the county of —, [describe the premises shortly from the particulars of sale,] upon and subject to the following amongst other conditions of sale; (c) [here set out such parts of the conditions as have immediate reference to the cause of action, and the breach,] that is to say, that the highest bidder should be the purchaser; that the purchaser should immediately pay down into the hands of the auctioneer, that is to say, the said E. F., £—— per cent. in part of his purchase-money, and enter into an agreement for payment of the residue of the said purchase-money, on the — day of —, then next ensuing, at which time he should have possession of the premises on having a good title, and that the auction duty (d) payable to government should be paid and borne by the vendor and purchaser in equal shares, and the purchaser should pay down his share thereof to the auctioneer at the time of sale; and that in case the purchaser should fail to comply with the said conditions, the deposit money should be forfeited, and the vendor be at liberty to resell the said tenements with the appurtenances, and the deficiency, if any, together with all charges, should be made good by the defaulter, as by the said conditions of sale (reference being thereunto had) will, amongst other things, more fully and at large appear. (e) And the plaintiff saith, that on the said exposure to sale, to wit, on &c. first aforesaid, the defendant was the highest bidder for, and then became and was in due manner declared to be the purchaser of, the said

Defendant the
purchaser.

(a) As to the law applicable to this subject, see Sugden's Law of Vend. & Purch. 8th edit. 225, 227. There are but few precedents in print by a vendor against a vendee for not completing his purchase. See a declaration by a vendor *seised in fee* against a purchaser at a public auction for non-payment of the purchase-money, and the law relative to these declarations, in 6 East, 555; 3 East, 410; 2 H. Bla. 123; and against a purchaser of an estate *in fee* by private agreement; 3 You. & Jerv. 129; 2 Wentw. 91, 105; 1 H. Bla. 270; and against a purchaser of a *chattel interest*, *Jones v. Berkley*, Dougl. 684; and see declarations, against purchaser of a lease, and evidence, *Laythorpe v. Bryant*, 1 Hodg. Rep. 19; 1 Bing. N. C. 421; *Luxton v. Robinson*, Dougl. 620; at suit of vendor of an *equitable interest*, in Dougl. 684. It seems from 3 East, 410, the vendor may at law recover a verdict for the whole purchase-money. The above precedent is given as it often occurs in practice. On a contract for the sale of lands, unless it be otherwise stipulated, the conveyance is to be at the expense of and to be prepared by the purchaser; and therefore a declaration in covenant by the vendor against the purchaser of lands for the non-payment of the purchase-money according to the contract need not

aver that the plaintiff offered or tendered a conveyance to the defendant. It is sufficient to allege that the plaintiff has always been ready and willing to execute a conveyance; *Poole v. Hill*, 6 M. & W. 835; 9 Dowl. 300, S. C. See post, 214, note (i).

Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendor cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract; *Laird v. Pim and another*, 7 M. & W. 474.

(b) It is certainly not necessary to state the local situation; see 6 East, 348; and care must be observed to avoid unnecessary particularity that might endanger variance.

(c) It is not necessary to set forth more of the conditions of sale than those which are essential to a clear statement of the cause of action, and the breach of which is complained of.

(d) 17 Geo. 3, c. 50, s. 7; 13 Price, 76.

(e) Some of the precedents here state the mutual promises; but it appears better to insert them after the allegation that the defendant became the purchaser.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Mutual pro-
mises.

Defendant's
part per-
formance.

Plaintiff's title
and readiness to
complete sale.

messuage, orchard, garden and premises, with the appurtenances as afore-
said, at and for a certain large sum of money, to wit, the sum of £——. (f)
And thereupon afterwards, to wit, on &c. first aforesaid, in consideration
thereof, and that the plaintiff, at the request of the defendant, had then
promised the defendant to perform and fulfil all things in the said conditions
of sale contained on the part of the vendor to be performed and fulfilled,
he the defendant then promised the plaintiff to perform and fulfil every
thing in the said conditions of sale on his part, as such purchaser, to be
performed and fulfilled. And although the defendant in part performance
of the said terms and conditions of sale and of his said promise did then
pay down a certain sum of money, to wit, the sum of £——, being at and
after the rate of £—— per cent., as a deposit upon and in part payment of
the said purchase-money, and did then sign an agreement for the payment
of the remainder of the said purchase-money on or before the said —— day
of ——, in the year of our Lord —— aforesaid, on having a good title. (g)
And although the plaintiff for a long time before and upon and after the
said —— day of ——, in the year last aforesaid, was ready and willing to
make and did make appear to the defendant a good and sufficient title in
fee-simple of, in and to the said tenements, with the appurtenances, (h) so
as to enable him the plaintiff to convey the same to the defendant in fee-
simple as aforesaid, and to execute and cause to be executed proper con-
veyances thereof to the defendant, and afterwards, to wit, on the day and
year last aforesaid, offered (i) to the defendant to make and convey to him
such good and sufficient title in fee-simple to the said tenements, with the

(f) Though it is necessary that the purchaser should in person, or by his agent, sign an agreement to purchase, (see 2 Taunt. 38,) yet it is not necessary to aver in declaration that such written contract was entered into. The purchaser cannot object that the vendor did not sign; see 5 East, 16.

(g) This averment is not necessary, see note (f), *supra*.

(h) According to the case of *Phillips v. Fielding*, 2 H. Bla. 123, this allegation is not sufficient, and it ought to be shown that the plaintiff really had an estate in fee-simple, or according to the terms of sale, and the particulars of such estate; but see 6 East, 555; Sugd. Vend. & Purch. 8th edit. 225. In *Luxton v. Robinson*, Dougl. 620, it was also held, that the plaintiff ought to state his title; and where it is quite certain that the vendor was seised of the legal estate, it may be prudent to make an averment accordingly, instead of risking the declaration in the above form. Where a title has been made out to the satisfaction of the defendant, an averment to that effect may suffice; see *Martin v. Smith* 6 East, 555; 2 Wentw. 105. Where the agreement is that the vendor need not make out his title, he need not set it forth; 8 Taunt. 62; 1 J. B. Moore, 498; see precedent, *id*. The precedents, by way of *inducement*, usually aver, that the plaintiff was seised in fee at the time of the sale; see 3 East, 410; 6 East, 555; 2 Wentw. 91. But this seems unnecessary, as it is not absolutely requisite that the vendor should have the legal title in him

at that time, and it is sufficient if he obtain it a reasonable time before the day appointed for the completion of the sale; Sugd. Vend. and Pur. 8th edit. 225; *Thompson v. Miles*, 2 Esp. Rep. 184.

(i) This seems sufficient without an averment that the plaintiff tendered the conveyances; 8 Taunt. 62; 1 J. B. Moore, 498. Where by an agreement concurrent acts are to be done by the plaintiff and the defendant, a declaration against the defendant for not doing the act on his part should allege that the plaintiff was ready and willing to do the concurrent act on his part. But if the plaintiff merely allege that he was ready and willing to perform the agreement on his part, it is sufficient if the defendant demur generally, or if he plead over; *Kemble v. Mills*, 1 M. & G. 757; 9 Dowl. P. C. 446. A vendor cannot in general bring an action for the purchase-money without having executed the conveyance, or rather tendered a proper draft and offered to do so, unless the purchaser has discharged him from so doing, as if he has refused to execute it, &c., see 6 Barn. & Cress. 506; Dougl. 684; 2 Hen. Bla. 123; 3 East, 443. But if the purchaser agree to pay the purchase-money on a particular day, and the making a good title, or executing the conveyance, be not expressly made a condition precedent, the declaration need not allege that the vendor had a good title to the land, or that he tendered a conveyance; see *Wilks v. Smith*, 10 M. & W. 355.

appurtenances, upon payment of the remainder of the said purchase-money according to the said terms and conditions of sale. Yet the defendant, not regarding the said terms and conditions of sale nor his said promise, did not, nor would, on or before the said — day of — in the year aforesaid, on having such good title as aforesaid, or at any other time, pay or cause to be paid to the plaintiff the remainder of the said purchase-money or any part thereof, but then wholly neglected and refused so to do, and wholly refused then or at any other time to complete the said purchase, or to accept a conveyance of the said tenements, with the appurtenances, to him the defendant. And thereupon the plaintiff afterwards, and after the said — day of —, in the year last aforesaid, to wit, on, &c. [*day of re-sale, or about it,*] according to and by virtue of the said conditions of sale, again exposed the said tenements, with the appurtenances, to sale by public auction, under and subject to certain terms and conditions of sale, and the same were then, at such last-mentioned exposure to sale as aforesaid, resold for a much less price or sum of money than the said price or sum for which the same had been so sold to the defendant as aforesaid, to wit, for the sum of £—, whereby there then was a deficiency between the said price for which the said tenements, with the appurtenances, were so sold to the defendant as aforesaid, and the said price for which the same were so sold on such re-sale, to a large amount, to wit, to the amount of £—; and the charges attending such re-sale then amounted to a certain other large sum of money, to wit, the sum of £—. Of all which said premises, the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and by reason of the premises, and according to the said terms and conditions of sale, he the defendant then became liable to pay and ought to have paid to the plaintiff the several sums of £— and £—; yet the defendant, further disregarding the said conditions of sale, and his said promise, hath not (although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do,) as yet paid the said sum of £— and £—, or either of them, or any part thereof, to the plaintiff, but so to do hath hitherto wholly refused and still doth refuse.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Defendant's refusal.

Re-sale and loss.

Defendant's non-payment of the difference.

See a second count more general in 2 Chitty on Pleading, 294, 5th edit.; and 2 Went. 105.

For that whereas the plaintiff, at the time of the making of the agreement and the promise of the defendant hereinafter next mentioned, was lawfully possessed, that is to say, for the residue of a certain term of years, to expire on &c., (I) of a certain dwelling-house and premises, with the appurtenances, situate in the parish of —, in the county of —, and the plaintiff was also then lawfully possessed of certain wine and spirit licenses and other licenses, and of certain liquors, and also of certain household furniture, fixtures, chattels, and other effects, then being on the said premises, and thereupon, heretofore, to wit, on &c. [*date of agreement or about it*] by a certain agreement then made between the plaintiff of the one part and the defendant of

On a public-house agreement and stipulated damages by vendor against the vendee for not procuring a broker to appraise the stock, &c. (k)

(k) See a form, 1 M. & P. 717. As to declarations of this nature, see *ante*, 213, note (a), 214, note (h); and Dougl. 620, 684;

2 Marsh. 332.

(l) As to what is a variance in stating the term, see 1 M. & P. 717.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Plaintiff's ap-
pointment of
his appraiser.

Defendant's
breach, non-ap-
pointment of his
appraiser.

the other part, it was agreed by and between the plaintiff and the defendant that the plaintiff should &c., [*here copy the agreement verbatim to the following words :*] But that if either of them should neglect or refuse to perform the said agreement on his part, the party so neglecting or refusing should pay to the other of them the sum of £ — on demand, by the said agreement mutually agreed to be the damages ascertained and fixed^(m) on breach thereof, and to become a just debt, and recoverable in any of her majesty's Courts of law, as by the said agreement, reference being thereunto had, will fully appear. And, &c., [*state mutual promises to perform the agreement, as ante, 168, and proceed with the averment of plaintiff's performance of all conditions precedent, and which must depend on the words of the agreement. In the case from which this form was taken, the averment was as follows : (n)*] And the plaintiff saith, that he was always from the time of the making of the said agreement until and upon the said — day of — ready^(o) and willing to assign and convey his said estate and interest in the said dwelling-house and premises, with the appurtenances, to the defendant, and to assign and deliver to him the said licenses, and to mend and allow for all the damaged windows of the said messuage and premises, with the appurtenances, and to clear the said premises from all incumbrances of rent and taxes, and to sell and deliver to the defendant the said household furniture, fixtures, liquors, chattels, and other effects, at a fair appraisement thereof as aforesaid, and also to deliver possession, and complete and fulfil the said agreement upon the said — day of —, at the joint expense of himself and the defendant, according to the effect and meaning of the said agreement in that behalf. And the plaintiff further saith, that he afterwards, to wit, on &c., aforesaid, appointed and procured one E. F. a broker, on his part, in order to make a fair appraisement and valuation of the said household furniture, fixtures, liquors, chattels, and effects, and the said E. F. was then ready to appraise and value the same accordingly; and the defendant then had notice of the premises, and was requested by the plaintiff to appoint and procure some person as a broker on his part to make such appraisement and valuation and to perform the said agreement on his part, according to the effect and meaning thereof. Yet the plaintiff saith, that the defendant did not nor would, when he was so requested as aforesaid, appoint or procure a broker on his part^(p) to appraise and value the said

(m) As to the distinction between a penalty and liquidated damages, see 2 B. & P. 346; and 3 B. & P. 632; 13 East, 345; 1 Hen. Bla. 227; Holt, C. N. P. 46; 8 J. B. Moore, 244; 1 Bingh. 302, S. C.; 5 Taunt. 247; 1 Chitty's Gen. Prac. 872; and *Davies v. Penton*, 6 Barn. & Cress. 216, from which it should seem that all the parts of the instrument must be looked at in order to ascertain whether it was the intention of the parties that the sum named should be a penalty or liquidated damages; and that where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty.

(n) The averments of performance on the

part of the plaintiff must always depend on each particular agreement; those in the precedent are such as most frequently occur in actions on public-house agreements.

(o) As to the necessary averments in this part of the declaration, see 2 Marsh. 332; *ante*, 214, note (i).

(p) Where A. agreed to sell to B. his interest in a public-house, and his furniture, &c. at an appraisement to be made by two appraisers, the same to be paid for on B.'s taking possession, which was to be done on or before the 25th of March then next, and £30 was paid by B. as a deposit; and he agreed that if he should not complete his part of the agreement, the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of March the two appraisers met, and the seller's appraiser was then informed that the ap-

household furniture, fixtures, liquors, and other effects, or any of them, according to the effect and meaning of the said agreement, but then wholly neglected and refused so to do, and by reason thereof the said household furniture, fixtures, liquors, and other effects, still remain unvalued and unpaid for by the defendant. And the plaintiff further saith, that although the defendant afterwards, to wit, on &c. nominated and appointed a certain other person, to wit, one G. H. as a broker to appraise and value the same chattels and effects for and on behalf of the defendant, and although the said E. F. and G. H. as such brokers as aforesaid then began such valuation and appraisement, and the same would have been proceeded with and completed, if the defendant would have suffered and permitted the said G. H. to have proceeded therein; yet the defendant, not regarding his said promise, did not nor would (although often requested so to do) suffer or permit the said G. H. to proceed in or go on with the valuation and appraisement of the said chattels and effects on his part, but afterwards and before the completion thereof, to wit, on the day and year last aforesaid, wholly refused to suffer or permit him so to do, and then countermanded and prevented the said G. H. from proceeding and going on with the said valuation and appraisement, and then and from thence hitherto hath neglected to nominate or appoint any other person to value or appraise the said chattels and effects for and on behalf of the defendant, and hath hindered and prevented the completion of such valuation and appraisement as last aforesaid, and the same chattels and effects still remain wholly unpaid for by the defendant, contrary to the said promise of the defendant. By means of which premises the defendant hath become liable to pay the plaintiff the said sum of £200 in the said agreement mentioned, when he the defendant should be thereunto afterwards requested. Nevertheless the defendant (although often requested so to do) hath not as yet paid the said sum of £200 or any part thereof to the plaintiff, but hath hitherto wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said agreement and his said promise.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Second breach, that although the defendant appointed his broker, yet he afterwards prevented him from proceeding to make a valuation.

Defendant's consequent liability to pay the £200 as stipulated damages. Breach, non-payment of the stipulated damages. (q)

For that whereas the plaintiff, at the time of making the agreement and promise of the defendant hereinafter mentioned, was lawfully possessed of certain stock in trade, fixtures, chattels and effects of great value, as of his own property. And thereupon heretofore, to wit, on &c., it was agreed by and between the plaintiff and the defendant as follows, that is to say, the

For the penalty in a written agreement to take fixtures and stock in trade at an appraisement. (r)

priser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day; no objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract: held, that under the circumstances, it was incumbent on the seller, if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer; and not having so done, the latter was entitled to recover back the deposit; 8 Barn. & Cresk. 575.

(q) When the contract was to pay stipulated damages, it is advisable thus to declare for them in one count, see 6 East, 567; 13 East, 345; for otherwise the jury may give less.

(r) See *Leeds v. Burrows*, 12 East, 1; and *post*, 219, note (t). In an action of assumpsit for the value of goods which the defendant agreed to purchase at the valuation of N. and M., the declaration averred that N. was ready to value for the plaintiff, but that the defendant and M. refused to value for the defendant, that the plaintiff gave notice to the defendant that his valuer N. was ready to meet M. or any other valuer the defendant might appoint, at any

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said stock, fixtures, chattels and effects, at a fair appraisement, by a person agreeable to both parties, on &c. then next, and to pay the money for the same on the day of appraisement: and it was then further agreed, that either party refusing to perform the said agreement should forfeit to the other the sum of £20.^(s) And the said agreement being so made, afterwards, to wit, on the day and year first aforesaid, in consideration &c.—[*Mutual promises, as ante, 168.*] And the plaintiff in fact saith, that under and by virtue of the said agreement, and in pursuance thereof, the said stock, fixtures, chattels and effects were afterwards, to wit, on &c., [*day of appraisement, or about it.*] appraised by a person agreeable to both parties, that is to say, by one E. F. at a large sum of money, to wit, the sum of £——, whereof the defendant then had notice; and although the plaintiff was then willing to deliver the said stock, fixtures, chattels and effects to the defendant, upon his paying the said sum of £—— to the plaintiff for the same, and then requested the defendant to take the said stock, fixtures and chattels, at such appraisement as aforesaid, and to pay him the said sum of £—— for the same; and although the plaintiff hath always, from the time of the said agreement, hitherto well and truly performed and fulfilled the same in all things therein contained on his part to be performed and fulfilled according to the tenor and effect, true intent and meaning thereof; yet the plaintiff in fact saith, that the defendant did not nor would, at the said time when he was so requested as aforesaid, or at any time afterwards, take the said stock, fixtures, chattels and effects, or any part thereof, at such appraisement as aforesaid, or pay the said sum of £——, or any part thereof, to the plaintiff, but wholly neglected and refused so to do, and therein failed and made default, whereby, and according to the form and effect of the said agreement, the defendant forfeited and became liable to pay to the plaintiff the said sum of £—— in the said agreement in that behalf mentioned; nevertheless the defendant (although often requested) hath not as yet paid the said sum of £—— or any part thereof to the plaintiff, but hath hitherto wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said agreement and his promise aforesaid.

By OUT-
GOING AGAINST
IN-COMING
TENANT.

On an agree-
ment between
an out-going
tenant against

For that whereas, before and at the time of the making of the agreement and the promise of the defendant hereinafter mentioned, the plaintiff was lawfully possessed of a certain farm, lands and premises, with the appurtenances, to wit, in the parish of —— in the county of ——, as tenant thereof, for a certain term then unexpired, and at the expiration of which said term the plaintiff was about to quit and yield up the said farm, lands and pre-

time within ten days which the defendant might fix for making the valuation; that the defendant refused to appoint any day for that purpose, and refused to appoint any other valuer or to take any steps to value the goods, or procure them to be valued, according to his agreement, whereupon, after the lapse of a month, N. valued them, and the price amounted to &c., alleging a breach in not taking the goods and paying such amount: held, on de-

murrer, that the count was bad, for that the defendant could not be liable for the price of the goods until they had been valued by both valuers pursuant to the agreement, at least without a distinct averment that the defendant refused to permit M. to value; *Thurnell v. Balbirnie*, 2 M. & W. 786.

(s) As to this stipulation for a penalty, see *ante*, 216, note (m).

mises, with the appurtenances, to and in favour of the defendant as the succeeding tenant thereof, and on which said farm, lands and premises the plaintiff had before then laid and spread divers large quantities of dung and manure, and there were then growing and being on the said farm divers large quantities of turnips, corn, grass, herbage and underwood, the plaintiff was then also lawfully possessed of divers large quantities of corn and grain in the straw, hay, dung, manure, fixtures, chattels and effects, then lying and being upon and about the said farm, with the appurtenances, and of great value, to wit, of the value of £—; and the plaintiff being so possessed thereof, heretofore, to wit, on &c., [day of agreement, or about it,] it was agreed between the plaintiff and the defendant, that the plaintiff should leave on the said premises, and the defendant should take and purchase of the plaintiff, the said dung and manure so laid on the said farm as aforesaid, and the said turnips, corn, grass, herbage and underwood so growing and being thereon, and that the plaintiff should sell and deliver to the defendant the said hay, dung, manure, fixtures, chattels and effects, and the defendant thereby agreed to pay for the same at a fair valuation to be made by certain persons, that is to say, by E. F. then named and appointed by and on behalf of the plaintiff, and G. H. then named and appointed by the defendant to value the premises. [Then state mutual promises, as ante, 168, and proceed as follows:] And the plaintiff further saith, that afterwards, to wit, on &c., under and by virtue of the said agreement, the said dung and manure so laid on the said farm as aforesaid, and the said turnips, corn, grass, herbage and underwood, and the said other hay, dung and manure, fixtures, chattels and effects, were fairly valued by the said E. F. and G. H. at a certain sum of money, to wit, the sum of £—, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice. And the plaintiff further saith that he, confiding in the

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

an in-coming
tenant, for not
paying amount
of valuation of
crops, labour,
manure, &c. (i)

(i) See other forms, 2 Wentw. 52, 56; 12 East, 1; post, 220, 221, 222. A custom that tenants shall have the way-growing crops after the expiration of their terms is good; Dougl. 201; and see Holt, C. N. P. 197; 3 J. B. Moore, 536. But this custom does not entitle the tenant to remuneration for his growing crops from the landlord or in-coming tenant, if there be any express stipulation between the out-going tenant and his landlord inconsistent with such usage of the country; 16 East, 71; 1 Taunt. 19; 1 Mer. 16; 2 B. & Ald. 746. A custom that a tenant may leave these crops in the barns, &c. of the farm for a certain time after the lease is expired, and he has quitted the premises, is a good custom, and the landlord may distrain corn so left for rent in arrear after six months have expired from the determination of the term; 1 H. Bla. 5. See further as to the tenant's right to emblements, &c., 4 Bing. 207. As to what buildings or erections an out-going tenant is entitled to remove, see 2 East, 88; 3 East, 38; 1 Leach, Crown Law, 389; 2 B. & A. 165; 4 J. B. Moore, 281; 2 D. & R. 1; 5 B. & A. 826, S. C.; 2 Stark. 403; 2 Chit. Com. Law, 268. If a tenant in a trade has covenanted to leave all erections, he cannot remove any, though erected for the purpose of trade; 1 Taunt. 19. But where

the out-going tenant has covenanted with his landlord to leave his manure, &c. on the farm, and to sell it to the in-coming tenant at a valuation, the out-going tenant nevertheless retains his property in such manure, &c. and he may maintain trespass or trover against the in-coming tenant if he remove and use them before such valuation; 16 East, 116. The right to the usual way-going crop may be confined or restricted by the agreement between the landlord and tenant, and though the in-coming tenant may in general maintain an action against the off-going for a breach of the custom of the country, yet the custom of the country can have no place where the off-going tenant holds under a lease expressly making a different provision; 16 East, 71; 1 Taunt. 19; 1 Meriv. 15; 2 B. & A. 746. See also Holt's C. N. P. 197; 3 J. B. Moore, 536.

Form of Declaration.—If there be an express agreement between the parties which is set out in the declaration, it must be stated with accuracy; 12 East, 1; but a plaintiff might recover under the general indebitatus count, when only personal property was sold, but not so if the valuation included labour, sowing, &c. in which case the declaration must be special. *Id. ibid.*

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

said agreement and promise of the defendant, did afterwards, to wit, on the day and year first aforesaid, leave on the said premises the said dung and manure so laid thereon as aforesaid, and the said turnips, corn, grass, herbage and underwood so growing and being thereon as aforesaid; and the plaintiff did then sell and deliver to the defendant the said hay, dung and manure, fixtures, chattels and effects, so lying and being upon and about the said farm, with the appurtenances, as aforesaid; and the defendant hath had and received the benefit thereof to his own use; yet the defendant, not regarding the said agreement nor his said promise, hath not paid to the plaintiff the said sum of £—, or any part thereof, but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do.

The like, merely
not stating an
engagement to
pay the value,
&c.

For that whereas the plaintiff, before and at the time of making the promise of the defendant hereinafter mentioned, was lawfully possessed of a certain farm with the appurtenances, and on which said farm he the plaintiff had before then laid divers large quantities of muck, and there were then growing and being on the same farm divers large quantities of turnips, grass, herbage and underwood, and the plaintiff was then also possessed of divers large quantities of corn and grain in the straw, hay, muck, fixtures, chattels and effects of great value, then growing and being upon and about the same farm, with the appurtenances; and thereupon, in consideration that the plaintiff, at the request of the defendant, would relinquish and give up the possession of the said farm, with the appurtenances, to the defendant, in order that he the defendant might hold and enjoy the same as tenant thereof in lieu and stead of the plaintiff, and would suffer and permit the defendant to have the benefit of the said muck so laid upon the said farm as aforesaid, and to have and take to his own use the said turnips, grass, herbage and underwood so growing and being thereon, and the said straw and chaff arising from the threshing and dressing of the said corn and grain, and would sell and deliver to him the defendant the said hay, muck, fixtures, chattels and effects so lying and being upon and about the said farm, with the appurtenances, he the defendant then promised the plaintiff to make all due and customary allowances to the plaintiff as between in-coming and out-going tenants for and in respect of the said muck so laid on the said farm as aforesaid, and of the said turnips, grass, herbage and underwood so growing and being thereon; and also for and in respect of the threshing, dressing and carting of the said corn and grain, and likewise to pay to the plaintiff for the said hay, muck, fixtures, chattels and effects so lying and being upon and about the said farm, with the appurtenances, so much money as he the plaintiff should therefore reasonably deserve to have of the defendant, when he the defendant should be thereunto afterwards requested. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year first aforesaid, relinquish and give up the possession of the said farm, with the appurtenances, to the defendant, in order that the defendant might hold and enjoy, and that he the defendant accordingly held and enjoyed the same as tenant thereof, in lieu and stead of the plaintiff, and did suffer and permit the defendant to have, and that the defendant accordingly had the benefit of the said muck so laid on the said farm as aforesaid; and did also suffer and permit the defendant to receive and take, and that he the defendant did accordingly receive and

take to his own use the said turnips, grass, herbage and underwood so growing and being on the said farm, and also the straw and chaff arising from the threshing and dressing of the said corn and grain, and did sell and deliver to the defendant the said hay, muck, fixtures, chattels and effects so lying and being upon and about the said farm, with the appurtenances; and the plaintiff further saith, that all due and customary allowance as between incoming and out-going tenants for and in respect of the said muck so laid on the said farm as aforesaid, and of the said turnips, grass, herbage and underwood so growing and being thereon, and also for and in respect of the threshing, dressing and carting of the said corn and grain, amounted to a large sum of money, to wit, the sum of £—; and that he the plaintiff therefore reasonably deserved to have of the defendant for the said hay, muck, fixtures, chattels and effects so lying and being in and about the said farm, with the appurtenances, another large sum of money, to wit, the sum of £—, of all which premises the defendant afterwards, to wit, on the day and year first aforesaid, had notice; and by reason thereof, and according to the tenor and effect of the said promise, he the defendant then became liable to pay to the plaintiff the said sums of money when the defendant should be thereunto afterwards requested.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

For that whereas the defendant heretofore, to wit, on &c., was indebted to the plaintiff in the sum of £— lawful money, for so much money before that time and then due and payable from the defendant to the plaintiff, upon, for, and in respect of the plaintiff's relinquishing and giving up of a certain farm and premises, with the appurtenances, together with the use and benefit of divers large quantities of muck and dung, and other materials before then laid and expended and bestowed thereon by the said plaintiff, and together also with divers large quantities of turnips, grass, herbage and underwood, chattels and effects, growing and being thereon, to and in favour of the defendant, and at his request, and by the plaintiff before then accordingly relinquished and given up to and in favour of the defendant. [*Add a count upon an account stated, and breach, as ante, 36.*]

The like, in indebtedness against the value of the crops, labour, &c.

For that whereas the plaintiff, before and at the time of the making of the promise of the defendant hereinafter next mentioned, was lawfully possessed of a certain farm, lands and premises, with the appurtenances, and held the same as tenant thereof to E. F., and on which said farm, lands and premises, the plaintiff had before that time laid divers large quantities of manure, and expended divers large sums of money, and done, performed and bestowed work and labour by himself and his servants and otherwise in ploughing, harrowing, manuring, sowing and otherwise cultivating and improving divers parts thereof, and the plaintiff was also possessed of divers large quantities of manure and effects thereon. And thereupon, heretofore, to wit, on &c., [*day of agreement, or about it,*] in consideration of the premises, and that the plaintiff, at the request of the defendant, would relinquish and give up to the defendant the possession of the said farm, lands and premises, with the appurtenances, and the benefit of the said manure and of the said monies so expended, and the said work and labour so done, performed and bestowed

The like, in another form, by an out-going against an incoming tenant, for amount of a valuation made by third persons of manuring and cultivating the farm, and of fixtures, &c. (u)

(u) See *ante*, 219, note (t).

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

as aforesaid, at [Lady Day] then next, and would leave the said manure in and upon the said farm, lands and premises, with the appurtenances, for the use of the defendant, he the defendant then promised the plaintiff to pay him so much money as A. B. and C. R. should ascertain and determine to be a due and proper sum of money to be therefore paid to the plaintiff. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, at Lady Day aforesaid, relinquish and give up to the defendant the possession of the said farms, lands and premises, with the appurtenances, and the benefit of the said manure and of the said monies so expended, and the said work and labour so done, performed and bestowed as aforesaid, and did then leave the said manure in and upon the said farm, lands and premises, with the appurtenances, for the use of the defendant. And the plaintiff further saith, that the said A. B. and the said C. R., after the making of the said promise of the defendant, to wit, on &c., in pursuance of the said reference, did ascertain and determine that the defendant should therefore pay to the plaintiff, for and in consideration of the premises, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, as and for the due and proper sum of money to be therefore paid to the plaintiff; of all which &c. [*Notice to defendant, and liability to pay on request. Account stated and breach, as ante, 36.*]

The like, by outgoing tenant against incoming tenant for fixtures left by plaintiff on the premises. (x)

For that whereas the plaintiff, before and at the time of the making the promise of the defendant hereinafter next mentioned, was lawfully possessed of a certain farm, lands and premises situate in the county of S., and on which said farm, lands and premises he the plaintiff had erected and made divers erections and buildings of great value, to wit, of the value of £—; and which, at the time of the making of the promise of the defendant hereinafter mentioned, remained and continued on the said farm, lands and premises; and the plaintiff was about to quit and give up possession of the said farm, lands and premises, and the defendant was about to become tenant thereof. And thereupon, heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would relinquish and give up the said buildings and erections to the defendant, and would leave the same in and upon the said farm, lands and premises, for the use of the defendant, and would suffer and permit the defendant to have and take the same to his own use, he the defendant then promised the plaintiff to pay him for the said buildings and erections so much money as he the plaintiff should therefore reasonably deserve to have of the defendant, when he the defendant should be thereunto afterwards requested. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, relinquish and give up the said buildings and erections to the defendant, and did leave the same in and upon the said farms, lands and premises, with the appurtenances, and did suffer the defendant to have and take the same to his own use. And the plaintiff in fact saith, that he therefore reasonably deserved to have of the defendant the sum of £—; whereof the defendant afterwards, to wit, on the day and year aforesaid, had notice. [*Add a count upon an account stated, and breach, as ante, 36.*]

(x) See *ante*, 219, note (t).

For that whereas heretofore, to wit, on &c. [*any day about the time of the breach complained of*], the defendant had become and was tenant to the plaintiff of a certain messuage, farm and premises, with the appurtenances, in the county of —, on certain terms, that is to say, that [*here set out such parts of the agreement between the parties which have reference to the breach complained of, and which may be thus :*] the defendant should and would spend, use and employ, on the said farm and premises, the hay, straw, dung and compost, which should grow, arise, or be made thereon, during the continuance of the said tenancy.—[*So stating any other stipulation broken and complained of.*] And in consideration thereof he the defendant then promised the plaintiff that he the defendant would spend &c.—[*So again stating the stipulation broken.*] And the plaintiff avers, that the defendant was and continued tenant to the plaintiff of the said messuage, farm and premises, with the appurtenances, under and by virtue of the said tenancy, and upon the terms aforesaid, for a long time, to wit, until and upon the — day of &c. [*or, "from thence hitherto," as the case is.*] Yet the defendant, not regarding his said promise, did [*here state the breach of the stipulation complained of, which may be thus :*] not nor would spend, use and employ, on the said farm and premises, the hay, straw, dung and compost, which grew, arose and was made thereon during the said tenancy; but on the contrary thereof, afterwards, to wit, on the day and year first aforesaid, and on divers other days and times afterwards, and before the commencement of this suit, took and carried away off and from the said farm and premises divers large quantities, to wit, — loads of hay, — loads of straw, — loads of dung, and — loads of compost, which had grown, arisen and been made on the said farm and premises, during the said tenancy, and spent, used, employed and consumed the same elsewhere and off the said farm and premises.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

BY LANDLORD
AGAINST
TENANT.

Landlord
against te-
nant, for the
breach of an
express agree-
ment to con-
sume straw on
premises, &c.
(y)

(y) When there is an express agreement not under seal, containing a stipulation for the breach of which the action is brought, the declaration should be on the agreement, stating mutual promises and the several breaches, according to the terms of the agreement; see 2 Bla. Rep. 840; and see *form of declaration by landlord against tenant* on the latter promising to pay an additional rent in consideration of the landlord's repairing; 3 Bar. & Adol. 899. But when there is no express contract on the subject, the law implies a contract on the part of a tenant, that he will occupy a farm, &c. in a tenant-like manner, and assumpsit may be supported for the breach of such implied contract, in the form, *post*, 226; 6 T. R. 373; 4 East, 154; *Earl of Falmouth v. Thomas*, 3 Tyr. 26. The law, however, will not imply a contract on the part of a tenant from year to year to repair generally, or do any particular act, but merely to conduct the farm in a tenant-like manner, and therefore a declaration stating that the defendant had become and was tenant to the plaintiff of a farm, and that in consideration thereof the defendant undertook to keep the premises in repair, or to do any other particular act not implied by

law, is bad on general demurrer; 1 Marsh. 567; 6 Taunt. 300, S. C.; Holt, C. N. P. 7; *sed vide* 2 B. & C. 273; 3 D. & R. 522, S. C.

When a tenant holds over the possession of premises after the expiration of a lease, by the permission of his landlord, he impliedly engages to observe such of the covenants contained in the lease as are applicable to a tenancy from year to year, though the remedy must be assumpsit or case; 1 Hen. Bla. 99; 1 T. R. 162; 5 T. R. 471; 1 Esp. Rep. 57; 6 East, 530; and in such case it may be advisable to state the covenants in the lease, and that such lease was determined, that the defendant had become tenant, subject to and on the terms of the lease, and his promise to perform the like stipulations; 1 Hen. Bla. 99; as in form, *post*. As to what is a breach of covenant to put and spread all manure and compost on the meadow land, and not to carry away the same, see *Hindle v. Pollett*, 6 M. & W. 529.

It is not necessary to show whether the contract amounts to a lease, or only an agreement for a lease; *Price v. Williams*, 1 M. & W. 6; 1 Tyrw. & G. 197, 206.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Against a tenant
who held over
after the end of
a lease on the
terms of such
lease, for not re-
pairing, &c. (s)

For that whereas before the making of the promise of the defendant hereafter next mentioned, to wit, on &c., the defendant was possessed of a certain messuage and premises, with the appurtenances, situate in the county of M., by virtue of a certain indenture before that time, to wit, on the 31st day of August, A. D. 1823, made between the plaintiff of the first part and the defendant of the other part, [*let this and the rest correspond with the indenture,*] whereby, for the considerations therein mentioned, the plaintiff did demise, lease and set unto the defendant the said messuage and premises, with the appurtenances, to have and to hold the same unto the defendant from the 29th day of September then next ensuing the said 31st day of August, A. D. 1823, for and during and unto the full end and term of seven years from thence next ensuing and fully to be complete and ended, at and under the rent thereby made payable from the defendant; in which said indenture, amongst other things, it was covenanted, promised and agreed by the defendant to and with the plaintiff, that the defendant should and would at all times during the said term, at his own costs and charges, well and sufficiently repair, uphold &c. [*here set forth the covenants the subject-matter of which were not performed by the defendant after the lease had expired*] as by the said indenture, reference being thereunto had, will more fully appear. And the plaintiff in fact says, that the defendant remained and continued possessed of the said messuage and premises, with the appurtenances, until the expiration of the said term as tenant thereof to the plaintiffs; and thereupon afterwards, and at and upon the expiration of the said term, to wit, on the 30th day of September, 1830, in consideration that the plaintiff, at the request of the defendant, would permit and suffer the defendant to continue to occupy the said messuage and premises, with the appurtenances, and to become tenant thereof to the plaintiff for and during the term of one year then next ensuing, and so on from year to year as long as the plaintiff and the defendant should respectively please, and in consideration that the plaintiff, at the like request of the defendant, had promised the defendant to perform and fulfil all things during the time the defendant should so continue such tenant from year to year to the plaintiff as aforesaid, as had been covenanted, promised and agreed on, and to observe and fulfil all such covenants, promises and agreements as had been made and concluded upon in and under the aforesaid indenture, to be done, performed and fulfilled during the continuance of the said term of seven years thereby granted on the part of the plaintiff, he the defendant then fully promised the plaintiff to do, perform and fulfil during the time he should so continue tenant of the said messuage and premises to the plaintiff from year

(s) See a form, 2 B. & C. 273; 3 D. & R. 522, S. C. A tenant holding over after the expiration of a lease, without any express understanding to the contrary, holds under the terms contained in such lease, so far as such terms can possibly be applicable to a tenancy from year to year; see 6 Esp. Rep. 106; 16 East, 71; 3 Taunt. 410; 4 Campb. 275; 3 Bing. 363; 5 T. R. 472; 3 B. & C. 483; 5 D. & R. 213, S. C.; *Torriano v. Young*, 6 Car. & P. 8; *aliter*, if party come in as an *under-tenant*, *id. ibid.* And quære if a tenant holding over after a lease impliedly stipulates to keep in repair, see 1 Marsh. 567; 6 Taunt. 300, S. C.; and quære,

therefore, as to this form. So where a party takes possession under an agreement for a lease, he may be treated as impliedly agreeing to become tenant from year to year on the terms of the agreement; *id.*; R. & M. C. N. P. 355; 3 B. & C. 478; 1 M. & P. 183; and see *Buckworth v. Simpson*, 2 Tyrw. 344. An agreement to keep and leave a house in repair is satisfied by keeping it in substantial repair according to the nature of the building; and with a view to determine the relative sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise; *Stanley v. Towgood and others*, 3 Bing. N. C. 4.

to year as aforesaid, all such agreements and covenants as had been made and agreed upon in and by the aforesaid indenture to be done, performed and fulfilled on the part of the defendant during the continuance of the said term of seven years thereby granted. (a) And the plaintiff avers that he, confiding in the said promise of the defendant, afterwards, to wit, on &c., did permit and suffer the defendant to continue to occupy the said messuage and premises, with the appurtenances, and to become and be and continue tenant thereof to the plaintiff for and during the term of one year, and so on from year to year, so long as the plaintiff and the defendant should respectively please, upon the terms aforesaid. And the plaintiff in fact says that the defendant, by virtue of that permission, did continue such tenant for a year, and from year to year as aforesaid, of the said messuage and premises, with the appurtenances, to the plaintiff, from thence hitherto; yet the defendant, not regarding his said promise, during the time he so continued such tenant from year to year as aforesaid of the said messuage and premises, with the appurtenances as aforesaid, did not nor would, at all times during the continuance of the said defendant's said tenancy, at his own proper costs and charges, well and sufficiently repair, uphold, &c. [*here negative the performance of the repairs, according to the words used in the indenture of lease. See form, post, in covenant,*] according to his said promise, but, on the contrary thereof, the defendant, after the making of his said promise, and during the continuance of the defendant's said tenancy for a year, to wit, on &c., and from thence hitherto suffered and permitted the said messuage and premises, together with all party and other walls &c. [*as in indenture*], to be and continue, and the same were for and during all that time ruinous, dilapidated, fallen down and in great decay, out of repair, and in bad order and condition, for want of well and sufficiently repairing, upholding, maintaining, glazing, paving, purging, scouring, cleansing, emptying, amending and keeping the same in good order and tenant-like repair, and not from any damage happening thereto by fire [*according to the covenant in the indenture*], contrary to his said promise.

For that whereas heretofore, to wit, on &c., in consideration that the defendant, at his request, had become and was tenant to the plaintiff of certain premises, with the appurtenances, of the plaintiff, upon and subject to the terms that the defendant should, as such tenant, during his tenancy, keep the premises in tenantable repair, order and condition, the defendant then promised the plaintiff to keep the said premises in tenantable repair, order and condition during his said tenancy. And although such tenancy

Another form,
more general.
(b)

(a) There might be such an express agreement in consideration of the permission to hold over, so that at all events such a declaration would not be *demurrable*.

(b) See *Richardson v. Gifford*, 1 A. & E. 52, as to this count. In that case it was proved that the defendant took the premises by written agreement for three years and a quarter, and engaged to keep them in good repair during the time they should be in his occupation; but the agreement was neither stamped as a lease nor signed by both parties, and yet

it was held that the defendant was bound by the covenant to repair, although the agreement was void as to the duration of the term by the statute of frauds, and that the above count was applicable. Where the first count of a declaration was framed on an agreement to repair, and the second was on an implied promise to use the premises in a tenant-like manner, it was held that the plaintiff could not recover on both counts; *Holford v. Dennett*, 7 M. & W. 348.

RELATING
TO THE
SALE, USE, &C.
OF LANDS, &C.

Landlord
against a tenant
from year to
year, on implied
contract to use
the premises in
a tenant-like
manner, and
according to the
custom of the
country. (c)

Breaches, over
cropping and
carrying off ma-
nure, &c.

General breach
of promise.

continued from thence until the — day of —, A. D. —, yet the defendant did not nor would during such tenancy keep the said premises in tenantable repair, order or condition, &c.

For that whereas the defendant heretofore, to wit, on &c., was tenant to the plaintiff of a certain farm, lands and premises, with the appurtenances, situate in the parish of —, in the county of —, and in consideration thereof the defendant then promised the plaintiff to manage, use, and cultivate the said farm, lands and premises, with the appurtenances, during the said tenancy, in a good and tenant-like manner (d) and according to the custom of the country where the said farm, lands and premises were so situate as aforesaid. And the plaintiff in fact saith, that the defendant was and continued tenant to the plaintiff of the said farm, lands and premises, with the appurtenances, for a long space of time, to wit, from the time of making his said promise, until the — day of —, A. D. —, [or "hitherto,"] yet the defendant, not regarding his said promise, did not nor would, during the continuance of the said tenancy as aforesaid, manage, use or cultivate the said farm, lands and premises, with the appurtenances, in a good and tenant-like manner, and according to the custom of the country where the said farm, lands and premises were so situate as aforesaid, (c)

(c) See Forms, Morg. 70 to 96; 3 Term Rep. 307; 4 East, 156; 1 Gale, 8; and *Earl of Falmouth v. Thomas*, 3 Tyr. 31. In that case the Court held that a count like this precedent, by assigning the breach generally in using the farm in a bad, improper and unhusband-like manner, without stating the particular acts of bad husbandry, was sufficient even on special demurrer, but at the same time recommended the plaintiff to amend rather than incur the risk of a writ of error. The law implies a promise on the part of a yearly tenant that he will use the farm in a husband-like or tenant-like manner, and according to the custom of the country where they are situate; 5 T. R. 373; Holt, C. N. P. 7; 1 Marsh. 569; and an action against a tenant upon promises that he would occupy the farm "in a good and husband-like manner, according to the custom of the country," is sustainable by showing that he had treated it contrary to the prevalent course of husbandry in that "neighbourhood," as by tilling half his farm at once, when no other farmer there tilled more than a third, though many tilled only a fourth; and it is unnecessary to aver or prove any precise definite custom or usage in respect of the quantity tilled; 4 East, 154. It seems the safer course, in the absence of any precise express agreement or proof of a precise custom, to declare only on the implied contract to cultivate and use the farm and land in a tenant-like manner, and at all events not to aver any precise custom; for if there be an averment of a custom, and the tenant take issue on the existence of the custom, and it be found for the defendant, the plaintiff will fail, although it was proved that the defendant mismanaged and injured the farm; *Angerstein v. Hanson*, 1 Gale, 8; 1 Crom. M. & Ros. 789; 5 Tyr. 383, S. C.

When the plaintiff may declare as on a demise, see 13 East, 18. If the tenancy be under a lease, containing a covenant to repair, &c., and the lessee executed the same, or a counterpart, (see 4 Esp. Rep. 42,) the remedy is by covenant, 1 J. B. Moore, 100; 7 Taunt. 392; and from the observations of Abbott, C. J. 5 B. & C. 603, it should seem case would lie in such case for permissive waste, but see *Dyer* 198, b. pl. 53; at all events, case would lie if there were wilful waste; 2 Bla. Rep. 1111; see *ante*, vol. i. A written agreement excludes evidence of the custom; 1 Meriv. 15; 16 East, 71. A tenant agreeing to manage, &c. a farm as the former tenant did, is not bound in equity without notice; 1 Meriv. 15.

(d) It is well established as the course of pleading, that a plaintiff may state generally that the defendant undertook to discharge a certain duty, as in this form; per Tindal, C. J., in *Callander v. Oelricks*, 5 Bing. N. C. 63. But care must be taken in this and all other cases not to lay the promise too large, or the declaration will be bad on demurrer; *Granger v. Collins*, 6 M. & W. 450. An express written agreement and the contract implied by law is all parcel of one contract, and should be declared on as such; see *Holford v. Dennett*, 7 M. & W. 352. A count stating that the defendant was tenant to the plaintiffs, and in consideration had promised to use lands in a husband-like manner, and the proof was of an agreement to farm lands in a husband-like manner, to be kept constantly in grass, it was held a fatal variance; 5 B. & C. 909.

(e) The general breach will suffice even on special demurrer, but the Court recommended special breaches; *Earl of Falmouth v. Thomas*, 3 Tyr. 50, 51.

but on the contrary thereof, after the making of the said promise, and during the continuance of the said tenancy, to wit,* in the successive years of our Lord — and —, wrongfully and injuriously overcropped the said land, and cropped, planted and sowed divers, to wit, — acres of the said farm, lands and premises, with divers, to wit, two successive crops of wheat, barley, peas, beans, tares and oats, that is to say, — acres, part thereof, with wheat, — acres, other part thereof, with barley, — acres, other part thereof, with peas, — acres, other part thereof, with tares, and the residue thereof with oats, the same, according to the course of good husbandry, then being excessive and unreasonable crops for the said land, and contrary to the course of good husbandry and the custom of the country where the said farm, lands and premises were so situate as aforesaid, and contrary to the said promise of the defendant. And the plaintiff further saith, that the defendant, further disregarding his said promise, after the making of his said promise, and during the continuance of the said tenancy, did not nor would spend, use and employ on the said farm, lands and premises, the hay, straw, soil, dung, compost and manure which grew, arose and were made thereon, during the continuance of the said tenancy, as he the defendant, according to the course of good husbandry, ought to have done, but on the contrary thereof, he the defendant, during the continuance of the said tenancy, to wit, on &c. aforesaid, and on divers other days and times between that day and the — day of —, took and carried away, off and from the said farm, lands and premises, divers large quantities, to wit, two hundred cart-loads of hay, two hundred cart-loads of straw, two hundred cart-loads of soil, two hundred cart-loads of dung, two hundred cart-loads of compost, and two hundred cart-loads of manure, of great value, to wit, of the value of £200, and which had arisen and been made on the said farm, lands and premises during the said tenancy, and spent and consumed the same elsewhere than on the said farm, lands and premises, or any part thereof, contrary to the course of good husbandry and the custom of the country where the said farm, lands and premises were so situate as aforesaid; and also contrary to the said promise of the defendant. By means of which said several premises the said farm, lands and premises, with the appurtenances, became and were greatly impoverished, and rendered less productive than the same otherwise would have been, and greatly deteriorated in value.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Particular
breach, over-
cropping. (f)

Another parti-
cular breach for
not consuming
straw, &c. on
farm.

Consequent
damage.

Same as the above precedent to the asterisk, and then proceed as follows:] On &c., ploughed up and converted into tillage a certain piece or parcel of land then in grass, called &c., and parcel of the said farm and lands, and cropped and sowed the same without manuring or dressing the same with sand and other manure, as he the defendant ought to have done, according to the course of good husbandry and the custom of the country where the same farm, &c. were so situate as aforesaid; contrary to the course of good husbandry and the custom of the country aforesaid and to the said promise of the defendant.

Breach for
ploughing up
grass land and
cropping the
land without
manuring the
same.

(f) See note (e), ante, 226.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

Breach for taking successive crops without manuring the land.

Same as the above precedent to the asterisk.] In the successive years of our Lord 1833, 1834, and 1835, wrongfully and injuriously cropped, planted and sowed a certain other piece or parcel of land, called &c., part and parcel of the said farm and lands, with divers, to wit, four successive crops of corn, potatoes and turnips, to wit, wheat, potatoes, turnips and wheat; and also without manuring or dressing the said last-mentioned land with sand or manure, as, according to the course of good husbandry, he the defendant ought to have done; contrary to the course &c. and custom &c. where the said farm &c. were so situate as aforesaid, and contrary to his said promise.

Against tenant for keeping and leaving the premises out of repair, contrary to express agreement. (g)

For that whereas heretofore, to wit, on &c. [*day of letting, or about it*], in consideration that the plaintiff, at the request of the defendant, would demise and let to the defendant a certain messuage, garden and premises, with the appurtenances, situate in the county of —, to hold the same to the defendant as tenant thereof to the plaintiff, to wit, from the — day of — then next, for one whole year, and so from year to year, so long as the plaintiff and defendant should respectively please, he the defendant then promised the plaintiff that he the defendant would, during the continuance of the said tenancy, keep the same messuage, garden and premises, with the appurtenances, in good and tenantable repair, order and condition. And the plaintiff avers, that he, confiding in the said promise of the defendant,

Plaintiff's performance, and defendant's tenancy.

(g) In this case also, if there were a *written agreement*, it is advisable to declare upon it, as recommended in the note to the precedent, *ante*, 223, n. (y). When plaintiff may declare as upon a demise, see 13 East, 18. If the action be for not taking due care of furniture, &c. see a precedent, *post*. When an action is sustainable against a tenant for not repairing before the expiration of his tenancy, the plaintiff *may also* recover damages for not being able to *re-let* so soon as he otherwise would have done; *Woods v. Pope*, 6 Car. & P. 782; 1 Bing. N. C. 467, S. C., where see form of declaration.

It has been supposed that the law *implies* a contract on the part of a *tenant even from year to year* to keep the premises in *tenantable* repair, and not to commit waste; 1 Saund. 323 b, n. 7; 1 Co. Lit. 57 a. 7; 1 J. B. Moore, 100; but that he is not bound to make substantial and lasting or general repairs, such as putting a new roof on an old house, putting in new main beams, &c.; 2 Esp. 589; Co. Lit. 57 a; 2 Saund. 352, n. 7; Holt, C. N. P. 7, 8; 2 Bla. Rep. 840; 2 B. & C. 278; Chit. jun. Cont. 3rd edit. 335 to 339. And he is only impliedly liable to make fair and reasonable repairs, such as putting in glass in windows broken by him or his servants, so as to prevent waste and decay; *id*. And it should seem that the law only implies a contract to *use the premises in a tenant-like manner*, and not a contract to *keep the premises in repair*, and consequently, where a tenant from year to year is sued for not repairing, an *express executory contract* must be stated in the declaration, and proved on the trial; 1 Marsh. 567; 6 Taunt. 301; Holt, Rep. 7; and see observations in 1 Chit. Gen.

Prac. 388 to 392, that no tenant is bound to repair or liable to be sued for *permissive* dilapidations, unless where he has *expressly* covenanted or contracted to repair; and see 6 Car. & P. 8; *sed vide* 2 B. & C. 273; 3 D. & R. 522, S. C.; *Buckworth v. Simpson*, 5 Tyrw. 344.

If a tenant refuses to repair, contrary to express agreement, and his landlord (the plaintiff) who is himself a lessee, and bound under pain of forfeiture to keep the premises in repair, enter and repair them without the defendant's assent, the measure of damages in *assumpsit* for not repairing shall be the sum expended; 2 B. & C. 273; 3 D. & R. 522, S. C.; and if the landlord (the plaintiff) do not enter and repair, and be sued by his lessor, and the tenant refuse to repair or defend the action, the damages and costs recovered by the ground landlord against the plaintiff may form the measure of damages against the tenant; 3 B. & C. 533; 5 D. & R. 542, S. C.; and see 5 B. & C. 603.

As to what fixtures a tenant may remove, and at what time, see *Elwes v. Mawes*, 3 East, 38, and the notes to that case in 2 Smith's Leading Cases.

It has been considered that *Case* may be supported against a tenant from year to year for *permissive* as well as *voluntary* waste; see 2 Saund. 252 c. and the forms there given; and see 5 B. & C. 603. *Sed vide* 7 Taunt. 329; 1 J. B. Moore, 100, S. C.; 2 Bla. Rep. 1111. *Case* cannot be supported for *permissive* waste against a mere tenant at will; 1 New Rep. 290; 1 Saund. 323 b. See more fully, *ante*, vol. i. Ind. tit. "Waste." As to what satisfies a covenant to repair, see *Stanley v. Towgood* and *others*, 3 Bing. N. C. 4.

afterwards, to wit, on the day and year first aforesaid, did demise and let the said messuage, garden and premises, with the appurtenances, to the defendant for the time and upon the terms aforesaid, and that the defendant was and continued tenant to the plaintiff of the said messuage, garden and premises with the appurtenances, under and by virtue of the said tenancy, for a long space of time, to wit, from the time of making his said promise, until and upon the — day of &c. Nevertheless the defendant, not regarding his said promise, did not nor would, after the making of his said promise, and during the continuance of the said tenancy, keep the said messuage, garden and premises, with the appurtenances, in good and tenantable repair, order and condition, according to his said promise; but on the contrary thereof, he the defendant, after the making of his said promise, and during the continuance of his said tenancy, to wit, on the day and year first above mentioned, and from thence until and upon the said &c. wrongfully and unjustly suffered and permitted the said messuage, garden and premises, with the appurtenances, to be and continue, and the same were, for and during all that time, ruinous, prostrate, foul and in bad and untenable repair, order and condition, for want of good and needful and necessary repairing, cleansing and amending thereof. And afterwards, to wit, on the day and year last aforesaid, he the defendant wrongfully and unjustly yielded and delivered up to the plaintiff the said premises so ruinous, prostrate, broken down, foul and in bad and untenable order, repair and condition as aforesaid, contrary to his said promise.

RELATING
TO THE
SALV, USE, &c.
OF LANDS, &c.

Defendant's
breach of promise.

Consequent
dilapidations.

Premises left
out of repair.

For that whereas heretofore, to wit, on &c., in consideration that the defendant had become and then was tenant to the plaintiff of a certain messuage, garden and premises, with the appurtenances, the defendant then promised the plaintiff to use the said messuage, garden and premises, with the appurtenances, in a tenant-like and proper manner for and during the continuance of the said tenancy. And although the said tenancy did continue and endure for a long space of time, to wit, from the day and year last aforesaid until and upon, &c. [or "hitherto."] Yet the defendant, not regarding his said promise, did not nor would, during the continuance of the said tenancy, use the said messuage, garden and premises, with the appurtenances, in a tenant-like and proper manner; but on the contrary thereof, the defendant, during the continuance of the said tenancy, so improperly behaved and conducted himself in that behalf, and used the said messuage, garden and premises with the appurtenances, and the trees and chattels therein, in so untenable-like and improper a manner, that by reason thereof the said messuage, garden and premises, with the appurtenances, to wit, on the day and year first aforesaid, then became and were and still are

Against a tenant for using the premises in untenable-like manner. (h)

(A) This count, founded on the implied contract, is sustainable against any immediate tenant, however short his interest; Holt, C. N. P. 7; 1 Marsh. Rep. 567; 4 East, 154; 5 T. R. 373; though not against an under-tenant; *Torriano v. Young*, 6 Car. & P. 8; and though there be a special agreement (which is to be the basis of a future lease), containing several obligations, one of which

is to keep the premises in tenantable repair, this count will suffice without setting out the agreement, which may be given in evidence in aid of this count; 2 Barn. & Cres. 273; 3 Dowl. & Ry. 522, S. C. See a form for not taking care of furniture, *post*. The action might be framed in *Case* for the breach of duty.

RELATING TO THE SALE, USE, &c. OF LANDS, &c. ruinous, broken down, destroyed, prostrated, foul, miry and greatly dilapidated, and the trees of the plaintiff growing in and upon the said last mentioned premises then became and were greatly damaged and spoiled.

By an out-going tenant against landlord on implied promise not to interfere with sale by tenant. *See Busby v. Fisher*, 3 Nev. & Man. 381.

By an out-going tenant against landlord for allowance for tillage and sowing. *See Hulkan v. Warren*, 1 M. & W. 466.

By tenant against landlord, on implied contract to indemnify tenant against payment of ground-rent. (i)

For that whereas before and at the several times hereinafter mentioned the defendant held certain premises, with the appurtenances, as tenant thereof to one E. F., at and under a certain yearly rent, to wit, &c., payable by the defendant to the said E. F.; and thereupon heretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, had become and was tenant to the defendant of the said premises, with the appurtenances, at and under a certain yearly rent, to wit, &c., therefore payable by the plaintiff to the defendant, he the defendant then promised the plaintiff, during the continuance of the said last mentioned tenancy, to indemnify and save harmless the plaintiff from and against the payment of the said yearly rent so payable to the said E. F. as aforesaid, and from and against any distress or action, costs charges, damages or expenses, which should or might be made, brought, arise or happen, for or by reason of the non-payment thereof. And although the said tenancy of the plaintiff was and continued for a long time after the making of the said promise of the defendant, to wit, until and upon &c. [or "thence hitherto,"] yet the plaintiff in fact saith, that the defendant, not regarding his said promise, did not nor would, during the continuance of the said tenancy of the plaintiff as aforesaid, indemnify or save harmless the plaintiff according to his said promise, but wholly neglected so to do; and by reason thereof, after the making of the said promise of the defendant, and during the continuance of the said respective tenancies, and whilst the plaintiff occupied and enjoyed the said premises as such tenant as aforesaid, to wit, on &c. [day of distress, or about it,] a certain distress was made by and on behalf of the said E. F. on certain goods and chattels of the plaintiff then in and upon the said premises, for a certain sum of money, to wit, the sum of £—, then due and in arrear to the said E. F., for and in respect of the said yearly rent so payable to him as aforesaid, and by means of the premises he the plaintiff was not only put to and suffered great trouble and inconvenience, but was forced and obliged to and did necessarily pay the said sum of £—, together with the charges of the said distress, in the whole amounting to a large sum of money, to wit,

(i) As to declarations for not indemnifying, see *post*, 232. A stranger, whose goods have been *distrainted*, and who has paid the rent in money, may recover the amount of the rent so paid in *assumpsit*, on the common count for money paid; 8 T. R. 306. But to recover *damages*, he must declare specially; see 11 East, 52. *Assumpsit* is not the remedy for the breach of the promise of this na-

ture, if the demise to the tenant be by deed; 3 B. & C. 769. But *Case* will, it seems, lie in all cases, and in some respects is the preferable form of action. See *id.* 589, where see a form in *Case* by a lessee against his assignee for not indemnifying against repairs, whereby lessor recovered against lessee; and see a form in *Case*, *post*. See also a form in *Covenant for breach of quiet enjoyment*, *post*.

the sum of £——, and was and is, by means of the premises, otherwise greatly injured and damaged. [If the goods were sold under the distress, then the declaration should be framed accordingly. Add an account stated, and breach, as ante, 36.

RELATING
TO THE
SALE, USE, &c.
OF LANDS, &c.

XXIV. ON GUARANTEES.

XXIV. ON
GUARANTEES.

For that whereas heretofore, to wit, on &c. [date of guarantee] in consideration that the plaintiff, at the request of the defendant, would [here set out the terms of the guarantee as relates to the consideration for it. In the case upon which this form was framed, it was thus: "sell and deliver to one E. F.

On a promise to be accountable for goods to be sold on credit to a third person. (k)

(k) See a form, 1 Rich. C. P. 471; 2 Lord Raym. 1085. Whenever the defendant is *collaterally* liable to pay for goods, &c. furnished to a third person (for the criterion of which see 2 T. R. 80, 81; 3 Chit. Com. Law, 318 to 322; 1 Chit. Col. Stat. tit. *Frauds*), his undertaking must be in writing, under the 29 Car. 2, c. 3, s. 4, and must state the consideration of the defendant's undertaking; 5 East, 10; 4 B. & Ald. 595; 6 J. B. Macre, 86; 1 Saund. 211 a; and the declaration must be *special* as above, and not merely for goods sold and delivered to the defendant, or bargained and sold to him, and delivered to a third person at his request; 1 Saund. 211 a, b; 2 Campb. 215; Ventr. 268, 293; but the declaration need not state that the contract was in writing or signed; 1 Saund. 276, n. 1; 6 Bing. 529. It is not necessary that the consideration should be co-extensive with the promise, or that it should appear in express terms on the face of the instrument; in *Heroes v. Armstrong*, 1 Bing. N. C. 761, Tindal, C. J. lays down the following rule, he says, "that the consideration need not appear on the instrument in express terms," but adds "not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum would be sufficient to satisfy the statute, but there must be a well grounded inference to be necessarily collected from the terms of the memorandum that the consideration stated in the declaration and no other than such consideration was intended by the parties to be the ground of the promise."

In the case of *Raikes and another v. Todd*, 1 P. & D. 138, it was holden that in the following guarantee: "I hereby undertake to secure to you the payment of any sums of money you have advanced or may hereafter advance to H. D. & Co. on their account with you commencing the 1st November, 1831, not exceeding 2000l." the consideration for guaranteeing past advances did not sufficiently appear so as to satisfy the Statute of Frauds.

Where the defendant sent the plaintiff the following letter: "W. being disappointed in receiving remittances and you expressing yourself inconvenienced for money, I send you his acceptance at two months, you may put your name as drawer, and safely pay it away;" and the plaintiff refusing to take the bill unless the defendant put his name to it, the defendant wrote on the back of the letter, "I

never put my name to bills, respectable professional men should not, but I will see it paid for W.:" it was held, that the guarantee was sufficient; *Emmott v. Kearns*, 5 Bing. N. C. 559.

In an action on the following guarantee: "In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof to the amount of 200l.," it was held that the guarantee was a continuing one, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than 200l. had been supplied to and paid for by V.; *Mayer v. Isaac*, 6 M. & W. 605; and see further as to when a guarantee continues, 12 East, 237; 2 Camp. 413, 436; 6 Bing. 244, 276; Chit. jun. on Contracts, 3d edit. 525; 3 Chit. Com. Law, 323. In an action on a guarantee given by defendants to see paid certain acceptances of L., in consideration of plaintiff's giving up, at defendant's request, a previous guarantee by him to pay plaintiff 10,000l. for L., and the guarantee given up was as follows: "In consideration of your being in advance to L. in the sum of 10,000l. for the purchase of cotton, I hereby give you my guarantee for that amount on their behalf," it was held that it was not clear that this guarantee was invalid so as to be worthless as a pecuniary consideration, for it might be construed to relate to prospective advances, but that at all events as the plaintiff had been induced at the defendant's request to part with it, the relinquishment of it was a good consideration for the subsequent guarantee; *Haigh and another v. Brooks*, 2 P. & D. 477.

As to the liability of a party giving a guarantee to a firm after there is a change in the firm, see *Day v. Davy*, 10 A. & E. 30; 2 P. & D. 249, S. C.

When a party guaranteeing is discharged or released, see 3 Chit. Com. Law, 324 to 327; 2 D. & R. 61; 1 B. & C. 10, S. C.; 2 D. & R. 337; 2 Swanst. 190; 4 J. B. Moore, 153. If the guarantee be for goods to be sold, defendant will not be liable for goods delivered in part discount of a bill; *Evans v. Whyllie*, 6 Bing. 485; 3 Moore & P. 130. How far a surety may be relieved, 3 Chit. Com. Law, 328 to 335. See the different decisions collected on this subject in the 10th edit. of Selw. N. P. 838 to 856, and in the 3rd edit. of Chit. jun. on Contracts.

ON
GUARANTEES.

Sale and delivery of goods to a third person on credit.

The credit elapsed, but the principal has not paid.

Notice to defendant.
Defendant's breach.

on credit, all such goods as he the said E. F. should have occasion for and require of the plaintiff in the way of his trade and business of a hemp merchant,"] he the defendant promised the plaintiff [*here set out the defendant's promise, which, in the case upon which this form was drawn, was thus*: "to be accountable to the plaintiff for whatever goods he the plaintiff should sell and deliver to the said E. F. as aforesaid."'] And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid [*here aver plaintiff's performance of the consideration, and which may be thus mutatis mutandis*:] sell and deliver to the said E. F. on certain credit then agreed upon between the plaintiff and E. F., certain goods of great value, which he the said E. F. then had occasion for and required of the plaintiff in the way of his said trade and business, and at and for certain reasonable prices then agreed upon by and between the plaintiff and the said E. F. [*or, if no stipulated price, say*, "at and for certain reasonable sums of money, amounting, &c."'] amounting in the whole to a large sum of money, to wit, the sum of £—; and although the said credit and the time for payment of the price of the said goods by the said E. F. to the plaintiff hath long since elapsed, yet the said E. F. hath not (although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do (*l*)), as yet paid to him the said sum of £—, or any part thereof, but hath hitherto (*m*) wholly neglected and refused so to do. Of all which said premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice. Yet the defendant, not regarding his said promise, hath not as yet accounted to the plaintiff, or paid the said sum of money, or any part thereof, for the said goods, or any part thereof (although he the defendant afterwards, to wit, on the day and year last aforesaid, was requested by the plaintiff so to do), and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and the said sum of £— still remains wholly due and unpaid to the plaintiff.

On promise to indemnify the plaintiff for refusing to deliver goods to a third person, and law. *See Betts v. Gibbins, 4 Nev. & Man. 64.*

On a guarantee to pay the debt of a third person in consideration of forbearance. *See a form of Declaration, ante.*

XXV. ON PROMISES TO INDEMNIFY.

By acceptor of a bill of exchange for the accommodation of defendant, for not indemnifying plaintiff, &c. (*n*)

XXV. ON PROMISES TO INDEMNIFY.

For that whereas heretofore, to wit, on &c. [*date of bill*] in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept a certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and made and drawn by the defendant on the plaintiff, and whereby the defendant re-

(*l*) Cro. Jac. 500; Cro. Eliz. 85, 91; 2 Hen. Bla. 131; 1 Stra. 88. *Sed quære*, if it be a necessary averment.

(*m*) It seems not necessary to deny a payment by the third person; 1 Sid. 178; 2 Rol. 738, l. 15.

(*n*) See other forms for not indemnifying,

post, 234, 235; 1 Wentw. 288; Pl. Ass. 38. See a similar action and the pleadings, 3 Wils. 346. See a declaration on a special agreement to indemnify acceptor, *Jallop v. Ebers*, 1 Bar. & Adol. 698.

A contract to indemnify is generally implied, as on the part of a defendant to indem-

quired the plaintiff [two] months after the date thereof to pay to the order of the defendant the sum of [£50] as for value received, (o) and would deliver the same so accepted to the defendant, in order that he the defendant might negotiate the same for his own proper use and benefit, he the defendant then promised the plaintiff [to provide money for the payment of the said bill of exchange when the same should become due and payable (p)] and to indemnify and save harmless the plaintiff from any loss or damage for or by reason of his acceptance of the said bill of exchange as aforesaid. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c., the day and year aforesaid, accept the said bill of exchange, and deliver the same so accepted to the defendant for the purpose aforesaid; and although the said bill of exchange, so accepted as aforesaid, was afterwards, to wit, on the day and year aforesaid, negotiated by the defendant for his own proper use and benefit, and the same hath long since become due and payable; Yet the defendant, not regarding his said promise, did not nor would [provide money for the payment of the said bill of exchange when the same became due and payable, nor] indemnify or save harmless the plaintiff from any loss or damage for or by reason of his acceptance of the said bill of exchange as aforesaid, but wholly neglected and refused so to do; by means and in consequence whereof the plaintiff, as such acceptor of the said bill of exchange as aforesaid, afterwards, to wit, on the day and year aforesaid, was called upon and forced and obliged to pay, and did then pay to one —, the holder thereof, the said sum of money in the said bill of exchange specified, together with certain interest thereon, and the costs of a certain action before then brought in the Court of our lady the queen, before the queen herself, (q) on the said bill of exchange, by the

nify a person who becomes bail for him, 3 Wils. 262; or a surety for him at his request, 2 T. R. 105; 7 T. R. 568; 2 B. & P. 268; or a broker on making a distress, though not regular; 4 Bing. 74; see also 6 Bing. N. C. 636. If the thing to be done be obviously illegal, no contract to indemnify can be implied, but otherwise where the act is not apparently illegal; 8 T. R. 186; and see in general as to contracts of indemnity, 4 Bing. 74.

A party who contracts to buy shares in a railway contracts no liability at all with the company, so that the seller is not a surety for him, and therefore an action will not lie on an implied promise to indemnify against all future calls; *Humble v. Langston*, 7 M. & W. 517.

If plaintiff becomes bail for a stranger in consideration of defendant's request and of defendant's promising to indemnify the plaintiff against the consequences, no action lies upon such promise, unless it be in writing under Statute of Frauds; *Green v. Cresswell*, 10 A. & E. 453.

When the debt of the principal has been paid by the surety, a common count for money paid is sufficient; but when a surety has not actually paid the debt in money, but has only given security for it, or he has sustained any costs or damage, the declaration should be special; 3 East, 169; 8 T. R. 310; 7 T. R. 204; 11 East, 52; 6 Bing. 299. So to

recover any costs paid by the acceptor, a special count is indispensable; *Seaver v. Seaver*, 6 Car. & P. 673. By declaring specially, a set-off may sometimes be avoided; 5 B. & Ald. 96. See *Pricket v. Booney*, 3 Tyrw. 949, how to lay special damage where plaintiff has incurred liability, but has not paid. See also *Hodsol v. Stallebrass*, 3 P. & D. 200.

What is a legal damnification, so as to enable a surety to sue, see 8 East, 593; 3 Wils. 13; 1 Atk. 262; cannot recover costs, *Roach v. Thompson*, 1 Mood. & M. C. N. P. 487; *Penley v. Watts*, 7 M. & W. 601; and see 4 Car. & P. 194; and as to how far a surety has his remedy against the principal, 3 Chit. Com. Law, 330. Of the remedies by one surety against another; 3 Chit. Com. Law, 335; 3 D. & R. 112; 2 Swanst. 185.

(o) The bill of exchange may be described concisely, according to its legal effect.

(p) These words are to be omitted unless there was an express engagement to provide for the bill.

(q) If the defendant was arrested, state the fact accordingly, and let the averment of damage be according to the fact. All these costs, &c. are recoverable; 1 Atk. 262; 3 Wils. 13; 8 East, 593. But it seems the plaintiff cannot recover more than taxed costs; see 4 Taunt. 7; Ry. & Moo. C. N. P. 419; but see *Nowell v. Roake*, 1 Chit. Col. Stat. 274; see *vide* 1 Stark. 306.

ON PROMISES
TO
INDEMNIFY.

said — against the plaintiff, in the whole amounting to a large sum of money, to wit, the sum of £——, and thereby also the plaintiff sustained and incurred and *became liable to pay (r)* divers costs and expenses, amounting, to wit, to the sum of £——, in and about the settling and putting an end to the said action; and by means of the said several premises the plaintiff hath been and is damnified to the amount thereof. [*The words between brackets, relative to the defendant's providing money for the payment of the bill, are to be omitted, if there was no promise to that extent. Add the account stated, and common breach, as ante, 36. N.B. The plaintiff might recover the amount of the principal money under a common count for money paid, but not the costs.*]

By the maker of
a promissory
note made for
the accommoda-
tion of de-
fendant, for not
indemnifying,
&c. (s)

For that whereas heretofore, to wit, on &c., [*date of note, or about it,*] in consideration that the plaintiff, at the request of the defendant, and for his accommodation, would make and deliver to one T. H. his certain promissory note in writing, and thereby promise to pay to the said T. H. or order, on demand, the sum of £——, as for value received by the plaintiff of the said T. H., he the defendant then promised the plaintiff that he the defendant would save harmless and indemnify the plaintiff against the payment of the said sum of £—— in the said note mentioned, and all charges and expenses he should bear, sustain or be put unto by reason of his making and delivering of his said note to the said T. H.; and the plaintiff in fact saith that he, confiding in the said promise of the defendant, afterwards, to wit, on &c., aforesaid, did make his certain promissory note in writing, bearing date the &c. aforesaid, and did thereby promise to pay to the said T. H. or order, on demand, the said sum of £——, as for value received by the plaintiff of the said T. H., and that he the plaintiff did deliver the said note so made by him as aforesaid to the said T. H.; and the plaintiff further saith that the defendant not having saved harmless and indemnified the plaintiff against the payment of the said sum of £—— in the said note specified, by the payment thereof, or of any part thereof, to the said T. H., and the said sum of money being wholly unpaid, he the plaintiff afterwards, to wit, on the day and year aforesaid, was compelled and obliged to pay, and did then pay to the said T. H. the said sum of £—— in the said note mentioned and contained, being then due and payable by virtue of the said note, whereof the defendant afterwards, to wit, on the day and year aforesaid, had notice; nevertheless the defendant, not regarding his said promise, hath not yet repaid to the plaintiff the said sum of £——, or any part thereof, nor in any manner indemnified him on account of his having paid the same (although so to do he the defendant afterwards, to wit, on the day and year aforesaid, and oftentimes since, hath been requested by the plaintiff,) but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do. (t) [*Add the account stated and breach, as ante, 36; and see note at end of last precedent.*]

By a broker
against a party
who employed
him to distrain
for rent, for not
indemnifying
from loss by
reason of the
distress.

See Topliss and another v. Grant, 5 Bing. N. C. 636.

(r) As to mere liability, see *Pricket v. Boovey*, 3 Tyrw. 949.

(s) There is an implied promise to indem-

nify in this case, *ante*, 232, n. (n).

(t) If a plaintiff has sustained any special damage, it should be here inserted.

For that whereas heretofore, to wit, on &c. [date of writ] a certain writ of our said lady the Queen, called a [*capias*] directed to the sheriff of —, was issued out of the Court of our said lady the Queen of the Bench at Westminster, in the county of Middlesex, by which said writ our said lady the Queen commanded &c., [*set out as much of the writ and of the indorsement for bail, and the delivery to the sheriff, and the arrest, as post, Declarations in Debt on Bail-bonds.*] And thereupon afterwards, to wit, on &c., [date of bail-bond] in consideration that the plaintiff, at the request of the defendant, would, together with one J. T., become bail and surety for the defendant, and would, as such bail and surety, seal, and as his act and deed deliver to the said R. B., as such sheriff as aforesaid, his certain writing obligatory, commonly called a bail-bond, in the penal sum of £—, to be paid to the said sheriff, with a condition to the said writing obligatory subscribed, that if &c., [*here set out so much of the condition as relates to the defendant's appearance*] he the defendant then promised the plaintiff that he the defendant would perform the said condition of the said writing obligatory, and save harmless and indemnify the plaintiff from all payments, damages, costs and expenses, which he the plaintiff should or might incur, bear, pay, sustain, or be put unto, by reason or by means of his so becoming bail and surety for the defendant as aforesaid. And the plaintiff in fact saith that he, confiding in the said promise of the defendant, did afterwards, to wit, on the said &c. aforesaid, at the request of the defendant, seal, and as his act and deed deliver to the said R. B., as such sheriff as aforesaid, the said writing obligatory, called a bail-bond, conditioned as aforesaid. Yet the defendant, not regarding his said promise, did not nor would appear before the said justices of the Bench of our said lady the Queen at Westminster aforesaid, according to the said condition, to answer to the said I. L. and W. E. in the said plea in the said condition mentioned, according to the form of the said condition, by reason whereof the said writing obligatory became forfeited, and the plaintiff thereby became liable to pay to the said sheriff the said penal sum of £—. And thereupon the said R. B., as such sheriff as aforesaid, afterwards, to wit, on &c., at the request, costs, and charges of the said I. L. and W. E., the plaintiffs in the said suit, by an indorsement on the back of the said writing obligatory, duly assigned the said writing obligatory to the said I. L. and W. E. And the plaintiff further saith that thereupon afterwards, to wit, on &c., a certain action was commenced and prosecuted on the said bail-bond, in the said Court of our said lady the Queen of the Bench aforesaid, at Westminster aforesaid, by and at

ON PROMISES
TO
INDEMNIFY.

For not indemnifying bail to the sheriff. (u)

Defendant's
promise to indemnify.

Plaintiff seals
bail-bond.

Defendant's
nonappearance.

Bail-bond assigned.

Action on bail-bond.

(u) See 3 Wils. 262; 2 Bl. Rep. 794. Bail may recover against the principal any expenses they may have incurred in taking him into custody for the purpose of surrendering him; 5 Esp. N. P. C. 171; *sed vide* 1 C. & P. 434. It is a general rule, that to support the common count for money paid, the defendant must have been originally liable to the debt, or money paid by the plaintiff; 1 McCl. 48, 25. Therefore it is proper to declare specially on the implied contract to indemnify, as above; 6 Car. & P. 673; 3 Tyrw. 949. Where the surety has paid expenses or incurred a loss beyond the amount of the debt, or money for which he became

bound for the defendant; and where a surety takes a bond or other specific security from his principal, he cannot resort to the count for money paid on the implied assumpsit; 2 T. R. 100, 104; 8 Taunt. 365; 2 J. B. Moore, 411, S. C.; Chit. jun. on Contracts, 3d ed. tit. Guarantees. See a form for not indemnifying bail below, 4 B. & A. 435. In assumpsit for not indemnifying bail, an averment that judgment was recovered against plaintiff in Michaelmas Term, and evidence that the judgment was in Hilary Term, is no variance; 4 B. & A. 435; and see 3 B. & C. 2.

ON PROMISES
TO
INDEMNIFY.

Plaintiff as such
obliged to pay,
&c.

Breach of pro-
mise to indem-
nify.

the suit of the said I. L. and W. E., as such assignees of the said R. B., so being such sheriff as aforesaid, against the plaintiff. And such proceedings were thereupon had in the said last-mentioned action in the said Court, that afterwards, to wit, on &c., he the plaintiff, as such bail or surety for the defendant as aforesaid, in order to prevent any further proceedings in the said action so commenced and prosecuted against him, was called upon, and forced and obliged to pay a large sum of money, to wit, the sum of £—, as and for the debt for which the said action was so commenced and prosecuted as aforesaid, and also another sum of £—, as and for the costs of the said action so commenced and prosecuted as aforesaid against the plaintiff by the said I. L. and W. E.; and also he the plaintiff, by means of the premises, was forced and obliged to incur and sustain great costs, charges and expenses, amounting in the whole to a large sum of money, to wit &c., in and about the defence of the said action so commenced and prosecuted against him as aforesaid, and in and about the settling and putting an end to the said action as aforesaid; of all which said premises the defendant afterwards, to wit, on &c., had notice. Yet the defendant, disregarding his said promise, did not nor would save harmless or indemnify the plaintiff from the said payments, damages, costs, charges and expenses so by the plaintiff incurred as aforesaid, but hath hitherto wholly refused and neglected, and still neglects and refuses.

By tenant
against landlord
for not indemnifying him against payment of ground-rent.

See a form of Declaration, ante.

XXVI.
ON PROMISES
TO MARRY.

XXVI. ON PROMISES TO MARRY.

SUGGESTIONS AS TO DECLARATIONS.—*Before Reg. Gen. Hil. Term, 4 W. 4, reg. 5, it was the practice to insert several counts, viz. 1. Upon a promise to marry on request, stating a particular request and refusal; 2. Upon a promise to marry within a reasonable time, averring that a reasonable time had expired, and a subsequent request and refusal; 3. Upon a promise to marry generally, and averring a request after a reasonable time had elapsed, and refusal; 4. Upon a promise to marry at a particular time, and averring plaintiff's readiness, but defendant's absolute refusal; or, in lieu of the averment of request in either of these counts, when the fact, the breach was assigned in the defendant's marrying another person. See the forms in Chitty on Pleading, 5th ed. vol. ii. p. 321 to 324. As the above pleading rules now preclude the use of more than one count, though several breaches are allowed, the pleader must select and rely on such one of the following counts as will be best adapted to the evidence in the particular case. In general the count for not marrying within a reasonable time will be preferable, when there is no certain evidence of a more qualified promise, because even proof of a promise to marry generally will establish a count on a promise to marry within a reasonable time; 1 Stark. Rep. 82; 3 Car. & P. 178; 1 M. & P. 239, S. C. But a promise to marry within a reasonable time after the death of his father, must be expressly so declared upon; see Atchinson v. Baker, 2 Peake's Rep. 103.*

For that whereas heretofore, to wit, on &c. [*any day about the time of the promise*] in consideration that the plaintiff being then sole and unmarried, at the request of the defendant, had then promised the defendant to marry him the defendant, he the defendant then promised the plaintiff to marry the plaintiff when he should be thereunto afterwards requested; and the plaintiff avers that she, confiding in the said promise of the defendant, hath always from thence hitherto remained and continued, and still is, sole and unmarried, and hath been, for and during all the time aforesaid, and still is, (y) ready and willing to marry him the defendant; whereof the defendant hath always had notice.* And although the plaintiff afterwards, to wit, on the — day of —, in the year of our Lord —, requested the defendant to marry the plaintiff; Yet the defendant, not regarding his said promise, did not nor would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, marry the plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do.

If the defendant have married another woman, no request need be averred, but after proceeding as above as far as the asterisk, and omitting the statement that the plaintiff "still is ready to marry defendant," then conclude with And the plaintiff further saith, that the defendant, further disregarding his said promise, after the making thereof, to wit, on &c., wrongfully and injuriously married a certain other person, to wit, one —, contrary to his said promise.

ON PROMISES
TO MARRY.

For not marry-
ing. (z)
On a promise
to marry upon
request.

Second breach,
for marrying
another woman.
(s)

(z) See other forms in Pleader's Assistant, 47, 99; 2 Rich. C. P. 128; 2 Wentw. 487 to 492, and Index to vol. ii. This action is sustainable only where the contract to marry was mutual; 1 Roll. Abr. 22, l. 5; 1 Sid. 180; 1 Lev. 147; Carth. 467; Freem. 95. But though one of the parties be an infant, yet the contract to marry will be obligatory on the adult; 2 Stra. 937; Bac. Ab. tit. Infant. The action is sustainable by a man against a woman; Carth. 467; 1 Salk. 24; 5 Mod. 511. But an executor cannot sue; 2 M. & Sel. 408. It is not necessary that the time of marriage should be specified; Carth. 467. A verbal promise to marry is not within the Statute against Frauds, 1 Stra. 34; 1 Ld. Raym. 316; Bul. N. P. 280 *acc.*; 3 Lev. 65, *semb. cont.* And if in writing, it need not be stamped; 2 Stark. 351. It is necessary to show mutual promises in the declaration. If the promise were to marry on a particular day, it should be so described, as *post*, 238. What request is sufficient see 1 Ld. Raym. 387.

As to the *evidence*, where the promise of the man was proved, and no actual promise of the woman, evidence of her carrying herself as consenting and approving his promise was held sufficient; 3 Salk. 16; 1 Salk. 24, n. b.; 2 Car. & P. 553. And where A. stated to the father of the plaintiff that he had pledged himself to marry his daughter in six months, or in a month after Christmas, although that proof varied from the promises laid in the special counts, it was considered evidence from which a jury might infer a promise to marry generally; 1 Stark. 82. In an action

for breach of promise of marriage, the promises declared on were, first, to marry on request; second, the like, assigning for breach that defendant had married another; thirdly, to marry within a reasonable time; and, lastly, to marry generally. The proof was, that defendant had said he would marry the plaintiff in July: held, that notwithstanding this variance, the jury were warranted by the evidence in inferring a promise to marry generally, and that the plaintiff was entitled to recover on the last count of the declaration; 1 M. & P. 239.

To support the action, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff, and a refusal by the defendant; but if the plaintiff's father go to the defendant and ask him if he means to fulfil his engagements to his daughter, and he reply, "certainly not," this will suffice; 2 Car. & P. 634; see 2 D. & R. 55. A bill in equity lies to compel the defendant to disclose whether he promised to marry; Forrest's Exch. Rep. 42.

If the intended husband or wife turn out on inquiry to be of bad character, that is a legal defence for the other party; Holt's C. N. P. 151; 4 Esp. Rep. 256; 1 Car. & P. 350; *Young v. Murphy*, 3 Bing. N. C. 64; 3 Scott, 379, S. C. And as to what may be shown in mitigation of damages, *Id.*; and see as to damages, 1 Yo. & Jerv. 477.

(y) As to this allegation, see 2 Keb. 265, 283.

(s) See form, Morg. 142, as to this second breach.

ON PROMISES
TO MARRY.On a promise
to marry in a
reasonable time.

For that whereas heretofore, to wit, on the — day of —, A. D. —, in consideration that the plaintiff being then unmarried, at the request of the defendant, had then promised the defendant to marry him the defendant, he the defendant then promised the plaintiff to marry her in a reasonable time then next following. And the plaintiff avers that she, confiding in the said promise of the defendant, hath always hitherto remained and continued, and still is sole and unmarried, and hath been for and during all the time last aforesaid ready and willing to marry the defendant, whereof the defendant hath always had notice; (a) and although a reasonable time for the defendant to marry the plaintiff hath elapsed since the making of the said promise of the defendant; and although the plaintiff, after such reasonable time had elapsed, to wit, on &c., [*day of request, or about it,*] requested the defendant to marry the plaintiff; Yet the defendant, not regarding his said promise, did not nor would within such reasonable time as aforesaid, or when so requested as aforesaid, or at any other time, marry the plaintiff, but hath hitherto wholly neglected and refused so to do. [*If defendant has made a special refusal to marry, insert an averment stating the fact. See 2 D. & R. 55.*]

On a promise
to marry gene-
rally. (b)

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, being then sole and unmarried, at the request of the defendant had then promised the defendant to marry the defendant, he the defendant then promised the plaintiff to marry the plaintiff. And the plaintiff avers that she, confiding in the said promise of the defendant, hath always from thence hitherto remained and continued, and still is sole and unmarried, and hath been for and during all the time aforesaid, and still is ready and willing to marry the defendant; and although a reasonable time for the defendant to marry the plaintiff hath elapsed since the making of the said promise of the defendant, and although the plaintiff, after the making of the said promise of the defendant, to wit, on &c. [*day of request, or about it,*] requested the defendant to marry her the plaintiff; Yet the defendant, not regarding his said promise, did not nor would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, marry the plaintiff, but on the contrary thereof, he the defendant, at the said time when he was so requested as aforesaid, wholly refused then to marry her the plaintiff.

On a promise
to marry at a
particular time.
(c)

For that whereas heretofore, to wit, on &c. [*day of promise, or about it,*] in consideration that the plaintiff, being then sole and unmarried, at the request of the defendant had then promised the defendant to marry the defendant in [the latter part of February then next], [*stating the time agreed on, according to the fact*] he the defendant then promised the plaintiff to marry the plaintiff in [the latter part of February then next]. And the

(a) This count has been held sufficient after verdict, although it omitted the statement of the defendant's having had such notice; but it should seem that it ought to state notice, or a request to marry, or a special refusal to marry, and that otherwise it would be bad on special demurrer; 2 D. & R. 55.

(b) A promise to marry generally, is, in point of law, a promise to marry within a rea-

sonable time; 1 Stark. 82; M. & R. C. N. P. 239.

(c) Where the promise to marry is special, as "after the death of the defendant's father," &c., it should in general be declared on with proper averments; *Atchinson v. Baker*, 2 Peake's Rep. 103; Chitty jun. on Contracts, 3rd edit. 538.

plaintiff avers that she, confiding in the said promise of the defendant in [the latter part of February next] after making of the said promise of the defendant, and before and ever since was and hath been ready and willing to marry the defendant, whereof the defendant then had notice. Yet the defendant, not regarding his said promise, did not nor would in [the said latter part of February next], after the making of his said promise, or at any time before or afterwards, marry the plaintiff, but hath hitherto wholly neglected and still doth neglect so to do, and afterwards, to wit, on &c. [*day of refusal, or about it,*] wholly declined and refused to marry the plaintiff, and wholly discharged her from performing her said promise.

ON PROMISES
TO MARRY.

XXVII. ON PROMISES TO EMPLOY.

XXVII. ON
PROMISES TO
EMPLOY.

For that whereas heretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, had then agreed with the defendant to enter into the service of the defendant as a [lady's maid], and to serve the defendant in that capacity, at certain wages, after the rate of £—— a year, to be therefore paid by the defendant to the plaintiff, during her continuance in such service, she the defendant then promised the plaintiff to receive her into the service of the defendant in the capacity aforesaid, and to retain and employ her in such service at the wages aforesaid. And the plaintiff avers, that she, confiding in the said promise of the defendant, hath always been ready and willing to enter into the service of the defendant in the capacity aforesaid, and to serve her the defendant in that capacity for the wages aforesaid. And although the plaintiff afterwards, to wit, on the day and year aforesaid, requested the defendant to receive the plaintiff into the service of the defendant in the capacity aforesaid, and to retain and employ her in such service at the wages aforesaid; Yet the defendant, not regarding her said promise, did not nor would, at the said time when she was so requested as aforesaid, or at any time afterwards, receive the plaintiff into the service of the defendant, or retain or employ her in such service, at the wages aforesaid, or otherwise howsoever, but wholly neglected and refused so to do: whereby the plaintiff not only lost and was deprived of all the profits and emoluments which might and would otherwise have arisen and accrued to her from entering into the service of the defendant, but also lost and was deprived of the means and opportunity of being retained and employed by and in the service of divers other persons, and remained and continued wholly out of service and unemployed for a long space of time, to wit, for the space of three months then next following, and was and is otherwise greatly injured and damnified. [*Add an account stated, if there be any evidence to support it, and breach, as ante, 36.*]

For not receiving
a hired servant
into defendant's
service. (d)

(d) See notes, ante, 52; see other precedents, 2 Wentw. 505 to 531; index to vol. ii. Where the service has been actually performed, the declaration may be for work and labour generally; Fitz. 302. See the common indebitum count, ante, 52. But where the defendant has refused, or ceased to employ the plaintiff, the declaration must in general be

special; 2 East, 145; Cowp. 437; 4 Esp. Rep. 77; ante, vol. i. See precedents for turning away, or ceasing to employ, after commencement of service, post, 240; 1 Gale, 72; 2 Crom. M. & Ros. 54, S. C.; 1 Crom. M. & Ros. 20; 6 Car. & P. 15; Williams v. Byrne, 7 A. & E. 177; Fillieu v. Armstrong, 7 A. & E. 557; Cooper v. Blick, 2 G. & D. 295.

**ON PROMISES
TO EMPLOY.**

By a mariner
for not suffering
him to go as
boatswain on
board defend-
ant's ship, and
paying him his
wages.

For that whereas the defendant, before and at the time of making his promise hereinafter next mentioned, was master and commander of a certain ship or vessel called the —, which said ship or vessel was then lying and being at —, in the West Indies, and bound on a voyage from thence to the port of London. And whereas also the defendant, so being master and commander of the said ship or vessel as aforesaid, heretofore, to wit, on the — day of — in the year of our Lord — at — in the West Indies, in consideration that the plaintiff, at the request of the defendant, would enter into and on board of the said ship or vessel, and would go the said voyage as boatswain therein, he the defendant then promised the plaintiff to suffer and permit him so to do, and to pay him the sum of £— three days after the arrival of the said ship or vessel in the said port of London. And the plaintiff avers that he, confiding in the said promise of the defendant, did afterwards, to wit, on the same day and year aforesaid, at — aforesaid, enter into and on board of the said ship or vessel, and did go and proceed a part of the said voyage as boatswain therein, and was ready and willing to go and proceed therein the remainder of the said voyage, whereof the defendant then had notice; Yet the defendant, not regarding his said promise, did not nor would suffer or permit the plaintiff to go or proceed the remainder of the said voyage as boatswain in and on board of the said ship or vessel as aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, he the defendant, after the making of his said promise, and whilst the said ship or vessel was proceeding on her said voyage from — aforesaid, to wit, on the — day of —, in the year aforesaid, on the high seas, wrongfully and unjustly, without the license and consent, and against the will of the plaintiff, caused and compelled the said plaintiff to go from and out of the said ship or vessel called the — in and on board a certain other ship or vessel in her majesty's service, and there left the plaintiff, and caused him to be detained and prevented from returning to the ship or vessel called the —, whereby the plaintiff was hindered and prevented from going or proceeding the remainder of the said voyage or in and on board of the said last-mentioned ship or vessel; nor did the defendant, within three days after the arrival of the said last-mentioned ship or vessel in the port of London aforesaid, or at any time afterwards (although often requested so to do), pay the said sum of £— or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused so to do, whereby the plaintiff not only lost and was deprived of all the profit, benefit, and advantage which might and would have arisen and accrued to him from going and proceeding the remainder of the said voyage in and on board of the said last-mentioned ship or vessel, but also suffered great hardship and inconvenience, and was put to great charge and expense of his monies, amounting to a large sum of money, to wit, the sum of £100, in and about the procuring of a passage home to the port of London aforesaid. [*Before the pleading rules it was usual to add a common count for seamen's wages, as ante, 52, one for work and labour, money paid, and an account stated.*]

By a domestic
servant, for
turning him
away without

For that whereas heretofore, to wit, on &c., [*any day about time of entering into service.*] in consideration that the plaintiff, at the request of the defendant, would become and be the servant of the defendant, to wit, in the

capacity of a [footman] at and for certain wages, to wit, the wages of £—*per annum*, he the defendant then promised the plaintiff to retain and employ the plaintiff in the defendant's service, and in the capacity aforesaid, and at and for the wages aforesaid, and to continue him in such service and employ until the expiration of a certain time, to wit, a month from and after notice or warning given by the plaintiff or the defendant to the other of them, of his intention to determine and put an end to such service and employ, or else to pay him a proportionate part of the said wages for a month. (f) And although the plaintiff, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, become and was th servant of the defendant, to wit, in the capacity and on the terms aforesaid, and did continue in such service and employ of the defendant for a long space of time, to wit, until &c. [*day of discharge, or about it.*] And although the plaintiff hath always been ready and willing, and then offered to continue in the said service and employ of the defendant in the capacity aforesaid, and on the terms aforesaid, until the expiration of a month from and after notice or warning given by the defendant to the plaintiff of his intention to determine and put an end to such service and employ as aforesaid; yet the defendant, not regarding his said promise, did not nor would continue the plaintiff in his said service and employ until the expiration of a month from and after notice or warning given by the defendant of his intention to determine and put an end to such service and employ, but, on the contrary thereof, wholly neglected and omitted to give the plaintiff notice or warning of his intention to determine and put an end to such service and employ, and then refused to suffer or permit the plaintiff to continue in his said service and employ, and then discharged him the plaintiff therefrom without any notice or warning whatever, and hath from that time hitherto wholly neglected and refused to retain or employ the plaintiff in his said service or employ, or pay him a proportionate part of the plaintiff's wages for a month; and by means thereof he the plaintiff hath lost and been deprived of all the wages, profits and advantages, meat, drink, lodgings and necessities, which he otherwise might and would have derived and acquired from being continued in the said service of the defendant; and the plaintiff hath been and is by means of the premises still wholly unemployed.

ON PROMISES
TO EMPLOY.

a month's
notice. (e)

For that whereas heretofore, to wit, on &c., by a certain agreement then made between the plaintiff and the defendant, the plaintiff agreed to [here

For preventing
plaintiff from
completing a

(e) As to the necessity of declaring specially, see 2 East, 145, and the cases cited in the notes, *ante*, 52 and 239. Under this count the plaintiff can only recover a month's wages; *Hartley v. Harman*, 11 A. & E. 798. As to the right to turn away a servant at a month's notice, or without it, and as to what is not a sufficient excuse for turning away a servant, see Burn, J. tit. "Servants;" 1 Chitty's Gen. Prac. 75 to 78, 81, 82; 7 A. & E. 557; and as to what is a sufficient excuse, see 3 Ad. & Ell. 171. See a form of declaration for turning away before expiration of a year, contrary to agreement, *Snelling v. Huntingfield*, 1 Crom. M. & Ros. 26; and

a form of declaration and plea, *Nowlan v. Ablett*, 1 Gale, 72; and see a declaration by a warehouseman, hired for a year, or on a general hiring, for turning him away before expiration of time, and without any reasonable notice, several counts, *Fawcett v. Cash*, 3 Nev. & Man. 177; 5 Bar. & Adol. 904, S. C. See also 7 A. & E. 177, 557; *Cooper v. Blick*, 2 G. & D. 295.

(f) If the servant be dismissed for misconduct, he will be entitled to no wages; 5 B. & Ad. 790; 4 C. & P. 208. 518; 6 C. & P. 15; nor if he quit his master without good cause; 2 M. & Gr. 252.

ON PROMISES
TO EMPLOY.

work which he
had undertaken
on a written
agreement.

The terms of
contract set
forth.

Mutual pro-
raises.

Averment of
plaintiff's pro-
ceedings on his
part.

Notice to de-
fendant.
Defendant's
breaches of the
contract.

set out the agreement in the past tense (g)] perform and complete the mason work at the Regent's Circus, north end of Portland Place, in the New Road, at the following prices, finding all materials and labour, and to do the same to the satisfaction of the architect appointed to survey the same; that is to say, strait Portland kirb twelve inches by ten inches, with rail-holes, plugs and lead, including the stone for the brace bar, at seven shillings and five pence per foot run, circular ditto at eight shillings per foot run, bases for the lamp irons two feet four inches and three quarters by two feet four inches and three quarters, and twelve inches high, at two pounds each, including rail-holes, and to do the whole complete in all respects according to the drawings, and within the time specified in the specification delivered; and it was also then agreed between the plaintiff and the defendant, that he the defendant should advance £12 in cash for every hundred feet set complete, and the balance by bill at two months after the accounts were adjusted; the whole of the Portland stone, kirb and gate bases on the south side of the whole line of the New Road, from east to west, to be fixed and made complete in all respects on or before the 25th day of November in the year aforesaid, and the half-circular area to be made complete on or before the 25th day of December in the same year; and part of the work having then already been done by G. H. it was thereby further understood, that the same should be ascertained by L. M., of &c., surveyor, on the part of the defendant, and E. F. of &c., on the part of the plaintiff; and in case any dispute should arise, the same to be decided by their umpire, and the balance paid to the said G. H., as well as the money then already advanced to him by the defendant, was to be accounted for by the plaintiff, and deducted from the balance due to him when completed, but at present to draw only for the setting the same. [And the said agreement being so made, afterwards, to wit, on the day and year first aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform and fulfil the said agreement on his the plaintiff's part to be performed and fulfilled, he the defendant promised the plaintiff to perform and fulfil the said agreement in all things on his the defendant's part to be performed and fulfilled.] And although the plaintiff hath always, from the time of making the said agreement, performed and fulfilled the same on his part, and did afterwards, to wit, on the day and year first aforesaid, enter upon and commence the said work, and for that purpose did procure and find all materials and labour necessary for performing the same, and did the same in part, to wit, one thousand two hundred feet thereof, to the satisfaction of the architect appointed to survey the said work, and hath always been ready and willing to perform and complete the whole of the said work, in pursuance of the said agreement; of all which said premises the defendant hath had notice; yet the plaintiff in fact saith, that the defendant did not nor would perform the said agreement nor his said promise, but thereby deceived the plaintiff in this, to wit, that the defendant did not nor would advance the said sum of £12 in cash for each of the said one hundred feet set complete, but on the contrary thereof hath hitherto wholly neglected and refused so to do; and the defendant, further disregarding the said agree-

(g) It is sufficient to show so much of the contract only as is necessary to show clearly the defendant's failure; 4 Taunt. 285; 6

East, 564. This cause was tried, and plaintiff obtained a verdict.

ment and his said promise, afterwards, to wit, on &c., did not nor would permit or suffer the plaintiff to proceed to complete the said work, and then wholly hindered and prevented him from so doing, and then wrongfully discharged the plaintiff from any further performance or completion of his said agreement and promise, whereby the plaintiff hath lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the completion of the said works. [*Add a count upon an account stated, if there be any promise to pay a particular sum, and conclude as ante, 36.*]

ON PROMISES
TO EMPLOY.

XXVIII. ON PROMISES TO PERFORM WORKS.

For that whereas heretofore, to wit, on &c., [*date of agreement,*] by a certain agreement then made by and between the plaintiff and the defendant it was agreed, that the defendant should take down a certain messuage or dwelling-house, situate at &c., and should build two other messuages or dwelling-houses for the plaintiff, agreeably to certain plans thereof then in the possession of the defendant, and according to the particulars and in manner following; that is to say, that the said old house should be taken down, and the bricks cleaned and worked up &c. [*Set out the agreement in the past tense.*] And the said agreement being so made, afterwards. [*Mutual promises, as ante, 242. (i)*] And although the plaintiff hath always &c. [*state plaintiff's general performance of the agreement, and special performance of any condition precedent,*] yet the plaintiff in fact saith, that the defendant did not nor would perform the said agreement nor his said promise, but thereby deceived the plaintiff in this, to wit, that the defendant wholly neglected and omitted to do and perform certain works which were requisite and necessary to be done and performed under and by virtue of the said agreement, and according to the tenor and effect, true intent and meaning thereof, that is to say, to pull down &c. [*Here specify the breach according to the fact.*] And the defendant also thereby deceived the plaintiff in this, to wit, that the defendant afterwards, to wit, on &c., and on divers other &c., did and performed certain other works which were requisite and necessary to be done and performed under and by virtue of the said agreement, in a bad, inartificial and unworkmanlike manner, contrary to the form and effect of the said agreement and of his said promise.

XXVIII. ON
PROMISES TO
PERFORM
WORKS.

On a building agreement, for not performing part of the work, and for performing the residue inartificially. (h) Mutual promises.

Defendant's several breaches.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had then retained and employed the defendant to take down a certain messuage and dwelling-house, with the appurtenances, and to erect and build divers, to wit, two other messuages or dwelling-houses, with the appurtenances, in lieu thereof, for the plaintiff, agreeably to certain plans and particulars then made and

The like in another form, for building contrary to plans and directions, and with improper materials, and in an improper manner.

(h) See next form, also Morgan, 188. The terms of the agreement are to be stated precisely according to the facts. The precedents which may be classed under this head are very numerous, see the index to 2 Wentw. When the action is founded on a written agreement, it is usual to set the same out, as to which see 6 East, 569. The declaration

must be either special, as upon a formal agreement, with mutual promises, or it must show that the defendant was to have a reward for the work to be performed, or that he actually performed it, and unskilfully; 5 T. R. 142; 4 B. & Cres. 346.

(i) But this statement is not absolutely necessary; see 2 New Rep. 62.

**ON PROMISES
TO PERFORM
WORKS.**

agreed upon by and between the plaintiff and defendant, for certain reasonable reward to the defendant in that behalf, he the defendant then promised the plaintiff to erect and build the said messuage or dwelling-house, with the appurtenances, agreeably to the said plans and particulars, with good and proper materials, and in a sound, substantial and workmanlike manner. And although the defendant did afterwards, and before the commencement of this suit, erect and build the said messuages or dwelling-houses, with the appurtenances, for the plaintiff; yet the defendant, not regarding his said promise, did not nor would erect or build the said messuages or dwelling-houses, with the appurtenances, for the plaintiff, agreeably to the said plans and particulars, with good and proper materials, and in a sound, substantial and workmanlike manner, but wholly neglected and refused so to do, and on the contrary thereof, he the defendant erected and built the said messuages or dwelling-houses, with the appurtenances, different from and contrary to the said plans and particulars, and with bad and improper materials, and in a slight, weak, inartificial and unworkmanlike manner, contrary to the form and effect of the said promise.

**On an agree-
ment to fix a
steam engine in
a complete
working condi-
tion.**

For that whereas the plaintiff, before and at the time of the making of the agreement and of the promise of the defendant hereinafter next mentioned, was, and from thence hitherto hath been and still is, a miller and mealman, and the trade and business of a miller and mealman hath for and during all that time used and exercised, and carried on, and still doth use, exercise and carry on. And thereupon heretofore, to wit, on &c. [*date of agreement*] by a certain agreement then made between the plaintiff and the defendant, he the defendant, for and in consideration of the sum of £— agreed by the plaintiff to be paid at the days and times thereafter mentioned, did agree to and with the plaintiff in manner following:—[*Here set out the agreement, and afterwards mutual promises, as ante, 242.*] And although the plaintiff hath always from the time of making the said agreement hitherto well and truly performed and fulfilled the same in all things on his part according to the tenor and effect, true intent and meaning thereof, and hath furnished the necessary brick-work for the framing and setting up the said boiler, together with the fire-bars, plumber's, painter's and stonemason's work, of and for the said engine, and fixing and setting up the same, and hath always been ready and willing to pay for the said engine as aforesaid, whereof the defendant hath always had notice; yet the defendant, not regarding the said agreement nor his said promise, has not, (although often requested so to do,) at his own costs and charges, made, fixed and set up, or caused to be made, fixed and set up, in complete working condition, of good materials and workmanship, on the premises of the plaintiff, in the said agreement above alluded to, one steam engine of seven-horse power, &c., together with all necessary utensils and implements for working the same, excepting as in the said agreement is excepted, but on the contrary thereof, after the making of the said agreement and his said promise, to wit, on &c. aforesaid, fixed and set up in the said premises above alluded to a steam engine not in complete working condition, and of much less power than a seven-horse power engine, to wit, a two-horse power engine, and with a boiler and pump of insufficient size, and not set together with requisite and necessary utensils and implements, according to the said agree-

**Breach by de-
fendant.**

ment, to be furnished by the defendant. By reason whereof the said engine hath been and is of very little use to the plaintiff, and the plaintiff hath not, since the said engine was so fixed and set up as aforesaid, been able to grind such *large quantities* of corn and grain as he might and would have ground, had the said defendant made, fixed and set up an engine according to the terms, true intent, and meaning of the said agreement and his said promise, and the plaintiff hath thereby also lost and been deprived of divers great gains and profit, which would have accrued to him from grinding such quantities of corn and grain, in the whole amounting to a large sum of money, to wit, the sum of £—, and also by means whereof a certain large quantity, to wit, 1000 bushels of corn, which he, the plaintiff, confiding in the said agreement, had purchased, in order that the same might be ground by means of the said engine, remains wholly unground, and has been and is greatly damaged and spoiled and reduced in value; by means whereof, and also on account of the said engine, with the appurtenances, having been and being so incomplete as aforesaid, and of divers attempts and endeavours having been made since the said engine was so fixed and set up as aforesaid, and before the exhibiting of the said bill of the plaintiff in this suit by the plaintiff, for and on behalf of the defendant, to amend and render the said engine, and the said insufficient implements for working the same, complete, according to the said agreement, he the plaintiff, on the several days and times since the engine was so fixed and set up as aforesaid, was wholly deprived of the use of the same, and thereby has also been forced and obliged to lay out and expend, and hath laid out and expended divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the providing lead-work, brick-work and other necessary materials and labour, in and about the putting, setting up and fixing a certain other boiler and pump in lieu and stead of the said insufficient boiler and pump.

ON PROMISES
TO PERFORM
WORKS.

Special damage that plaintiff was prevented from grinding so much corn as he otherwise would, and that a quantity which he had purchased for the purpose became of no use to him, &c.

For that whereas the plaintiff, before and at the time of the making of the promise of the defendant hereinafter next mentioned, had been and was about to consign from parts beyond the seas, to wit, from S. to L., in and on board of a certain ship or vessel, called &c. a large quantity, to wit, &c., and the plaintiff then had on board the said ship or vessel a part of the said wine &c., of great value, to wit, of the value of £—. And thereupon heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had retained and employed him to use due endeavours to effect a sufficient and proper insurance on the said goods during the said voyage against the queen's enemies, and other adventures and perils usually in such cases insured against, for the plaintiff, according to the usage and custom of merchants, for reasonable reward to the defendant in that behalf, he the defendant then promised the plaintiff to use due and proper care in and about endeavouring to effect such insurance for the plaintiff as aforesaid. And the plaintiff saith that heretofore, to wit, on &c. aforesaid, the said ship or vessel, with the said wine on board thereof, departed and set sail from S. aforesaid on her voyage to L. aforesaid, and that afterwards, and whilst the said ship or vessel was proceeding on her said voyage with the said wine and barilla so on board thereof as aforesaid, and before her arrival at L. aforesaid, to wit, on &c. the said ship or vessel, with the said wine,

Against an insurance broker for not properly effecting an insurance.

**ON PROMISES
TO PERFORM
WORKS.**

&c. on board thereof, was upon the high seas, by stormy and tempestuous weather and the perils and dangers of the seas, greatly broken and damaged and wholly lost; and thereby the said wine, &c., being of great value, to wit, &c. became and were wholly lost to the plaintiff. And although the defendant, after the making of his said promise, and before he had any notice of the said loss, could and might and ought to have effected such insurance for the plaintiff, according to his said retainer, if he had used due and proper care in that behalf; yet the defendant, wholly disregarding his said promise, did not use due and proper care in and about endeavouring to effect such sufficient insurance as aforesaid, but wholly neglected so to do, and wrongfully and injuriously insured the said wines, &c. only to a small amount, to wit, for divers small sums of money, amounting to a much less sum of money than the sums of money for which the defendant could and might and ought to have effected such insurance as aforesaid, to wit, the sum of &c., the same being much less, to wit, the sum of &c., less than the value of the said wines, &c.; and by means of the said neglect and improper conduct of the defendant, the plaintiff hath lost and been deprived of the benefit of the insurance which he ought to have had in pursuance of the said promise of the defendant.

Against an insurance broker
for not giving notice to his employers of his inability to effect an insurance. (j)

Callander v. Oelricks, 5 Bing. N. C. 58.



**XXIX.
AGAINST
BAILEES.**
General observations. (k)

XXIX. AGAINST BAILEES.

In *Coggs v. Bernard*, 2 Ld. Raym. 912, 913, Holt, C. J., states that there are six sorts of bailments; but Sir Wm. Jones, in his work on bailments, 35, 36, arranges them under five heads:—1. *Depositum*, or the delivery of goods to the bailee to be kept for the bailor without reward. 2. *Mandatum*, or commission, when the bailee undertakes without reward to do some act about the thing bailed, or to carry it. 3. *Commodatum*, or loan for bailee's use, without reward to bailor. 4. *Pignori acceptum*, where goods are pawned to bailee. 5. *Locatum*, or hiring, which is always for reward; and which is either, 1st, *Locatio rei*, or use of the thing by bailee paying reward to the bailor; 2ndly, *Locatio operis faciendi*, when work and labour, or care and pains, are to be performed or bestowed on the thing delivered; 3dly, *Locatio operis mercium vehendarum*, when goods are delivered to a public carrier or a private person to be carried. The respective liabilities of these several bailees are considered in the authorities above referred to, and in 1 Hen. Bla. 158; 1 Saund. 312, n. 2; 3 Chit. Com. Law, 354, &c.; Chit. jun. Cont. 3d edit. Index, tit. "Bailments;" see also the observation of Sir Wm. Scott on bailments, 6 Rob. Rep. 316. In the following pages a precedent is given under each of the heads that usually occur in practice,

(j) Upon an undertaking to effect an insurance according to special instructions, a part of the duty implied is the giving notice to the employer in case of failure; *Callander v. Oel-*

ricks, 5 Bing. N. C. 58.

(k) See precedents in *Case*, *post*, and 2 Campb. 291.

except that of *Mandatum*, as to which see a declaration, 1 Hen. Bla. 158 ; 4 T. R. 143 ; Lord Raym. 909.

AGAINST
BAILEES.

For that whereas heretofore, to wit, on &c. [*any day when defendant had the goods and before title of declaration,*] in consideration that the plaintiff, at the request of the defendant, had caused to be delivered to the defendant certain goods and chattels, to wit, &c. [*set them out, as in trover,*] of great value, to wit, of the value of £—, to be taken care of and safely and securely kept by the defendant for the plaintiff, and to be re-delivered by the defendant to the plaintiff, he the defendant then promised the plaintiff to take due and proper care of and safely and securely keep the said goods and chattels for the plaintiff, and to re-deliver the same to the plaintiff when he the defendant should be thereunto afterwards requested ; and although the defendant then had and received the said goods and chattels of and from the plaintiff for the purpose aforesaid ; and although the defendant was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff to re-deliver the said goods and chattels to the plaintiff, yet the defendant, not regarding his said promise, did not nor would take due and proper care of and safely and securely keep the said goods and chattels or any part thereof for the plaintiff, nor did nor would, at the said time he was so requested as aforesaid or at any time afterwards, re-deliver the same to the plaintiff, but on the contrary thereof he the defendant so negligently and carelessly conducted himself with respect to the said goods and chattels, and took so little care thereof, that by and through the mere carelessness, negligence and improper conduct of the defendant and his servants in that behalf, the said goods and chattels being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff.

Depositum,
ante, 246.
Against bailee
without reward
for not taking
care of and re-
delivering goods
intrusted to his
care. (1)

(1) See form, Morg. 191 ; this description of bailment is called a *depositum*, or a bailment of goods to be kept by the bailee for the bailor, without reward to the bailee ; 2 Ld. Raym. 912 ; Sir W. Jones, 35, 36 ; 2 Stra. 1099 ; and the bailee is not liable for loss or damage, unless it be attributable to *gross negligence* ; *id. ibid.* ; 1 Esp. Rep. 316 ; Willes, 121 ; 1 Campb. 138 ; *Rooth v. Wilson*, 1 B. & A. 61 ; *Doorman v. Jenkins*, 2 Ad. & Ell. 256. Indeed, any bailee is liable for *gross negligence* ; 2 Stra. 1099. The bare leaving goods in custody, and accepting such trust, raise a promise not grossly to neglect the care of the goods ; 2 Stra. 1099. But such a bailee is not liable if he be robbed of the goods ; Willes, 121. He is liable for ordinary neglect if he *spontaneously* and *officiously* offers to keep the goods ; Jones, 48, 54 ; or when he changes the description of his character, by taking the charge of the goods, in consequence of any reward or lucrative contract ; *id.* A bailee to take care of goods is liable for negligence, though his employer might have resorted to a third person ; 1 Stark. 104. A bailee of this description is always bound to

be ready to re-deliver the thing bailed upon request ; Jones, 52 ; 15 East, 42 43 ; 2 Bla. Com. 462. Where the bailee has a reward for his care of the goods, he is bound to use exertions to secure the property ; 1 Campb. 138. Where A. hired a room in the house of B. at 2s. per week, for the purpose of depositing goods for safety, and kept the key of a padlock, by which the room-door was fastened, and the goods were stolen by one of B.'s family : it was held that B. could not be sued as bailee for the value of the goods stolen ; 4 Dowl. & Ryl. 636. This bailee has no right to use the bailment ; Bac. Ab. Bailment, D. Semble, that a declaration in *assumpsit*, stating that the plaintiff being about to proceed to N., paid money to the defendants in London, that they might cause it to be paid to him at N. on a certain day, and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at N., disclosed a sufficient consideration for the promise ; *Shillibeer v. Glyn and others*, 2 M. & W. 143.

AGAINST
BAILEES.

Commodatum,
ante, 246.
For not return-
ing casks or
paying for
them. (m)

For that whereas heretofore, to wit, on &c. [*day of delivery, or about it,*] in consideration that the plaintiff, at the request of the defendant, would from time to time sell and deliver to the defendant ale, and would send and deliver the same to the defendant in hogsheads and casks of the plaintiff, he the defendant then promised the plaintiff to return the said hogsheads and casks to the plaintiff at the expiration of a reasonable time to be allowed for emptying the same, or to pay him for the said hogsheads and casks at the rate and price of £1 for each of the said hogsheads and casks. And the plaintiff avers, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, sell and deliver divers large quantities, to wit, — hogsheads and — casks of ale, to the defendant, and did then send and deliver the same to the defendant in divers, to wit, — hogsheads and — casks, of the plaintiff, of great value, to wit, to the value of £—, and although a reasonable time for emptying the said hogsheads and casks, and returning the same to the plaintiff, hath long since elapsed; yet the defendant, not regarding his said promise, did not nor would, at the expiration of such reasonable time as aforesaid, or at any time before or since, although often requested so to do, return the said hogsheads and casks, or any of them, to the plaintiff, nor did nor would pay the plaintiff for the same, or any of them, at the rates and prices aforesaid; but to return the said hogsheads and casks, or any of them, to the plaintiff, or pay for the same as aforesaid, he the defendant hath hitherto wholly neglected and refused, and still neglects and refuses so to do.

Pignori accep-
tum, ante, 246.
Against a pawn-
broker for losing
a pledge. (n)

For that whereas, before and at the time of the making of the promise of the defendant hereinafter next mentioned, the defendant was a pawnbroker; and thereupon heretofore, to wit, on &c. [*day of delivery, or about it,*] in consideration that the plaintiff, at the request of the defendant, had then pawned and delivered to the defendant certain goods and chattels, to wit, &c. [*enumerate them, as in trover,*] of the plaintiff of great value, to wit, of the value of £—, as and by way of pledge to the defendant for a certain sum of money, to wit, the sum of £—, then advanced by the defendant

(m) See a form, 1 Wils. 115; more care is required in this species of bailment than the former, and the bailee will, generally speaking, be liable for any loss arising from any thing short of absolute impossibility to prevent it, Jones, 64, 69; but in some cases the bailee will only be liable for ordinary neglect, Jones, 65. This bailee cannot lend or let the bailment to another, 1 Mod. 210; 3 Salk. 271; he must at all times be ready to redeliver it to bailor; 2 Stark. 539; 2 T. R. 376. As to who may sue for not returning sacks where vendor sends malt in a third person's sacks, see 2 Stark. 172.

(n) Jones 74 to 76; Ld. Raym. 917; Bul. Ni. Pri. 72. The pawnee in this case is liable for ordinary neglect, and he will be liable for any loss arising from any thing except unavoidable force; Jones, 75, 79; Bul. Ni. Pri.

72 a; Ld. Raym. 917. How far a pawnee may use or dispose of goods, Ld. Raym. 917; Owen, 123; Jones, 80 to 82; Bract. 99; Holt, C. N. P. 383. If he part with the possession he loses his security; *Ryal v. Rolle*, 1 Atk. 165; *Reeves v. Capper*, 5 Bing. N. C. 140. The acts relating to pawnbrokers are 30 Geo. 2. c. 24; 39 & 40 Geo. 3. c. 99; see also 1 Jac. 1. c. 21, concerning pawnbrokers in London. A pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner tender him the principal and interest due; 5 B. & A. 439; 1 D. & R. 1, S. C.; 1 Stark. 672; Burn, J., tit. "Pawnbrokers." See pleas to an action of trover against a pawnbroker, *Nickesson v. Trotter*, 3 M. & W. 130.

to the plaintiff thereon, he the defendant then promised the plaintiff to take due and proper care of the said goods and chattels until the same should have been redeemed by and re-delivered to the plaintiff, or sold by the defendant according to the form of the statute relative to pawnbrokers in such case made and provided. And although the defendant then had and received the said goods and chattels for the purpose and on the terms aforesaid; yet the defendant, not regarding his said promise, did not take due and proper care of the said goods and chattels until the same were redeemed by the plaintiff and re-delivered by the defendant to the plaintiff, or sold by the defendant, according to the form of the said statute; but on the contrary thereof, he the defendant afterwards, and whilst he so had the custody of the said goods and chattels as aforesaid, to wit, on the day and year aforesaid, took so little care of, and so negligently kept the said goods and chattels, that the same, while they were in the possession of the defendant for the purpose aforesaid, by and through the carelessness and negligence of the defendant in that behalf, became and were wholly lost to the plaintiff (or greatly damaged and spoiled).

AGAINST
BAILEES.

For that whereas heretofore, to wit, on &c. [*day of hiring, or about it,*] in consideration that the plaintiff, at the request of the defendant, would let to hire and deliver to the defendant a certain horse (*p*) of the plaintiff of great value, to wit, of the value of £——, for the defendant to go and perform a certain journey therewith, to wit, (*q*) from &c. to &c., and from thence back again to &c. aforesaid, for reasonable reward to the plaintiff in that behalf, he the defendant then promised the plaintiff that he the defendant would not go or perform another or different journey with the said horse than the said journey, and that he would ride and use the said horse in a moderate, careful and proper manner. And the plaintiff avers, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, let to hire and deliver the said horse to the defendant, and the defendant then hired and received the same of and from the plaintiff for the purpose and upon the terms aforesaid; yet the defendant, not regarding his said promise, afterwards, to wit, on the day and year aforesaid, went and performed with the said horse another and different journey than the said journey from &c. aforesaid, to &c. aforesaid, and from thence back again to &c. aforesaid, that is to say, a certain journey from &c. aforesaid, to &c. aforesaid, and from thence to a certain place called ——, in the county

Locatio rei,
ante, 246.
Against the
hirer of a horse
for riding it
improperly, and
a different jour-
ney from that
for which it was
hired. (*o*)

(*o*) See a form, 1 Mall. 127. A hirer is not bound to exercise more than ordinary diligence and care over the thing let to hire; *Ld. Raym.* 916; *Bul. N. P.* 72; *Jones*, 89; *Dunn v. Keate*, 3 Camp. 4; *Davy v. Chamberlain*, 4 Esp. 229; *Reading v. Menham*, 1 Moo. & Rob. 234. A hirer may let another ride, but a borrower cannot; 1 Mod. 210. The hirer of goods is not even at common law answerable for their loss by fire; *Longman v. Gallini*, Abbott on Shipp. 5th edit. 250, n. The hirer of a horse is not liable to make compensation for his death, occasioned by error of a farrier called in, but he is liable if he imprudently gave medicine himself; nor is a hirer liable for the

horse falling, &c. without his default; 3 Campb. 6. The hirer of a horse is liable for its feed; 2 B. & B. 359; 5 J. B. Moore, 74. He must not ride a horse after it is exhausted and refuses its feed; 1 Gow, C. N. P. 1. The hirer of a chaise and horse to go a journey is not liable for an injury occasioned by the negligence or misconduct of the post-boy; 5 Esp. Rep. 36.

(*p*) This is usual, though to avoid any doubt it may perhaps be advisable, when applicable to the facts, to insert the words, "and bridle and saddle."

(*q*) Let this agree with the real facts of the hiring.

AGAINST
BAILEES.

of —, and thence back again to — aforesaid, and in going and performing the said last-mentioned journey as aforesaid, he the defendant so immoderately, violently, carelessly and improperly rode and used the said horse, that by means of the several premises aforesaid, the said horse became and was greatly lamed and hurt, and so remained and continued for a long space of time, to wit, hitherto and during all which time he the plaintiff lost and was deprived of the use and benefit of his said horse, and also thereby the said horse then became and was greatly damaged, lessened in value, and spoiled.

For not taking
care of furniture
let to hire to
defendant. (r)

For that whereas heretofore, to wit, on &c. [*day of letting, or about it,*] in consideration that the plaintiff, at the request of the defendant, had let to hire and delivered to the defendant certain household furniture, goods and chattels, to wit, &c. [*enumerate them*] of the plaintiff of great value, to wit, of the value of £—, to be had and used by the defendant, for a certain time in that behalf agreed upon by and between the plaintiff and the defendant, to wit, from — to —, and to be re-delivered by the defendant to the plaintiff after that time, he the defendant then promised the plaintiff to take due and proper care of the said household furniture, goods and chattels, and to re-deliver the same to the plaintiff at the expiration of the time for which the same were so let to hire as aforesaid. And although the defendant then had and received the said household furniture, goods and chattels, of and from the plaintiff for the purpose aforesaid, and although the time for which the same were so let to hire as aforesaid hath long since elapsed; yet the defendant, not regarding his said promise, did not nor would take due and proper care of the said household furniture, goods and chattels, or at the expiration of the time for which the same were so let to hire as aforesaid, or at any time afterwards, re-deliver the same or any part thereof to the plaintiff, (although he was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff so to do,) but on the contrary thereof, he the defendant took so little care of the said household furniture, goods and chattels, that by and through the negligence, careless and improper conduct of the defendant in that behalf, the said household furniture, goods and chattels became and were greatly broken, spoiled, damaged and wholly lost to the plaintiff.

Locatio operis fa-
ciendi, ante, 246.
Against a
watch-maker
for losing a
watch delivered
to him to re-
pair. (s)

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was a watch-maker, and the trade and business of a watch-maker then followed and carried on. And thereupon heretofore, to wit, on &c. [*day of delivery, or about it,*] in consideration

(r) 2 Wentw. Index, 21; see notes to the last precedent, as to the liability of a bailee of this nature. If the guests or servants of this bailee damage the furniture he will be liable; 4 T. R. 319; 5 T. R. 373.

(s) 2 Wentw. Index, 20; this species of bailment requires the bailee not only to perform his contract, but to use ordinary diligence in the care of the property; see *Clarke v. Earnshaw*, 1 Gow, C. N. P. 30; *Broadwater v. Blot*, Holt, C. N. P. 547; *Lack v. Maestaer*, 1 Camp. 138; *Thomas v. Davy*,

4 Esp. 262. How far the proprietor of a dry dock is liable for bursting of flood-gates, 1 Campb. 138. How far agister of cattle liable, Holt, C. N. P. 547; 8 Co. Rep. 32; and how far a watchmaker liable, 1 Gow, 30. This bailee, unless he be an innkeeper or common carrier (as to whose liability, see *post*), is not liable for loss by a mere accident, not resulting from his negligence; 4 T. R. 581; 5 T. R. 389; 8 Taunt. 443; 1 Went. 121.

that the plaintiff, at the request of the defendant, had then delivered to the defendant a certain watch of the plaintiff, of great value, to wit, of the value of £——, to be repaired by the defendant, in the way of his said trade or business of a watch-maker, for reasonable reward (t) to be therefore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff to endeavour to repair the said watch, and to take due and proper care thereof until the same should be returned by the defendant to the plaintiff; yet the defendant, not regarding his said promise, did not nor would take due and proper care of the said watch until the same was returned by the defendant to the plaintiff, but, on the contrary thereof, he the defendant, after the making of his said promise, to wit, on the day and year aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said watch, that by and through the mere carelessness, negligence and improper conduct of the defendant in that behalf, the said watch being of the value aforesaid, became and was and still is wholly lost to the plaintiff.

AGAINST
BAILEES.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had then delivered (u) to the defendant a certain watch of the plaintiff, of great value, to wit, of the value of £——, to be rectified by the defendant, and to be re-delivered by him to the plaintiff, for reward to be therefore paid to him, he the defendant then promised the plaintiff to endeavour to rectify the said watch within a reasonable time then next following, and to deliver the same to the plaintiff whenever, after such reasonable time had elapsed, he the defendant should be thereunto requested. And although the defendant then had and received the said watch for the purpose aforesaid; yet he, not regarding his said promise, hath not, although a reasonable time for rectifying the said watch hath long since elapsed, and the defendant was, after such reasonable time had elapsed, to wit, on the day and year aforesaid, requested by the plaintiff so to do, as yet delivered to the plaintiff the said watch, but hath hitherto wholly neglected and refused so to do.

For not re-
delivering the
watch.

For that whereas heretofore, to wit, on the —— day of —— A. D. ——, [any day while defendant had the goods, and before title of declaration,] in consideration that the defendant at his request then had the care and custody of divers goods and chattels of the plaintiff, to wit, [set out the goods and value, as in trover,] he the defendant then promised the plaintiff to take due and proper care thereof whilst the defendant so had the care and custody of the same; yet the defendant, not regarding his said promise, whilst the defendant so had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof, that the same afterwards, to wit, on the day and year aforesaid, became and were greatly damaged and injured and wholly lost to the plaintiff.

General count
against a bailee,
for not taking
care of goods.

(t) 2 New Rep. 458.

(u) See 1 Bingh. 34.

AGAINST
BAILLES.

XXX.
AGAINST
AGENTS,
FACTORS, &c.

XXX. AGAINST AGENTS, AS FACTORS, BROKERS, &c.

How to Declare against Agents, &c.—If there was an express contract, it should always be declared upon in its very exact terms, or at least according to its legal effect, and in general the former is preferable. But if there be only an implied contract, then care must be observed to state the defendant's situation or character, as an attorney, solicitor, architect, surveyor, builder, wharfinger, &c. and that in consideration that the plaintiff would retain and employ him as such for reward, &c. to prosecute or defend an action, or to superintend buildings, &c. he promised the plaintiff to perform his duty in the premises; and then to allege that the plaintiff, confiding in defendant's promise, did retain and employ him, &c. and then aver that it was defendant's duty to do so and so, or not to do so and so, and whereof he had notice; but that the defendant, disregarding his said promise, did not, &c. (then stating as many breaches of duty and promises as can be proved, which are still permitted, though only *one count* on the same transaction is allowed,) and concluding with statements of the resulting damages. A special pleader of the old school used to insist that assuredly a judge and jury *must* imply a contract on the part of every agent, "to do those things which he ought to do, and to leave undone those things which he ought not to do;" and he used to frame his statement of the implied promise in those very words. At present the implied contract of every description of agent may now be thus described, "that the defendant promised to perform his duty in the premises," or, "that the defendant promised the plaintiff to use due and reasonable endeavours to cause the plaintiff to have a good and sufficient security for the repayment of the said sum of £——;" but not stating that the defendant absolutely engaged that the plaintiff should have a perfect security, because the law will not imply a promise of so extensive and absolute a nature, and if the declaration be framed on a promise not implied by law, it will be bad in arrest of judgment; see *Boorman v. Brown*, 4 P. & D. 401.

Against an agent employed to sell, for not duly accounting for the goods. (x)

For that whereas heretofore, to wit, on &c. [*day of delivery of goods, or about it,*] in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant divers goods and chattels, to wit, &c. [*here specify them as in trover*] of great value, to wit, of the value of £——, to be sold and disposed of by the defendant for and on account of the plaintiff for

(x) See Forms, 2 Rich. C. P. 174; Pl. Ass. 69; 1 Taunt. 572, and other modern forms and notes, *post*. See a form against a sworn broker of the city of London for charging his principal more than the cost price of articles purchased for him in addition to his commission, 2 Moore & P. 284. See a declaration for accounting *only in part*, but not as to the residue, next precedent. As to this action and declaration, see Bul. Ni. Pri. 147, 148; Garth. 89; 2 Bos. & Pul. 136; 1 Saund. 50; 1 Taunt. 572. The term "accounting" is of large signification; any non-payment is a non-accounting. The word

"accounting" may mean "satisfy;" see 9 B. & Cres. 330. This count is sustainable against an auctioneer who delivers the goods without receiving the price from the purchaser; 2 Chit. Rep. 353. An agent is *at all times* bound to be prepared to render a clear and faithful account of all his transactions relating to the commission; 1 Jac. & Walk. 135; 14 Ves. 500, 510; 8 Ves. 49; 13 Ves. 47, 53; 4 Madd. Rep. 373; 1 Chitty's Gen. Prac. 509, 868, 869. But in general the principal cannot compel his agent to deliver over the proceeds of a contract till the latter has actually received them; and if an agent em-

reasonable reward to the defendant in that behalf, [if the defendant was a general agent to sell and account from time to time, then the declaration should be more comprehensive, as thus : "in consideration that the plaintiff, at the request of the defendant, would from time to time deliver to the defendant goods and chattels to be sold and disposed of by the defendant for the plaintiff, for reasonable reward to the defendant in that behalf, he the defendant then promised, &c." and averring the delivery of goods to the defendant, "from time to time," &c.] he the defendant then promised the plaintiff to endeavour to sell and dispose of the said goods and chattels for the plaintiff, and to render a true and just account of the sale thereof to the plaintiff, and of the monies arising from such sale, whenever after the sale thereof he the defendant should be thereunto requested. And although the plaintiff, confiding in the said promise of the defendant, did afterwards, to wit, &c., aforesaid deliver the said goods and chattels to the defendant, for the purpose aforesaid. And although the defendant did afterwards, to wit, &c., aforesaid, sell and dispose (y) of the said goods and chattels for and on account of the plaintiff, for divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, [state enough]; (z) And although the plaintiff afterwards, to wit, on &c., requested the defendant so to do, (a) yet the defendant, not regarding his said promise, hath not rendered to the plaintiff a just and true or other account of the sale of the said goods and chattels, or any part thereof, or of the monies arising from such sale or any part thereof, (b) but the defendant hath hitherto wholly refused and still refuses so to do.

played to sell receive part only of the price, the principal cannot sue him till the transaction be closed, unless indeed it is the agent's fault that the rest of the price is not paid, 2 Esp. Rep. 710; but as soon as the agent is in cash by any sale or contract, he must account and take care of the produce, and keep or dispose of it according to the principal's orders, 1 Stark. 392; 4 Madd. 3; 5 Madd. 47. If goods are consigned to a factor for sale, it is presumed that he contracts to account for such as are sold, to pay over the proceeds and redeliver the residue unsold, on demand; 1 Taunt. 572. The receipt of money by an agent may in many cases be presumed, as if he refuse, after a reasonable time has elapsed, to account for them; 1 Stark. 224; Peake, 56. An agent is responsible for the price of a commission sold by him for an officer on foreign service; 1 Esp. Rep. 450. According to *Groves v. Dubois*, 1 T. R. 112, and *Biss v. Dickason*, *idem*, 285, a commission del credere converted the factor into a principal, by making him liable in the first instance to the owner of the goods, so that upon a delivery to the factor and sale by him, a debt was raised between the factor and his employers, but these cases have been overruled by subsequent authorities; *Morris v. Cleasby*, 4 M. & Sel. 566; *Hornby v. Lacy*, 6 M. & Sel. 166; *Baker v. Langhorn*, 6 Taunt. 519. As to the agent's liabilities and rights in other respects, see notes, *post*;

also 3 Chitty's Com. Law, 193 to 224. It has been supposed that when there is a long complicated account, this action is not sustainable, 2 Campb. 238; Tidd's Prac. 9th edit. 2; but it seems that the difficulty of trying the cause constitutes no legal objection to the action. See 5 Taunt. 431; 1 Marsh. 116; though if the accounts are very intricate and difficult, a bill in equity is the preferable remedy, 2 Campb. 238; Eq. Ca. Abr. 5; 7 Ves. 588. When not, see 2 Young. & Jerv. 33. When the defendant cannot set up illegality in the sale, see 4 Camp. 183; 3 M. & Sel. 117; Holt, 105, 107.

(y) This averment of the sale must be proved, 1 C. & P. 572; as sale and receipt of proceeds may be presumed if the agent, after a reasonable time, refuse to account; 1 Stark. 224; Peake, 56.

(z) Where the promise was to account for monies to be received, it should seem that the declaration ought to aver the receipt of money; 6 Taunt. 45; *sed vide* 1 Price, 109. But if money has been received, it may be recovered under the common count for money had and received.

(a) When a request is necessary, see 1 Taunt. 572.

(b) If the defendant has in part accounted for or paid over some of the money received, the best course is to admit such part performance on the face of the declaration.

AGAINST
AGENTS,
FACTORS, &c.

The like, more
general, on an
executed con-
sideration.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had from time to time delivered to the defendant divers other goods and chattels of great value, to wit, of the value of £——, to be sold and disposed of by the defendant for the plaintiff, he the defendant then promised the plaintiff to render a just and reasonable account of the said goods and chattels to the plaintiff whenever afterwards he the defendant should be thereunto requested; Yet the defendant, not regarding his said promise, hath not rendered to the plaintiff a just and reasonable or other account of the said goods and chattels, or any part thereof (although the defendant afterwards, to wit, on &c. [*day of request*,] was requested by the plaintiff so to do), but the defendant hath hitherto wholly refused and still wholly refuses so to do. [*Add a count for money had and received, the account stated, and breach; if there be any reason to suppose the goods have been lost or injured by carelessness, add the general count, as ante, 251.*]

Against agent,
for not account-
ing for goods
consigned at
different times
for sale, or pay-
ing over the
proceeds. (c)

For that whereas heretofore, to wit, on &c., [*day of first assignment, or about it,*] in consideration that the plaintiff, at the request of the defendant, had sent and consigned to the defendant divers goods and chattels of the plaintiff of great value, to wit, of the value of £——, in order that the defendant might sell and dispose of the same for the plaintiff for commission and reward to the defendant in that behalf, he the defendant then promised the plaintiff to endeavour to sell and dispose of the said goods and chattels for and on the account of the plaintiff, and to render a just and reasonable account of the said sales thereof to the plaintiff in a reasonable time then next following, and to pay over the proceeds of such sales to the plaintiff when he the defendant should be thereunto reasonably requested by the plaintiff. And although the defendant then had and received the said goods and chattels for the purpose aforesaid, and afterwards, to wit, on the day and year aforesaid, and on divers other days and times afterwards, and before the commencement of this suit, sold the same for and on account of the plaintiff, for a large sum of money, to wit, the sum of £——, (d) and which the defendant then received to the use of the plaintiff; and although a reasonable time for the defendant to render such account as aforesaid and pay over the produce of the said sales to the plaintiff hath long since elapsed,* yet the defendant, not regarding his said promise, hath not, (although he was afterwards, to wit, on &c., requested by the plaintiff so to do,) as yet rendered to the plaintiff a just and reasonable account of the said sale, or paid over the proceeds thereof to the plaintiff, but hath hitherto wholly neglected and refused so to do.

Against a per-
son employed
to settle the
amount of a
certain debt due
to plaintiff from
a third person,
for not account-
ing for monies
received by him.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had authorized and empowered the defendant to settle the amount of a certain debt then due and owing from one E. F. to the plaintiff, and to obtain payment and satisfaction of the said debt from one E. F., he the defendant then promised the plaintiff to render

(c) See *ante*, 252, note.

(d) *Quere*, if this should not aver the receipt of the money; 6 Taunt. 45; 2 Esp. Rep.

710. It should seem not, for the promise is merely to account for the sale, and not for the proceeds only; see 2 Chit. Rep. 354.

a just account to the plaintiff of all monies and securities for money, which he the defendant should receive for and on account of the said debt, and to pay and deliver all such monies and securities to the plaintiff when he the defendant should be thereunto afterwards requested; and although the defendant did afterwards, to wit, on the day and year aforesaid, receive (e) divers large sums of money, and also divers securities for money, under and by virtue of the said power and authority, for and on account of the said debt,* yet the defendant, not regarding his said promise, hath not rendered a just and reasonable or other account to the plaintiff of the said monies or securities for money so received by the defendant as aforesaid, or any part thereof (although the defendant was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff so to do.) but he to do this hath hitherto wholly refused, and still refuses so to do. [*Add an account stated.*]

AGAINST
AGENTS,
FACTORS, &c.

The same as in the last two precedents to the asterisk, and then say as follows:] And although he the defendant, in part performance of his said promise, hath accounted to the plaintiff to the amount of £—, and paid to the plaintiff the said sum of £—, parcel of the said sum of £—, yet the defendant hath not fulfilled his said promise, and hath not as yet accounted to the plaintiff concerning, or paid him the residue of the said sum of £—, or any part thereof, although he was afterwards, and after the expiration of the said credit, to wit, on the day and year aforesaid, requested by the plaintiff so to do, and the residue of the said sum of £— still remains wholly due and unpaid to the plaintiff.

The like, admitting that the defendant in part accounted and paid. (f)

For that whereas heretofore, to wit, on &c., [*day of retainer, or about it,*] in consideration that the plaintiff, at the request of the defendant, had retained and employed the defendant to sell and dispose of for cash, or any approved bill (h) at a short date, certain goods and merchandizes, to wit, [fifty hides, and twenty-six —,] of the plaintiff, of great value, to wit, of the value of £—, for commission and reward to the defendant in that behalf, he the defendant then promised the plaintiff to endeavour to sell and dispose of the same, but not otherwise than for cash, or an approved bill at a short date; yet the defendant, not regarding his said promise, afterwards, to wit, on the day and year aforesaid, sold and disposed of the said goods and merchandizes of the plaintiff for a large sum of money, to wit, the sum of £—, otherwise than for cash, or an approved bill at a short date, to wit, for a disapproved and bad and insufficient bill of exchange, which hath become and is of no use or value to the plaintiff, and which said sum of

Against an agent, for selling goods on credit, and otherwise than for cash or a good bill, contrary to orders. (g)

(e) This seems a necessary averment; see 6 Taunt. 45; 2 Esp. Rep. 710.

(f) See ante, 253, note (b).

(g) A factor or broker may in general sell on credit, unless prohibited by the express or implied terms of his employment, or by usage of trade; Willes, 406; 3 B. & P. 489; 6 Bro. P. C. 287; Cowp. 395. He cannot sell stock on credit, as that is contrary to the usual course of business; 1 Campb. 258. An auctioneer is liable if he sells otherwise than for ready money; 2 Chit. Rep. 353; see also

12 Mod. 5, 14; Winch. 53; 5 Taunt. 749. If the vendee be not in reputed good circumstances, the agent would be liable; see 6 Bro. P. C. 287; Beawes, 43; Moll. 239. The time of credit must in all cases be reasonable and customary; Bulst. 103; Moll. 328; and the security also, Bulst. 104; Yelv. 202; Winch. 53.

(h) As to what is an approved bill, see 2 Campb. 532; 2 H. Bl. 573; 3 Mod. 273; 3 Stark. Evid. 1636; 1 M. & P. 656.

**AGAINST
AGENTS,
FACTORS, &c.**

money is wholly unpaid to the plaintiff; and by reason of the premises he the plaintiff is likely to lose the same.

Declaration for not selling for ready money, or a good bill of exchange. (i)

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had retained and employed him the defendant to sell and dispose of certain goods and merchandizes, to wit, &c. he the defendant then promised the plaintiff that he would not sell or dispose of the said goods and merchandizes otherwise than for ready money, or a good bill of exchange; yet the defendant did not perform or regard his said promise, but deceived and defrauded the plaintiff in this, to wit, that the defendant did not sell or dispose of the said goods and merchandizes for ready money, or for a good bill of exchange, but, on the contrary thereof, afterwards, to wit, on the day and year aforesaid, sold and disposed of the same for a bad bill of exchange, and which became and was of no use or value to the plaintiff.

Declaration for not obtaining a good bill of exchange in payment according to promise.

For that whereas heretofore, to wit, on &c., the defendant, under and by virtue of the retainer and authority of the plaintiff, had, for commission and reward to him in that behalf, sold and disposed of certain goods and merchandizes, to wit, &c. for and on the behalf of the plaintiff, for a certain sum of money, to wit, the sum of £——, and in consideration thereof, and that the plaintiff, at the request of the defendant, would accept and receive for and on account of the said goods and merchandizes, of and from the defendant, a certain bill of exchange, to wit, a bill dated &c., and made and drawn by one G. H. upon one I. K., and whereby the said G. H. requested the said I. K. — after the date thereof, to pay to the plaintiff or order £156, the defendant then promised the plaintiff that the said bill of exchange was a good bill of exchange. And the plaintiff avers that he, confiding in the said promise of the defendant, afterwards, to wit, on the day and year last aforesaid, did accept and receive, for and on account of the said goods and merchandizes, the said bill of exchange of and from the defendant; yet the defendant did not perform or regard his said promise, but deceived and defrauded the plaintiff in this, to wit, that the said bill of exchange was not a good bill of exchange, but on the contrary thereof then was and still is a bill of exchange of no use or value; and although the time for payment of the said sum of money therein specified, according to the tenor and effect of the said bill of exchange, hath long since elapsed, and the plaintiff hath endeavoured to obtain payment thereof, yet the plaintiff hath been and is wholly unable to procure payment of the same or any part thereof, and the same remains wholly due and unpaid to the plaintiff.

Declaration for not using due care in the sale of goods. (k)

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had retained and employed him for commission and reward to him in that behalf, to sell and dispose of certain goods and merchandizes of the plaintiff, to wit, &c. the defendant then promised the plaintiff to use due care in and about the sale of the said goods and merchandizes. And although the defendant afterwards,

(i) See a form, the *Earl of Ferrers v. Robins*, 1 Gale Rep. 70.

(k) This may be found a very useful general form.

to wit, on the day and year aforesaid, sold the said goods and merchandizes for and on account of the plaintiff, for a large sum of money, to wit, the sum of £—, yet the defendant, not regarding his said promise, did not use due care in and about the sale of the said goods and merchandizes, but wholly neglected and refused so to do, and wrongfully and unjustly took, accepted, and received, in payment of the said goods and merchandizes, a certain bill of exchange of no use or value to the plaintiff, and by reason of the improper conduct of the defendant in the premises he the plaintiff is likely to lose the price of the said goods and merchandizes.

AGAINST
AGENTS,
FACTORS, &c.

For that whereas heretofore, to wit, on the — day of —, A.D. —, in consideration that the plaintiff, at the request of the defendant, had retained and employed the defendant for reward to him in that behalf to sell and dispose of certain goods and merchandizes of the plaintiff, to wit, &c. of great value, to wit, of the value of £—, the defendant then promised the plaintiff to be responsible to him for the prices of the said goods and merchandizes. And although the defendant afterwards, to wit, on &c. aforesaid, sold and disposed of the said goods and merchandizes for a large sum of money, to wit, the sum of £—, and although a reasonable time for the payment thereof has long since elapsed, yet the defendant, not regarding his said promise, hath not as yet paid, or caused or procured to be paid, the said sum of money, or any part thereof, to the plaintiff, although he afterwards, to wit, on &c. aforesaid, had notice of the premises, and was requested by the plaintiff so to do.

Count on promise to be responsible in consequence of the stipulations to receive a *del credere* commission.^(l)

For that whereas heretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, had caused to be delivered to the defendant certain goods and chattels, to wit, one hogshead of tallow of the plaintiff, of great value, to wit, of the value of £—, to be sold and disposed of for ready money by the defendant for reward to be therefore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff not to sell or dispose of the said goods and chattels otherwise than for ready money; yet the defendant, not regarding his said promise, did afterwards, to wit, on &c. aforesaid, sell and dispose of the said goods and chattels upon credit and otherwise than for ready money, that is to say, to one R. H., at and for a certain sum of money, to wit, the sum of £—, and which said sum of £— is still wholly unpaid to the plaintiff, and the said R. H. having since become insolvent, he the plaintiff is likely to lose the same.

Against a factor instructed to sell for ready money, for selling upon credit to a person who afterwards became insolvent.^(m)

For that whereas the plaintiff, before the making of the promise of the defendant hereinafter mentioned, was a linen draper, and the trade and business of a [linen draper] exercised and carried on: and thereupon heretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, had retained and hired the defendant to serve the plaintiff as a

Against a shopman for selling on credit, contrary to express orders.⁽ⁿ⁾

^(l) See *ante*, 253, note; 1 J. B. Moore, 279, and a form there, and the common count, 14 East, 578; 8 Taunt. 371; 2 J. B. Moore, 420, S. C.

^(m) See note to last precedent; and see VOL. II.

form in *The Earl Ferrers v. Robins*, 1 Gale Rep. 70.

⁽ⁿ⁾ See a form in assumpsit for selling on credit against an auctioneer, *The Earl Ferrers v. Robins*, 1 Gale Rep. 70.

**AGAINST
AGENTS,
FACTORS, &c.**

Second breach
of same con-
tract.

servant and shopman in the said trade and business for wages and reward to be paid to the defendant, and that the plaintiff, at the request of the defendant, had then agreed to find and provide board and lodging for the defendant whilst he the defendant should continue to serve the plaintiff as aforesaid, the defendant then promised the plaintiff that he the defendant would not, whilst he should continue to be the servant and shopman of the plaintiff as aforesaid, sell or deliver any goods or merchandizes of the plaintiff on credit, or otherwise than for ready money, to any person or persons, without the consent or approbation of the plaintiff; and that in case he the defendant should sell and deliver any goods or merchandizes on credit or otherwise than for ready money, without the plaintiff's consent and approbation, and the same should not be duly paid for by the purchasers thereof, he the defendant would pay to the plaintiff the prices for which he should so sell such goods and merchandizes on credit or otherwise than for ready money; (o) yet the defendant, not regarding his said promise, after the making of the said promise, and whilst he continued to be the servant and shopman of the plaintiff as aforesaid, to wit, on the day and year aforesaid, without the consent and approbation of the plaintiff, sold and delivered certain goods and merchandizes, to wit, &c. the property of the plaintiff, of a large value, to wit, of the value of £——, for a certain sum of money, to wit, the sum of £——, to certain persons to the plaintiff unknown, on the credit of a certain draft on certain bankers trading under the style and firm of Messrs. Robson and Co., which said draft the said Messrs. R. and Co. afterwards, to wit, on the day and year aforesaid, wholly refused to pay, and which said last-mentioned sum of money still remains wholly due and unpaid to the plaintiff, and the plaintiff is in great danger of losing the same, nor have the said persons who so purchased the said goods and merchandizes duly paid the said sum of £——, or any part thereof, for the same. And the plaintiff further says, that the defendant further disregarding his said promise, afterwards, and whilst he continued to be the servant and shopman of the plaintiff as aforesaid, to wit, on &c., without the consent and approbation of the plaintiff, and against his will, sold and delivered certain other goods and merchandizes, to wit, on &c., the property of the plaintiff, of a large value, to wit, of the value of £——, on credit, otherwise than for ready money, to one E. F. for a certain other sum of money, to wit, the sum of £——, and which said last-mentioned sum of money still remains wholly due and unpaid to the plaintiff, and the plaintiff is in great danger of losing the same.

For not accounting for the produce of a bill of exchange delivered to defendant to get discounted. (p)

For that whereas heretofore, to wit, on &c. [*date of delivery or about it*] in consideration that the plaintiff, at the request of the defendant, had then delivered to the defendant a certain bill of exchange in writing, bearing date

(o) The promise should not be stated thus specially as to the defendant's promise to pay the prices of the goods, unless there were an *express* contract to that extent, but limited to the first part of the statement, to which extent the law would, perhaps, even infer a contract on the part of the shopman, or it might be safer to declare on the certainly *implied* promise to observe his duty,

and then aver that it was his duty not to give credit without permission.

(p) See precedent, *ante*, 202, for not discounting or getting discounted. The plaintiff might recover on the count for money *had and received*; 1 M. & P. 438. He need not produce the bill in evidence, but may give parol evidence of its contents.

a certain day and year therein mentioned, to wit, &c. [*the date*] for the payment of a certain sum of money therein mentioned, to wit, the sum of £—— [two] months after the date thereof, to wit, to one E. F. or his order, for the purpose of the defendant's endeavouring to get the same bill discounted for the plaintiff for commission and reward to the defendant in that behalf, he the defendant then promised the plaintiff to use due endeavours to get the said bill of exchange discounted for the plaintiff, and to deliver to the plaintiff such money or goods (*q*) as he the defendant should procure on the security of the said bill, or to return the said bill to the plaintiff in a reasonable time then next following; and although the defendant did afterwards, to wit, on &c., get the said bill of exchange discounted, and did thereupon then obtain and procure on the security of the said bill a certain sum of money, to wit, the sum of £——, and certain goods of great value, to wit, the sum of £——; yet the defendant, not regarding his said promise, did not nor would, although he was afterwards and after a reasonable time for his so doing had elapsed, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, deliver to the plaintiff the said sum of £—— and the said goods so procured by the defendant on the security of the said bill as aforesaid, or any or either of them, or any part thereof, or return the said bill to him the plaintiff, but hath wholly neglected and refused and still doth neglect and refuse so to do. And the plaintiff further says, that after the said bill became due and payable according to the tenor and effect thereof, to wit, on &c., he the plaintiff was arrested and held to bail by a certain person, to wit, G. H. then being the holder of the said bill, and was then called upon and forced and obliged to pay, and did then pay, to the said G. H. the said sum of money in the said bill specified, together with certain interest thereof, and the costs of a certain action before then brought on the said bill by the said G. H. against the plaintiff, in the whole amounting to a large sum of money, to wit, the sum of £——. And thereby also the plaintiff was put to and incurred great trouble and costs, to wit, costs amounting to the sum of —— in and about the settling and putting an end to the said action. [*In the fifth edition of this work, vol. ii. 351, a second count more general was inserted.*]

AGAINST
AGENTS,
FACTORS, &c.

XXXI. AGAINST WHARFINGERS.

XXXI.
AGAINST
WHARFINGERS.

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was a wharfinger, and the business of a wharfinger used, exercised, and carried on at and upon a certain wharf, situate in the city of London, [*or "county of S." according to the fact.*] And thereupon heretofore, to wit, on &c. [*day of delivery, or about it,*] in

Against a wharf-
inger for losing
goods delivered
to him to be
shipped by a
particular ves-
sel. (*r*)

(*q*) If the defendant was only authorised to obtain money, and not to receive goods even in part, omit what relates to goods.

(*r*) See forms, 2 Wentw. Index; 7 T. R. 171; 3 Wentw. 21. A wharfinger is not, like a carrier, an insurer, responsible at all events for the safe custody of goods intrusted to his care, and is liable only for actual

neglect; see 4 T. R. 581; Peake's N. P. 114; 1 Stark. 72; 1 Esp. Rep. 315; Cowp. 480. When liable for loss by fire, see 2 Stark. 400. By statutes 6 Ann. c. 31, 14 Geo. 3, c. 78, s. 86, they are not liable for loss by fire. In order to discharge a wharfinger who undertakes to ship goods from responsibility for goods left with him to be sent coast-

**AGAINST
AGENTS,
FACTORS, &c.**

consideration that the plaintiff, at the request of the defendant, had caused to be delivered to the defendant at and upon the said wharf certain goods and chattels, to wit, &c. [*describe them minutely, or as in trover,*] of the plaintiff, of great value, to wit, of the value of £—, to be by the defendant safely and securely kept at and upon the said wharf, and from thence shipped in and on board of *a certain ship or vessel*, (s) for the purpose of being carried and conveyed therein to a certain place, to wit, a place called —, for reasonable (t) wharfage and reward to the defendant in that behalf, he the defendant then promised the plaintiff that he the defendant would safely and securely keep the said goods and chattels at and upon the said wharf, and would ship the same in and on board of the said ship or vessel in manner and for the purpose aforesaid. And although the defendant then had and received the said goods and chattels, and could and might and ought to have shipped the same in and on board of the said ship or vessel in manner and for the purpose aforesaid; yet the defendant, not regarding his said promise, did not nor would safely and securely keep the said goods and chattels at and upon the said wharf, nor ship the same in and on board of the said ship or vessel in manner and for the purpose aforesaid, but on the contrary thereof, he the defendant so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence of the defendant and his servants in that behalf, the said goods and chattels, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff. [*The declaration originally contained four other counts, which now follow as if distinct declarations, no second count on the same transaction being now allowed, and consequently that best adapted to the particular case must be selected.*]

**Declaration for
not shipping the
goods on board
any vessel in a
reasonable time.**

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had caused to be delivered to the defendant certain goods and chattels of the plaintiff, to wit, &c., of great value, to wit, of the value of £—, to be by the defendant safely and securely kept and taken care of, and shipped within a reasonable time then next following in and on board of some ship or vessel about to sail and proceed from [the river Thames aforesaid] to, &c., aforesaid, for certain reasonable reward to the defendant in that behalf, he the defendant then promised the plaintiff safely and securely to keep the said goods and chattels till the same should be so shipped as aforesaid, and to ship the same within a reasonable time then next following in and on board of some ship or vessel about to sail from &c., aforesaid, to &c. aforesaid; and although the defendant then had and received the said goods and chattels for the purpose aforesaid, and although a reasonable time for the defendant to ship the said goods and chattels in and on board of some ship or vessel about to sail from &c., aforesaid, to &c., aforesaid, hath long since elapsed, and although the defendant could and might during that time have shipped the said goods and chattels

wise, a delivery to the mate or some other officer of the ship by which they are to be conveyed, is necessary; 1 Ry. & Moo. 224. Leaving goods at a wharf piled amongst other goods, without any communication with any one there, is not a delivery to the wharfinger; 3 Camp. 414. As to when a party is a gra-

tuitous bailee, and when he may be charged for loss of goods, see *Cairns v. Robins and another*, 8 M. & W. 258.

(s) If the vessel be named, say, "a certain ship or vessel called the —."

(t) 2 New Rep. 458.

as aforesaid, yet the defendant, not regarding his said promise, did not nor would, within such reasonable time as aforesaid, or at any time since, ship the said goods and chattels in and on board of any ship or vessel about to sail from &c., aforesaid, to &c., aforesaid, but wholly neglected so to do; and the defendant so carelessly and negligently conducted himself in that behalf, that by and through the mere carelessness and negligence of the defendant, the said goods and chattels, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff.

AGAINST
WHARFINGERS.

For that whereas the defendant heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had caused to be delivered (u) to the defendant certain goods and chattels of the plaintiff, to wit, &c., of great value, &c.,* and which said goods and chattels were then intended to be shipped for and on account of the plaintiff, to be by the defendant safely and securely kept at and upon the said wharf until the same should be so shipped as aforesaid, for a reasonable wharfage and reward to and for the defendant, he the defendant then promised the plaintiff that he the defendant would safely and securely keep the said goods and chattels at and upon the said wharf until the same should be so shipped as aforesaid. And although the defendant had and received the said goods and chattels, hamper, and its contents aforesaid, for the purpose aforesaid, yet the defendant, not regarding his said promise, did not nor would safely or securely keep the said goods and chattels at or upon the said wharf until the same were so shipped as aforesaid, but on the contrary thereof, he the defendant so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence of the defendant and his servants, the said goods and chattels, being of the value aforesaid, were afterwards, and before the same were so shipped, to wit, on the day and year aforesaid, wholly lost to the plaintiff.

Declaration for
not keeping
safely till the
goods were
shipped.

For that whereas [same as last precedent to the asterisk, and then proceed as follows:] to be by the defendant safely and securely kept for the plaintiff, he the defendant then promised the plaintiff that he the defendant would safely and securely keep the said goods and chattels for the plaintiff as aforesaid.† And although the defendant then had and received the said goods and chattels for the purpose aforesaid, yet the defendant, not regarding his said promise, did not nor would safely and securely keep the said goods and chattels; but on the contrary thereof, he the defendant so carelessly and negligently conducted himself in that behalf, that by and through the mere carelessness and negligence of the defendant the said goods and chattels, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff.

Declaration for
not safely keep-
ing goods gene-
rally.

For that whereas heretofore, to wit, on &c. [same as last count as far as †, and then proceed as follows:] and to re-deliver the same to the plaintiff when he the defendant should be thereto afterwards requested. And although the defendant was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff to re-deliver the said goods and chattels to the plaintiff, yet

Declaration on
a promise safely
to keep goods
and re-deliver
them on re-
quest.

(u) See 1 Bing. Rep. 34.

**AGAINST
WEARFINGERS.**

the defendant, not regarding his said promise, did not nor would, at the said time when he was so requested as aforesaid, or at any time afterwards, redeliver the said goods and chattels, or any of them, or any part thereof, to the plaintiff, but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse. [*Add counts for money had and received, and the account stated, if there be any reason to apprehend that the defendant has received the value of the goods.*]

**XXXII.
AGAINST A
FARRIER.**

Against a farrier
for badly shoe-
ing plaintiff's
horse. (x)

XXXII. AGAINST A FARRIER.

For that whereas the plaintiff heretofore, to wit, on &c. [*day of retainer, or about it,*] at the request of the defendant, retained and employed the defendant (he the defendant then being a farrier) in the way of his said business of a farrier, to shoe a horse of the plaintiff, of great value, to wit, of the value of £—; and in consideration thereof and of certain reasonable reward to the defendant in that behalf, he the defendant then promised the plaintiff to endeavour to shoe the said horse in a skilful, careful, and proper manner; and although the defendant then had and received the said horse for the purpose aforesaid, and shod the same, yet the defendant, not regarding his said promise, did not nor would shoe the said horse in a skilful, careful, and proper manner, but wholly neglected so to do; and on the contrary thereof, the defendant afterwards, to wit, on &c., aforesaid, so unskilfully, carelessly, negligently and improperly shod the said horse, that by and through the unskilful, careless and improper conduct of the defendant in that behalf, the near foot before of the said horse was then pricked and wounded; and the defendant then put and placed too narrow a shoe on the said horse, and thereby and otherwise so improperly shod the said horse, that by means of the said several premises the said horse then became and was lamed and hurt, and so remained and continued for a long time, to wit, from thence hitherto, during all which time the plaintiff thereby lost and was deprived of the use and benefit of his said horse, and also thereby the plaintiff was forced and obliged to and did necessarily lay out and expend a large sum of money, to wit, the sum of £—, in and about endeavouring to heal and cure the said horse, and the said horse was and is by means of the said premises greatly damaged and deteriorated in value.

**XXXIII.
AGAINST CAR-
RIERS BY LAND.**

Against a car-
rier by land for
the loss of
goods. (y)

XXXIII. AGAINST CARRIERS BY LAND.

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was a common carrier of goods and chattels for hire [in and by a certain waggon [*or "coach,"*] from a certain

(x) This action is founded on the implied contract, that every workman, &c. undertaking any work, will perform it properly; 1 Saund. 312, n. 2; 1 Hen. Bla. 158; 7 T. R. 171; 5 T. R. 150; *Brown v. Edgington*, 2 M. & G. 279; see *ante*, 204.

(y) See the older forms, Morg. 131; Pl. Assist. 67, 68, 248, and forms in *Case*, *post*, and the stat. 11 G. 4 and 1 W. 4, c. 68,

and decisions, 1 Chitty's Gen. Prac. 496 to 494; *Owen v. Burnell*, 2 Crom. & Mees. 353; 6 Car. & P. 58.

The action should in general be brought in the name of the consignee of the goods, when they are sent at his risk, as is most usual and not in the name of the consignor; *Dawes v. Peck*, 8 T. R. 330; Bull. N. P. 36; *Godfrey v. Furze*, 3 P. Wms. 185; *Dutton v.*

place] to wit, from — to a certain other place, to wit, to —; (z) and thereupon the plaintiff heretofore, to wit, on &c. [*day of delivery, or about it*], at the request of the defendant, caused to be delivered to the defendant, as such carrier, certain goods and chattels, to wit, &c. [*describe them as in trover (a)*] of the plaintiff, of great value, to wit, of £—, to be taken care of and safely and securely carried and conveyed by the defendant, as such carrier as aforesaid, in and by the said waggon [*or "coach,"*] from &c., aforesaid, to &c., aforesaid [*or merely say, "to &c., aforesaid," omitting the place from whence they were to be carried*], and there, to wit, at &c., aforesaid, to be safely and securely delivered by the defendant for the plaintiff; and in consideration thereof and of certain reward (b) to the defendant in that be-

Solomonson, 3 B. & P. 582; *Wilbraham v. Snow*, 2 Saund. 47; *Cowp.* 295; 3 T. R. 469; *Morg. Prec.* 131. But if the consignee had no property in the goods at the time of delivery to the carrier, the consignor should sue; *id.*; 3 B. & A. 277; *Coates v. Chaplin and another*, 2 G. & D. 552.

As to who are common carriers, and of their liabilities and rights in general, see *Jeremy's Law of Carriers*; 3 Chitty's Com. Law, 369 to 384; *Selw. N. P. tit. Carrier*; Chitty, *jun.* on Contr. 3d ed. index, *Carrier*; and see 1 Chitty's Gen. Prac. 486 to 494; and see stat. 1 W. 4, c. 68, and cases thereon, *id.*

The 1 Will. 4, c. 68, protects a carrier from liability even for gross negligence in respect of silks and the other goods therein enumerated above the value of £10, unless at the time of their delivery to the carrier their value and nature is declared, and an agreement entered into to pay the extra charge for them as provided by sect. 2; *Hinton v. Dibbin and others*, 2 G. & D. 36.

The contract entered into by a booking office keeper, who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier; *Gilbert and another v. Dale*, 1 N. & P. 22. Where a railway act requires notice to be given to the company before any action is brought for any thing done in pursuance of the act, and the company do not act in pursuance of their duty as common carriers, and not by virtue of the act of parliament, no notice of action is requisite; *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749; 7 Dowl. 232, S. C. Where a party brings a parcel to a railway station, knowing at the time that the company only carries to a particular place, and the railway company receives the parcel and books it to another place, *prima facie* they undertake to convey it to that other place; *Muschamp v. L. and P. J. R. Co.* 8 M. & W. 421.

A carrier is not bound to convey goods except on payment of the full price for the carriage according to their value, and if that be not paid it is competent to him to limit his liability by special contract; *Wyld v. Pickford and another*, 8 M. & W. 443, where see special pleas. But it is not necessary to tender the money for the carriage in order to support an action for not carrying; *Pickford and another v. The G. J. R. Co.* 8 M. & W. 372.

The action against a carrier may be either in *assumpsit* or *case*; 5 Mod. 92; 2 Salk. 440. The latter form of action is preferable, if there be any doubt as to the defendant's having a partner, because in an action on the *case* the joinder of too many defendants will not prejudice, nor can the defendant plead in abatement the non-joinder of his co-partners, 3 East, 62; 2 Chit. Rep. 1; 3 B. & B. 54; 6 J. B. Moore, 141; 9 Price, 408; but even if the action be in *assumpsit*, the non-joinder of a co-defendant is now no ground for pleading in abatement; 11 Geo. 4 and 1 Will. 4, c. 68, s. 5; see *ante*, vol. I. p. 14, note (r).

With respect to the declaration it does not appear to be necessary to commence with an inducement of the defendant's being a common carrier, or of the nature of the conveyance, but the declaration will suffice if it merely state the delivery to the defendant of the goods, &c. to be carried from, &c. to, &c., and his undertaking to carry accordingly, &c.; 1 Wils. 281; *Bac. Ab. tit. Carrier, A.*; *Com. Dig. Action on Case for Negligence*; *Possi v. Shipton*, 8 A. & E. 974. The declaration may be on an executed consideration, in consideration of plaintiff having delivered the goods; 7 J. B. Moore, 283. If the carrier excepts his liability from loss occasioned by fire or robbery, &c., it must be so stated in the declaration; 3 D. & R. 211; 2 B. & C. 20, S. C. So if the carrier gives a notice that he will not pay any thing for loss of goods which exceed £5 in value, the exception must be set out in the declaration; but if the notice be that he will not pay more than £5 for the loss of any goods, such exception need not be noticed; 3 D. & R. 212; see 6 East 564, 569.

(s) Under an averment that the coach went "from — to —," without the *videlicets* laid as above, a variance in the description of either place was held insufficient; 2 Stark. 385; 5 Taunt. 789. London, in common parlance, means Westminster, &c.; and when no variance on that account, see 1 M. & P. 735. It would suffice to state merely the place to which the goods were to be conveyed.

(a) An exact description is not material; 2 Saund. 74 n.

(b) This is sufficient, without showing what reward; 13 East, 114, n. (a); 2 New Rep. 458; 2 Ld. Raym. 115.

**AGAINST
CARRIERS BY
LAND.**

half, the defendant, being such carrier as aforesaid, then, to wit, on the day and year aforesaid, promised the plaintiff to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by the said waggon [or "coach,"] from &c. aforesaid, to &c. aforesaid [or "to &c., aforesaid"], and there, to wit, at &c., aforesaid, safely and securely to deliver the same for the plaintiff. And although the defendant, as such carrier as aforesaid, then had and received the said goods and chattels for the purpose aforesaid, yet the defendant, not regarding his duty as such carrier, nor his said promise, hath not taken care of the said goods and chattels, or safely or securely carried or conveyed the same from, &c. aforesaid, to &c., aforesaid [or "to &c., aforesaid"], nor hath there, to wit, at &c., aforesaid, safely or securely delivered the same for the plaintiff; but on the contrary thereof, he the defendant, being such carrier as aforesaid, so carelessly and negligently behaved and conducted himself(c) with respect to the said goods and chattels aforesaid, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and his servants in this behalf, the said goods and chattels, being of the value aforesaid, afterwards, to wit, the day and year aforesaid, became and were wholly lost to the plaintiff.

Declaration for
not carrying
within a reason-
able time.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had caused to be delivered to the defendant certain goods and chattels, to wit &c., of the plaintiff, of great value, to wit, of the value of £——, to be taken care of and safely and securely carried and conveyed by the defendant to &c. aforesaid, and there to be delivered by the defendant for the plaintiff, for certain reward to the defendant in that behalf, he the defendant then promised the plaintiff to take care of the said goods and chattels, and safely and securely to carry and convey the same to &c. aforesaid, and there, to wit, at &c. aforesaid, to deliver the same for the plaintiff in a reasonable time then next following. And although the defendant then had and received the said goods and chattels for the purpose aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, hath long since elapsed, yet the defendant, not regarding his said promise, did not nor would, within such reasonable time as aforesaid, or at any time afterwards, although often requested so to do, safely and securely carry and convey the said goods and chattels to &c. aforesaid, nor there, to wit, at &c. aforesaid, deliver the same for the plaintiff, but hath hitherto wholly neglected and refused so to do, whereby the said goods and chattels, being of the value aforesaid, have been and are wholly lost to the plaintiff. [*Before the Pleading Rules of Hil. Term, 4 W. 4, reg. 5, prohibiting more than one count, it was usual to add a general count for not taking proper care of the goods, as ante, 251.*]

Against a
coach-owner for
not carrying a
passenger. (d)

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was the owner and proprietor of a

(c) This is a sufficient averment to admit of proof of gross negligence; 2 J. B. Moore, 18.

(d) This count is founded on the undertaking implied by the plaintiff's having taken a place, see a form in case, post. Where a

person engaging a place in a stage pays merely the deposit, the proprietor may put in another person if the party be not at the coach at the appointed time, 1 Esp. Rep. 27; but where the whole fare is paid, the seat

certain coach or carriage, going and passing from a certain place, to wit, from — to a certain other place, to wit, to —, (e) for the carriage and conveyance therein of passengers and their luggage for certain reasonable hire and reward. (f) And thereupon heretofore, to wit, on &c., [*the day of journey, or about it,*] in consideration that the plaintiff, at the request of the defendant, would take and engage a place or seat in the coach or carriage of the defendant, to be carried and conveyed therein as a passenger from a certain place, to wit, from — to a certain other place, to wit, to — aforesaid, together with his luggage, to be carried and conveyed by the said coach from the said place called — to the said place called —, at and for certain reasonable hire or reward to be [*or if already paid, omit "to be"*] therefore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff to carry and convey the plaintiff, together with his said luggage, in and by the said coach or carriage, from — aforesaid to — aforesaid. And the plaintiff in fact saith, that although he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, take and engage a place or seat in the said coach or carriage to be carried and conveyed, together with his said luggage, in and by the said coach or carriage, from — aforesaid to — aforesaid. And although the plaintiff, from the time of making the said promise of the defendant, was ready and willing, and on the day and year aforesaid was ready, to wit, at the said place called —, to be carried and conveyed, together with his said luggage, in or by the said coach or carriage, from thence to — aforesaid, and the plaintiff then requested the defendant to carry and convey the plaintiff, together with his said luggage, in or by the said coach or carriage, from — aforesaid to — aforesaid; yet the defendant, not regarding his said promise, did not nor would, when he was so requested as aforesaid, or at any other time, carry or convey the plaintiff, together with his said luggage or otherwise, in or by the said coach or carriage from the said place called — to the said place called —, but then wholly neglected and refused so to do, whereby he the plaintiff was then forced and obliged to procure another conveyance to &c. aforesaid, and was thereby also put to great trouble and inconvenience and to great expense of his monies, amounting to a large sum of money, to wit, the sum of £—, and was and is, by means of the premises, otherwise greatly injured and damnified. [*State any special damage which the plaintiff may have sustained.*]

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was the owner and proprietor of a certain coach, going and travelling from a certain place, to wit, a place called — to a certain other place, to wit, a place called —, for the carriage and conveyance of passengers therein for hire and reward to the defendant in that behalf, and thereupon, heretofore, to wit, on &c., in consideration

Against the owner of a stage-coach (by a person who had engaged a place) for taking more passengers than lawful, whereby plaintiff was prevented from proceeding on his journey, and incurred sundry expenses. (g)

must be kept open during the whole of the journey: *Id. ibid.* If no place have been taken, and the defendant refuse to carry the plaintiff or his luggage, having room for that purpose, the declaration should be in case, which action is sustainable; B. N. P. 70; 2 Show. 327; 1 Show. 105; Dyer, 158; 8 Co. 32; 1 Saund. 312, n. (e); 6 T. R. 149;

Ld. Raym. 652, 654. See a form in case, post, for the loss of a parcel which defendant engaged to carry with a passenger.

(e) As to this averment, see ante, 263, note (s).

(f) 2 New Rep. 458.

(g) See 46 Geo. 3, c. 136; 9 Geo. 4, c. 49; 4 Esp. Rep. 269; and post, 267.

AGAINST
CARRIERS BY
LAND.

that the plaintiff, at the request of the defendant, would take and engage a place in the said coach to be carried and conveyed therein from the said place called — to the said place called — at and for certain reasonable reward to be therefore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff to carry and convey the plaintiff in and by the said coach from the said place called — to the said place called —, and not to put or suffer or permit to be put into the said coach more than [six] persons, including the plaintiff, children in lap excepted. And the plaintiff in fact saith, that he, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, did take and engage the said place as an inside passenger in and by the said coach to be carried and conveyed therein from — aforesaid to — aforesaid; and although the plaintiff was then ready and willing to go and proceed as a passenger in and by the said coach from — aforesaid to — aforesaid, and afterwards, to wit, on the day and year aforesaid, paid to the defendant a large sum of money, to wit, the sum of £—, the same being [or part of] a reasonable reward to the defendant for the carriage and conveyance of the plaintiff as aforesaid, (and was then ready and willing to pay him the residue of such reward) whereof the defendant then had notice; yet the defendant, not regarding his said promise, then wrongfully and unjustly put and suffered and permitted to be put more than [six], to wit, seven persons, none thereof being children, into the said coach, contrary to his said promise, and by reason thereof there was not convenient and sufficient room in the inside of the said coach for the plaintiff to be carried and conveyed therein from — aforesaid to — aforesaid, and thereby the plaintiff was hindered and prevented from going and proceeding as such passenger as aforesaid in and by the said coach, from — aforesaid to — aforesaid, and was thereby then forced and obliged to, and did then necessarily pay, lay out, and expend a large sum of money, to wit, the sum of £— in and about his necessary maintenance and disbursements, until he the plaintiff could procure another conveyance from — aforesaid to — aforesaid, and in and about the taking of the said journey from — to — aforesaid.

The like, for
not providing
sufficient room
for plaintiff.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had then taken and engaged an inside place in a certain coach to be conveyed as a passenger therein to — aforesaid, at and for certain reasonable reward theretofore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff that he the defendant would carry and convey the plaintiff in and by the said coach to — aforesaid, and that he the defendant would take due and proper care to provide the plaintiff as such passenger as aforesaid convenient and sufficient room in the inside of the said coach in and during the journey; and although the plaintiff, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, was ready and willing to be carried and conveyed as aforesaid, whereof the defendant then had notice; yet the defendant, not regarding his said promise, did not nor would use due or proper care to provide the plaintiff convenient and sufficient room in the inside of the coach, but then wholly refused and neglected so to do.

For that whereas the defendants, before and at the time of the making of their promise hereinafter next mentioned, were the owners and proprietors of a certain stage coach or carriage, going and passing from a certain place, to wit, from [London], to a certain other place, to wit, to [Liverpool], for the carriage and conveyance thereby of passengers for certain reasonable hire and reward to the defendants in that behalf, and thereupon heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, would take and engage a place and seat in the said coach of the defendants, to be carried and conveyed in and by the said coach from [London] aforesaid to [Liverpool] aforesaid, at and for certain reasonable hire and reward, to wit, the sum of £—— to be therefore paid by the plaintiff to the defendant in that behalf, they the defendants then promised the plaintiff to carry and convey the plaintiff in or by the said coach from [London] aforesaid to [Liverpool] aforesaid, and to use due care, skill and diligence in and about so carrying and conveying him as aforesaid. And the plaintiff in fact saith, that he, confiding in the said promise of the defendants, did afterwards, to wit, on the day and year aforesaid, take and engage a place and seat in the said coach to be carried and conveyed in and by the said coach from [London] aforesaid to [Liverpool] aforesaid, and did then pay to the defendants the sum of £——, the same being a reasonable hire or reward to the defendants for the carriage and conveyance of the plaintiff as aforesaid. And although the plaintiff, confiding in the said promise of the defendants, did afterwards, to wit, on the day and year aforesaid, become and was such passenger in and by the coach to be carried and conveyed in and by the same from [London] aforesaid to [Liverpool] aforesaid, yet the defendants, not regarding their said promise, did not nor would use due and proper care, skill and diligence in and about the carrying and conveying the plaintiff in and by the said coach from [London] aforesaid to [Liverpool] aforesaid, but then wholly neglected and refused so to do; and on the contrary thereof, so carelessly, improperly, negligently and unskil-

AGAINST
CARRIERS BY
LAND.

Against the proprietors of a stage-coach, for negligence and overturning it, whereby the plaintiff's arm was broken. (h)

(h) See other forms, *ante*, 264, 265; Morg. Prec. 131; Pl. Ass. 67, 68, 248; 2 Wentw. 240, 254. See form in case, *post*. Coach-owners liable for accidents occasioned by overloading coach; 46 Geo. 3, c. 136; 9 Geo. 4, c. 49; 4 Esp. Rep. 259. The proprietors of a mail coach are liable for injuries occasioned by the misconduct of their driver; *Peake Rep.* 81. Coach-owners do not insure the persons of their passengers against accidental injuries not attributable to negligence; 2 Campb. 81; 2 Esp. 533; 5 Esp. 273; 2 Esp. 685; 3 Bingh. 321; 11 J. B. Moore, 153, S. C. The breaking down or overturning of the coach is *prima facie* evidence of negligence on the part of the owner; 2 Campb. 79. So where a coach that is overloaded breaks down, the excess in the number of passengers has been held to be conclusive evidence of the accident having arisen from overloading; 4 Esp. 259. As to the law of the road, see 2 D. & R. 255; 5 Esp. 273. The proprietor of a stage coach is answerable for the safety of his passengers till the coach arrives at its usual place of destination, and if they are passing through any place that is dangerous, he is bound to warn them of the

full extent of their danger; 1 Campb. 167. If the driver may adopt either of two courses, one of which is safe, and the other hazardous, and he elects the latter, he will be responsible for damage ensuing thereby; 1 Stark. 422. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made, and also with lights by night; per Best, C. J., 3 Bingh. 321; 11 J. B. Moore, 153, S. C. The coachman is always to blame if he has not exercised the best and soundest judgment on the subject; if he could have exercised a better judgment than he did, the owner is liable; per Ellenborough, C. J., 2 Stark. 29. If a passenger, in consequence of the negligence of the defendant, is placed in such a situation as obliges him to adopt the alternative of leaping from the coach, or remaining at certain peril, and he leaps and is hurt, the defendant is liable; but it must appear that the leaping was a prudent precaution for the purpose of self-preservation; 1 Stark. 493.

**AGAINST
CARRIERS BY
LAND.**

fully drove and managed the said coach, that afterwards, and whilst the said coach was proceeding from [London] aforesaid to [Liverpool] aforesaid, to wit, on the day and year aforesaid, by and through the carelessness, negligence, unskilfulness, misconduct and want of due care by and on the behalf of the defendants the said coach was overturned, by means of which said several premises the right arm (i) of the plaintiff became and was fractured and broken, and the plaintiff was then in other respects greatly hurt, bruised and wounded, and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the plaintiff suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted; (k) and also thereby he the plaintiff was forced and obliged to and did necessarily pay, lay out and expend a large sum of money, to wit, the sum of £100, in and about endeavouring to be cured of the bruises, wounds, sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid.

The like, in a more general form.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, had then taken and engaged a seat and place by a certain other coach to be carried and conveyed thereby to &c. aforesaid, for certain other reasonable hire and reward to the defendants in that behalf, they the defendants then promised the plaintiff that due and proper care should be observed and taken in and about the carrying and conveying the plaintiff as such passenger as aforesaid, to &c. aforesaid. And although the plaintiff, confiding in the said promise of the defendants, afterwards, to wit, on the day and year aforesaid, did become such passenger by the said coach; yet the defendants, not regarding their said promise, did not nor would cause or procure due and proper care to be observed and taken in and about the carrying and conveying the plaintiff as such passenger aforesaid to &c. aforesaid, but wholly neglected so to do; and by reason of the careless and improper conduct of the defendants and their servants in that behalf in and about the driving, conducting and management of the said last-mentioned coach, one of the arms of the plaintiff became and was broken and fractured, and the plaintiff was in other respects greatly hurt, bruised and wounded, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the plaintiff thereby suffered and underwent great pain, torment and agony, and was hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted; and also thereby he the plaintiff was forced and obliged to and did necessarily pay, lay out and expend another large sum of money, to wit, the sum of £100, in and about endeavouring to be cured of the bruises, wounds, sickness, soreness, lameness and disorder aforesaid, so occasioned as aforesaid.

(i) Let this agree generally with the facts.

(k) If any other special damage has risen, here state it.



XXXIV. BY AND AGAINST CARRIERS BY WATER.

XXXIV. By
AND AGAINST
CARRIERS BY
WATER.

Against the captain of a ship, on his bill of lading, for loss of goods. (1)

For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was the master and commander of a certain ship or vessel called the —, then in [the river Thames,] and bound from thence to [Liverpool, in the county of Lancaster]. And thereupon the plaintiff heretofore, to wit, on &c. [*the date of the bill of lading, or about it,*] in the river Thames aforesaid, at the request of the defendant, [*let the following averment agree with the bill of lading,*] caused to be shipped and loaded in and on board of the said ship or vessel divers goods and merchandizes, to wit, —, then in good order and well-conditioned, [*these latter words are to be omitted if not in the bill of lading,*] of great value, to wit, of the value of £—, to be taken care of, and safely and securely carried and conveyed by the defendant as such master and commander as aforesaid, in and on board of the said ship or vessel, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, to be safely and securely delivered in the like good order and well conditioned for the plaintiff, (the dangers of the seas only excepted). (m) And in consideration thereof, and of certain freight and reward to the defendant in that behalf, he the defendant then promised the plaintiff to take due and proper care of, and safely and securely carry and convey and deliver the said goods and merchandizes as aforesaid, (the dangers of the seas only excepted). (n) And although the defendant then had and received the said goods and merchandize, to be carried, conveyed and delivered as aforesaid, and although a reasonable time for the carrying, conveying and delivering of the said goods and merchandize as aforesaid had long since elapsed, and the defendant hath delivered a part [*let this agree with the fact*] of the said goods and merchandize, to wit, — part thereof, for the plaintiff, at [Liverpool] aforesaid; yet the defendant, not regarding his duty in that respect, nor his said promise, did not nor would take care of and safely and securely carry or convey the residue of the said goods and merchandizes so shipped in and on board of the said ship or vessel as aforesaid, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, safely or securely deliver the same for the plaintiff, (although no danger of the seas did prevent him from so doing,) but on the contrary thereof, he the defendant so carelessly and negligently behaved and conducted himself with respect to the said residue of the said goods and merchandize, that by and through the carelessness, negligence and improper conduct of the defendant and his mariners and servants in that behalf, the said residue of the said goods and

(1) See other forms, 2 Wentw. Index; Morg. 131, 134, 136; Plead. Assist. 147; Lil. Ent. 26, and other modern forms, *post*; Carth. 58; Rep. Temp. Hardw. 196; 5 East, 428; 3 B. & A. 277. See note, *ante*, 263. See also 6 J. B. Moore, 158, 415; 7 J. B. Moore, 283. Who to sue under, 3 B. & A. 277; 3 Campb. 320. The action may be brought either against the owner or the master of the ship; Carth. 58; Abbott's Shipping, *per totum*, and Index, tit. "Master and

Owners." If the action be against the owner, the above form will suffice, with very little alteration. In coasting voyages, frequently there is no bill of lading, in which case a part of the description of the contract will be omitted. If there be a charter-party under seal, the action must in general be founded on the deed; 1 New Rep. 104.

(m) This exception depends on the terms of the bill of lading.

(n) *Ibid*.

BY AND
AGAINST
CARRIERS BY
WATER.

The like, more
general.

merchandize, being of great value, to wit, of the value of £—, became and was wholly lost to the plaintiff.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had then caused to be delivered to the defendant certain goods and merchandizes of the plaintiff, to wit, &c. of great value, to wit, of the value of £—, to be taken due and proper care of, and safely and securely carried and conveyed by the defendant, in and on board of a certain ship or vessel, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, to be safely and securely delivered for the plaintiff, for certain freight and reward to the defendant in that behalf, he the defendant then promised the plaintiff to take due and proper care of the said goods and merchandize whilst he had the care and custody thereof for the purpose aforesaid. And although the defendant then had and received the said goods and merchandize for the purpose aforesaid; yet the defendant, not regarding his duty in that behalf, nor his said promise, whilst he had the care and custody of the said goods and merchandize for the purpose aforesaid, took so little and such bad care of the same, that by and through the carelessness, negligence and improper conduct of the defendant in that behalf, the said goods and merchandize, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff.

By the master
of a ship against
a person who
had employed
him to bring
goods, for not
unloading the
same in ten days
after notice of
the arrival,
whereby plain-
tiff lost freight
during another
voyage.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would receive and take in and on board of a certain ship or vessel called —, then in the port of —, and bound to —, a large quantity of goods and chattels, to wit, [100 puncheons of whiskey,] to be carried and conveyed therein by the plaintiff from — aforesaid to — aforesaid, for the defendant, he the defendant then promised the plaintiff that he the defendant would use due and proper care to cause the said goods and chattels to be taken and unladen from and out of the said ship or vessel in ten working days after such notice to him the defendant of the arrival of the ship or vessel, with the said whiskey on board thereof, at — aforesaid. And the plaintiff avers, that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, receive and take in and on board the said ship or vessel the said goods and chattels, and did carry and convey the same in and on board the said ship or vessel from — aforesaid to — aforesaid for the defendant; and the said ship or vessel, with the said goods and chattels on board thereof, afterwards, to wit, on &c. [day of arrival, or about it], did arrive at &c. aforesaid, and although the plaintiff was then and from thence continually afterwards ready and willing, and offered to the defendant to permit and suffer him, and did then require the defendant to take and unload the said goods and chattels from and out of the said ship or vessel in ten working days then next following, and the defendant then had notice of the premises; yet the defendant, well knowing the premises, but not regarding his said promise, did not nor would use due and proper care to cause the said goods and chattels to be taken and unladen from and out of the said ship or vessel in ten working days next following after the notice of the said arrival of the

said ship or vessel, with the said goods and chattels on board thereof as aforesaid, but, on the contrary thereof, he the defendant wrongfully and injuriously delayed, neglected and omitted to use due or proper care to cause the said goods and chattels to be taken and unladen from and out of the said ship or vessel for a great and unreasonable time after the expiration of the said ten working days, to wit, until and upon &c.; whereby the plaintiff, during the time aforesaid, was not only deprived of the use of the said ship or vessel, and of all the profits and emoluments which might and would have accrued therefrom, but was thereby also hindered and prevented from taking and receiving, in and on board of the said ship or vessel, a certain large quantity of [timber,*] which he the plaintiff had agreed to take and receive in and on board of the said ship or vessel at — aforesaid, to be carried and conveyed from — aforesaid to —, for certain reward to be therefore paid to the plaintiff; and thereby the plaintiff hath lost and been deprived of divers great gains and profits which he might and would otherwise have made and acquired from the use of the said ship or vessel.

BY AND
AGAINST
CARRIERS BY
WATER.

For that whereas heretofore, to wit, on &c. in consideration that the plaintiff at the request of the defendant, had received on board of a certain ship or vessel, to wit, at — aforesaid, a certain large quantity of goods and chattels, to wit, [100 puncheons of whiskey,] to be carried and conveyed therein by the plaintiff to —, for the defendant, he the defendant then promised the plaintiff that he the defendant would use due and proper measures to cause the said goods and chattels to be taken and unladen from and out of the said ship or vessel within a reasonable time next after he the defendant should have had notice of the arrival of the said ship or vessel, with the said goods and chattels on board thereof, at &c. aforesaid, and that the said goods and chattels were ready to be delivered to him from on board of the said ship or vessel; and although the plaintiff, confiding in the said promise of the defendant, to wit, on &c. aforesaid, did carry and convey the said goods and chattels to — aforesaid for the defendant; and although the defendant afterwards, to wit, on &c. aforesaid, had notice of the arrival of the said ship or vessel, with the said goods and chattels on board thereof, at &c. aforesaid, and that the same goods and chattels were ready to be delivered to him from on board of the said ship or vessel; and although a reasonable time since the defendant had notice as last aforesaid for him to cause the said goods and chattels to be taken and unladen from and out of the said ship or vessel hath long since elapsed; and the plaintiff was during all that time ready and willing to deliver the said goods and chattels to the defendant, whereof the defendant during that time had notice; yet the defendant, well knowing the premises, but not regarding his said promise, did not nor would, within such reasonable time as aforesaid, use due or proper means to cause the said goods and chattels to be taken or unladen from and out of the said ship or vessel, but, on the contrary thereof, he the defendant wrongfully and injuriously delayed and neglected and omitted so to do, for a great and unreasonable length of time, to wit, until &c., whereby the plaintiff was during all that time aforesaid not only deprived of the use of the said ship or vessel, and of all the profits and emoluments which might and would otherwise have accrued therefrom, but was

The like, for not
unloading with-
in a reasonable
time.

BY AND
AGAINST
CARRIERS BY
WATER.

thereby also hindered and prevented from taking and receiving in and on board of the said ship or vessel a large quantity of timber, [*as in the last precedent from the asterisk * to the end.*—*Quere, as to a count for demurrage, for use of ship, and account stated.*]

On a promise that if plaintiff would take on board his vessel certain masts of the defendant, and convey them from Oporto to London, defendant undertook that they might be lawfully imported, when they could not.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff at the request of the defendant would take and receive on board a certain ship or vessel of the plaintiff, in parts beyond the seas, to wit, at —, divers, to wit, [six masts,] and carry and convey the same in and on board of the said ship or vessel from — aforesaid to —, for the defendant, for freight and reward to the plaintiff in that behalf, he the defendant then promised the plaintiff that the said [masts] might be lawfully imported from — aforesaid to Great Britain, and that he the defendant would clear the same from the said ship or vessel within a reasonable time next after the arrival of the said ship or vessel at London aforesaid; and the plaintiff in fact saith, that he, confiding in the said promise of the defendant, did afterwards, to wit, on &c. aforesaid, take and receive the said [masts] on board the said ship or vessel, and carried and conveyed the same from — aforesaid to London aforesaid, and on the terms aforesaid; and the said ship or vessel, with the said masts on board thereof, afterwards, to wit, on the day and year aforesaid, arrived at London aforesaid, and the plaintiff was then ready and willing to deliver the same to the defendant, whereof he then had notice; yet defendant, not regarding his said promise, did not nor would take or clear the said masts from the said ship or vessel within a reasonable time next after the arrival of the said ship or vessel at London aforesaid, but wholly neglected and refused so to do for a great and unreasonable length of time, to wit, from &c. until the — day of —, during all which time the plaintiff lost and was deprived of the use of the said ship or vessel, and all the profits and advantages which he might and otherwise would have derived and acquired from the use of the said ship or vessel. And the plaintiff further saith, that the defendant further disregarding his said promise then deceived and defrauded the plaintiff in this, to wit, that the said masts could not be legally imported from — aforesaid to Great Britain aforesaid, and by reason thereof, after the arrival of the said ship or vessel with the said masts on board thereof at — aforesaid, to wit, on &c. the said ship or vessel and the said masts became and were liable to be seized as forfeited to our said lady the queen, and being so liable, the same were thereupon then lawfully seized (o) as being so forfeited as aforesaid; and the said ship or vessel was by reason thereof kept and detained from the plaintiff for a long time, to wit, until the — day of —, during all which time the plaintiff lost and was deprived of the use of the ship or vessel, and of all the profits, gains and advantages, which he might and would have derived and acquired therefrom; and also by reason thereof, he the said plaintiff, in order to regain possession of his said ship or vessel, afterwards, to wit, on the — day of —, was forced and obliged to pay, and did pay, a large sum of money, to wit the sum of £ —; and also, by

(o) As to this averment, see 7 T. R. 171.

reason of the premises, the plaintiff otherwise sustained great trouble and expense, to wit, an expense of £— in and about endeavouring to regain the possession of his said ship or vessel.

BY AND
AGAINST
CARRIERS BY
WATER.

XXXV. AGAINST ATTORNIES.

For that whereas heretofore, to wit, on &c., [*day of retainer, or about it,*] in consideration that the plaintiff, at the request of the defendant, had then

XXXV.
AGAINST
ATTORNIES.

Against an attorney for negligently conducting a cause to trial without proper evidence. (p)

(p) See other forms, 2 Wentw. 290 to 307; also for forms against other agents, *ante*, 252 to 259. For the laws relating to the liabilities of attornies, see Tidd, 9th edit. 85, &c.; and the more recent decisions, 2 Chit. Gen. Prac. 32 to 35; Selw. N. P. 10th edit, 169; and see a form against an attorney for not instructing counsel to defend an action, 3 B. & Ad. 350; and for suffering judgment by default, 7 Bing. 413.

In ordinary cases, if an attorney be deficient in skill or care, by which a loss arises to his client, he is liable to a special action of assumpsit, or action on the case for damages; 2 Wils. 325; 4 Burr. 2061; 1 Saund. 312, n. 2; 8 J. B. Moore, 340; 1 Bing. 347, S. C.; Tidd, 9th edit. 85. As for neglecting to have a material witness in Court, whereby plaintiff was nonsuited, 4 B. & Ald. 202; for neglecting to charge a defendant (a prisoner) in execution, whereby the defendant was superseded, or for not declaring in due time, 2 Wils. 325; 4 Burr. 2061; or for not entering and docketing a judgment in due time, 1 Stra. 639; Sugd. Vend. & P. 311; and an attorney employed to invest money on a copyhold security is liable, if the security be invalid and insufficient, 4 J. B. Moore, 508; and an attorney, relying on a mere partial extract of a will, where his client advanced money on it, is liable, if the client did not take the responsibility on himself; 3 Stark. 154; 1 D. & R. C. N. P. 30, S. C. And a jury may find an attorney guilty of negligence, if he omit to notice conveyances and deeds in laying an abstract before a conveyancer, and instead of leaving the whole case to counsel, choose to draw his own conclusions, which are incorrect; 3 B. & Cres. 799; 5 D. & R. 587, S. C.

But an attorney is not liable, unless for gross negligence or ignorance, and if he acted to the best of his skill, and with a *bona fide* and moderate degree of attention, he would not be liable; 2 Wils. 325; 4 Burr. 2060; 3 B. & Cres. 738, 742; 5 D. & R. 635, 638, S. C.; 1 Ry. & Moo. 317; 2 C. & P. 113, S. C. Therefore he is not liable for a mistake in a nice point of practice, arising on the doubtful meaning of a rule of Court; 3 B. & Cres. 738; 5 D. & R. 635, S. C. And where an attorney took the advice of counsel, who advised him certain proofs were unnecessary, whereby for the non-production of them plaintiff was nonsuited, the attorney was held not liable; 6 Bing. 460. He will not be liable to an action for not filing a plea of non-joinder in abatement, when instructed so to do merely for delay; 1 Campb. 176; 2 Salk. 515; nor is he liable for negligence in

conducting a suit against excise officers for a seizure, if it appear that such seizure was lawful; Peake's Rep. 162; and though it is now fully settled, by 1 New Rep. 214, that the grant or assignment of an annuity is void, unless the trusts in the annuity deeds are stated in the memorial, yet the omission of such a recital, before this doctrine was established, was not such negligence as to render an attorney answerable; 3 Campb. 17, 19. The attorney of a vendor is however liable to be sued for negligence if he suffer his client to execute a conveyance with an *unqualified* covenant for good title, instead of one qualified only against his own acts; *Stannard v. Ullithorne*, 10 Bing. 491.

An attorney retained to do a particular act, and also directed to do the needful, is authorized to take such steps as have immediate relation to the act for which he is specially retained; 4 Esp. 75.

An attorney, in the exercise of his general authority, may defend, but not institute, a suit; 3 Meriv. 12.

The question of negligence is for the opinion of a jury; 4 B. & A. 202. If diligence would have been ineffectual, the defendant must prove it; 2 Chit. Rep. 311; 7 Bing. 413.

As to the liability of attornies, &c. without reward, see 5 T. R. 143; 7 T. R. 171; 1 H. Bla. 158.

The court will, in some instances, order an attorney to pay costs to his own client for neglect (Say. Rep. 50, 172; 3 Taunt. 484; Tidd, 9th edit. 85, 86), or to the opposite party for vexatious and improper conduct; 2 Burr. 654; *Hullock on Costs*, 482, &c.; 4 T. R. 371 b; 3 Taunt. 492; 1 Chit. Rep. 44, 80; Tidd, 9th ed. 86; 4 Taunt. 191. It is not usual, however, for the Court to interfere in a summary way for a mere breach of promise, where there is nothing criminal, (2 Wils. 371,) or on account of negligence or unskilfulness, (4 Burr. 2060; 2 Bla. Rep. 780,) except it be very gross, (Say. 50, 169,) or for the misconduct of an attorney independent of his profession, (Tidd, 86.) As to when Court will in a summary way compel an attorney to execute his trust, 4 B. & A. 47; 2 Chit. Rep. 68; 1 Bing. 91; 7 J. B. Moore, 424; and see further, Tidd, 9th edit. 87.

Declaration.—The plaintiff may frame his action in assumpsit or case for the breach of duty; see *ante*, vol. i. In some cases the latter form of action would be most preferable; and see forms in Case, *post*. To take the case out of the statute of limitations, it seems, according to the case in 5 Bar. & Cres. 259; 8 D. & R. 14, S. C., immaterial whether the plaintiff declares in assumpsit or case, for the

AGAINST
ATTORNEYS.

retained (q) and employed the defendant as then being an attorney of the Court of our said lady the queen before the queen herself, (r) to prosecute and conduct a certain action of [trover] in the same Court, by and at the suit of the plaintiff, against one E. F. for a certain supposed cause of action, to wit, for [taking away and converting to his own use certain goods and chattels claimed by him the plaintiff to be his own proper goods and chattels,] for reasonable fees and reward (s) to be therefore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff to prosecute and conduct the said action in a proper, skilful and diligent manner, [or the implied contract may be laid to have been "to use due and proper care in and about his prosecuting and conducting the said action for the plaintiff;" or thus, "to observe and fulfil his duty as such attorney in and about his prosecuting and conducting the said action for the plaintiff." In either of the latter cases the general breach must correspond with the promise.] Nevertheless the defendant, not regarding his said promise, did not nor would prosecute or conduct the said action in a proper, skilful or diligent manner; but on the contrary thereof, prosecuted and conducted the same

breach of promise or breach of duty arises when the defendant is guilty of the misconduct or negligence, and it is perfectly immaterial when the consequences of such misconduct are discovered; and see 3 B. & Ald. 626. The cases in 4 J. B. Moore, 508, 532; 2 B. & B. 73, S. C.; 4 Esp. 18, 20; 16 East, 215, are somewhat to the contrary, but the above case may be considered as maintaining the most correct doctrine.

Though usual, it is not necessary nor advisable to allege that the party against whom the action was depending, was indebted, &c. and if the plaintiff, though unnecessarily, set out the former proceedings in which the defendant was retained, he must state them with accuracy; Peake's Rep. 119; what a variance, see 2 Esp. Rep. 726, 727; Peake's Rep. 119.

The declaration may be without any inducement, and may commence with the statement of the defendant's retainer, without stating any consideration; 2 Chit. Rep. 311; 5 T. R. 143; Peake's Rep. 237; 4 J. B. Moore, 532. It is not necessary to show of what Court the defendant was an attorney, Peake's Rep. 237; and if the plaintiff does state it, he must prove it; 2 Chit. 311. It is best merely to state that plaintiff retained defendant as an attorney, as above.

It is in general proper, at least in one count, to declare generally on the duty; Rep. temp. Hardw. 309. In some cases it is advisable to state the particular act, which it was the duty of the defendant to perform, and which allegation may be introduced in the following way, "and although it was the duty of the said C. D., under and by virtue of his said retainer and his said promise and undertaking, to &c." (stating the particular duty), and then proceed, "Nevertheless &c."

As to the statement of the consideration for the retainer, see *infra*.

Where the proceedings in a former action form the groundwork of the present one, such proceedings must be produced, though all the papers are in the hands of the defendant, who has had notice to produce them; 1 Esp. Rep.

399.

(q) This is sufficient without stating a consideration, the defendant being stated to have been retained as an attorney; 2 Chit. Rep. 311; 5 T. R. 143. In a case, where a declaration in assumpsit alleged that in consideration the plaintiff would retain and employ defendants to lay out a sum of money in the purchase of an annuity, they undertook to do their duty in the premises; that plaintiff did retain and employ them, but defendants did not do their duty in the premises, but on the contrary took insufficient security for the payment of the annuity, whereby plaintiff lost the money, it was held, on motion in arrest of judgment, that the count was bad, inasmuch as that it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character, so as to make them responsible for taking a bad security, although not guilty of negligence or dishonesty; 4 Bar. & Cres. 345; 6 D. & R. 438, S. C. Other counts in the same declaration alleged that the defendants at the time when they lent the money, knew that the security was insufficient, but did not allege that the plaintiff had sustained any damage—*semble*, on that ground those counts were held insufficient, *id.* In a prior case, in 2 Bing. 464; 10 J. B. Moore, 183, S. C. a count, stating that the plaintiff had retained defendant, at his request, to lay out 700*l.* in the purchase of an annuity, that defendant promised to lay it out securely, that plaintiff delivered the money to him for that purpose, and that defendant laid it out insecurely; it was held, after verdict, that the consideration for the defendant's promise was sufficiently stated.

(r) This need not be stated, Peake's Rep. 237; if it be stated it must be proved, 2 Chit. Rep. 311; though defendant plead as attorney of the Court, *id.*; and a bill for business done is not evidence that the party was an attorney of that Court; Peake's Rep. 236; 4 T. R. 366.

(s) See *supra*, note (q).

action to trial in so improper, unskilful and negligent a manner, [to wit, in not having a certain instrument before then prepared by the defendant, and purporting to be a sale and assignment of the said goods and chattels by the said E. F. to the plaintiff, stamped according to law, so that the same might have been given in evidence on the said trial of the said action,] that the plaintiff, by the said neglect and default of the defendant in that behalf, was hindered and prevented from giving the same instrument in evidence upon the trial of the said cause, and by reason thereof he the said plaintiff was afterwards, to wit, on &c. [*day of nonsuit, or about it,*] compelled to suffer himself to be nonsuited in the said action, whereby he was not only hindered and prevented from recovering his damages from the said E. F. by reason of his taking away and converting the said goods and chattels as aforesaid, but hath also been forced and obliged to pay, and hath paid to the said E. F. a large sum of money, to wit, the sum of £—— for his costs and charges in and about his defence of the said action; and hath also paid to the defendant another large sum of money, to wit, the sum of £—— for his costs and charges for the prosecution and conduct of the said action.

For that whereas heretofore, to wit, on &c. [*day of retainer, or about it,*] in consideration that the plaintiff, at the request of the defendant, had then retained and employed the defendant as an attorney of the Court of our lady the queen before the queen herself, [*or if in the Common Pleas, instead of the words "before the queen herself," say "of the bench,"*] to prosecute, conduct and manage a certain action in the said Court, by and at the suit of the plaintiff, against one E. F. for the recovery of a certain sum of money, to wit, the sum of £—— [*state enough*] then alleged and claimed by the plaintiff to be due and owing to him from the said E. F. [*or if not for a debt but for damages, say "for the recovery of certain damages, amounting, to wit, to the sum of £—— [state enough]*] then alleged and claimed by the plaintiff to have been sustained by him by reason of certain acts and wrongs before then done and committed by the said E. F. to the plaintiff's damage,"] for fees and reward to the defendant in that behalf, (u) he the defendant then promised the plaintiff to prosecute, conduct and manage the said action with due and proper care, skill and diligence; yet the defendant, not regarding his said promise, did not nor would prosecute, conduct or manage the said action with due and proper care, skill and diligence; and, on the contrary, by reason of the defendant's conducting and managing the said action in a careless, unskilful, undue and improper manner, and for the want of due and proper care, skill and diligence in that behalf, the said action afterwards, to wit, on the day and year aforesaid, became and was rendered wholly abortive and of no use or avail to the plaintiff, and the plaintiff thereupon and thereby then was forced and obliged to be and he then was nonsuited [*or if a verdict found against him or otherwise, state the fact shortly accordingly,*] whereby the plaintiff was and hath been hitherto not only hindered and prevented from recovering his said debt [*or "damages"*] from the said E. F., but is likely to lose the same, and also hath been forced and obliged to incur and pay and hath incurred and paid to the said E. F. a large sum, to wit, the sum of £—— [*state enough*] for his costs and

General count
against an at-
torney for im-
properly con-
ducting an ac-
tion, whereby
plaintiff did not
recover in it.

(u) See 4 B. & C. 345; 6 D. & R. 438, S. C.; ante, 274, note (1).

AGAINST
ATTORNEYS.

charges in and about his defence to the said action, and hath also incurred and paid to the defendant another large sum, to wit, the sum of £——, for the plaintiff's costs and charges in and about the prosecuting and conducting the said action.

Against an attorney for not obtaining judgment as soon as he ought to have done. (x)

For that whereas heretofore, to wit, on &c. [*day of retainer, or about it,*] in consideration that the plaintiff, at the request of the defendant, would retain and employ the defendant as an attorney of the Court of our said lady the queen, before the queen herself, [*or if in C. P., instead of the words "before the queen herself," say "of the bench,"*] to prosecute and conduct an action in the same Court by and at the suit of the plaintiff against one E. F. for the recovery of a large sum of money, which he the plaintiff then claimed to be due and owing to him (y) from the said E. F. for certain reasonable fees and reward (z) to be therefore paid by the plaintiff to the defendant, he the defendant then promised the plaintiff to prosecute and conduct the said action in a proper, skilful and diligent manner; and although the plaintiff, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, retain and employ the defendant as such attorney as aforesaid to prosecute and conduct the said action on the terms aforesaid; and the defendant then and there accepted the said retainer and employment, and under and by virtue thereof afterwards, to wit, on the —— day of ——, A. D. ——, as the attorney of and for the plaintiff, commenced an action for the recovery of the said sum of money at the suit of the plaintiff against the said E. F. in the said Court, and although the defendant could and might, in case he had prosecuted the said action with due diligence and despatch, have obtained final judgment there for the plaintiff, heretofore, to wit, on the —— day &c.; yet the defendant, well knowing the premises, but not regarding his duty as such attorney nor his said promise, did not nor would (although often requested so to do), prosecute the said action with due diligence and despatch, but on the contrary thereof, he the defendant so carelessly, negligently and improperly behaved and conducted himself in and about the prosecution of the said action, that by and through the carelessness, negligence, delay and improper conduct of the defendant in that behalf, the defendant did not obtain final judgment in the said action for the plaintiff until after the said day and year last aforesaid, to wit, until on the &c., whereby the plaintiff was greatly delayed, prejudiced and injured, and hath lost and been deprived of the means and opportunity of recovering the said sum of money.

Against an attorney for a defendant for not putting in bail, whereby sheriff was fixed, and the now plaintiff was obliged to pay debt and costs. (a)

For that whereas, before and at the time of the making of the promise of the defendant hereinafter next mentioned, a certain action had been commenced and was depending in the Court of our said lady the queen of the bench, [*or if in Q. B. instead of the words "of the bench," say "before the queen herself,"*] at Westminster, by and at the suit of one E. F. against the plaintiff, and the plaintiff had been and was arrested by the sheriff of the county of ——, in the said action, under and by virtue of a certain writ of our said lady the queen, called a *capias*. And thereupon heretofore, to wit,

(x) See note, *ante*, 273, 274.

(y) See the propriety of this allegation, instead of a positive averment of the debt being due, *Peake's Rep.* 119.

(z) See note, *ante*, 274, note (q).

(a) See *ante*, 273, note (p). This form is retained, as it may assist in framing other declarations.

on &c. [*day of retainer*], in consideration that the plaintiff, at the request of the defendant, would retain and employ the defendant, as his attorney, to defend the said action (b) for the now plaintiff, for certain reasonable fees and reward (c) to be therefore paid by the now plaintiff to the now defendant, he the now defendant then promised the now plaintiff to perform his duty as such attorney for the now plaintiff in and about the defence of the said action. And the now plaintiff in fact saith, that he, confiding in the said promise of the now defendant, did afterwards, to wit, on &c., last aforesaid, retain and employ the now defendant as his attorney, to defend the said action for the now plaintiff, for reasonable fees and reward to be therefore paid to the now defendant; and although afterwards, to wit, on &c., according to the course and practice of the said Court, it became and was the duty of the now defendant, as such attorney as aforesaid, to put in bail in due time for the now defendant in the said action, with the [prothonotaries] of the said Court, yet the now defendant, not regarding his said duty in that behalf, nor his said promise, did not nor would, according to the course and practice of the said Court, in due time put in bail for the defendant in the said action with one of the [prothonotaries] of the said Court, but wrongfully and injuriously wholly neglected so to do; by means whereof such proceedings were thereupon had, that afterwards, to wit, on &c., the said sheriff of — was called upon, and forced and obliged to pay to the said E. F. a certain sum of money, to wit, the sum of £—, as and for the amount of the debt and costs of the said action, and also by means of the premises, the now plaintiff afterwards, to wit, on the &c., last aforesaid, was forced and obliged to pay, and did then pay to the said sheriff of [Middlesex] the said sum of £—, in order to prevent proceedings being had by and on behalf of the said sheriff, upon a certain bail-bond before then made and given by the now plaintiff, with two other persons as his sureties, to the said sheriff, upon the said arrest; and also by reason of the said neglect and default of the now defendant he the now plaintiff was put to great costs and charges, amounting to a large sum of money, to wit, the sum of £—, in and about the endeavouring to resist and avoid the payment of the said sum of £—; and also thereby he the now plaintiff was deprived of the means and opportunity of preventing the payment of the supposed debt claimed to be recovered in the said action, and also of the means and opportunity of recovering the costs of his defence of the said action, amounting to a large sum of money, to wit, to the sum of £—, and hath been and is, by means of the premises, otherwise greatly injured and damnified.

For that whereas, at the time of the making of the promise of the defendant hereinafter next mentioned, a certain action had been commenced and prosecuted, and was then depending, by and at the suit of one E. F. against the now plaintiff, in the Court of our said lady the queen of the bench [*or if in Q. B. instead of the words "of the bench," say "before the queen herself,"*] at Westminster, in the county of Middlesex, for the recovery of a certain sum of money, to wit, the sum of £—, at the time of the said promise of the now defendant hereinafter next mentioned, claimed by the said E. F. to be due and owing to him from the now plaintiff. And there-

Against an attorney, for not putting in a sufficient plea to an action which he defended for plaintiff.

(b) If the retainer was only to put in bail, then state it so accordingly.

(c) See *ante*, 274, note (q).

AGAINST
ATTORNEYS.

upon heretofore, to wit, on &c. [*day of retainer*], in consideration that the now plaintiff, at the request of the now defendant, had then retained and employed the defendant (he then acting as attorney of the said Court), as such attorney, to defend the said action for the now plaintiff; he the now defendant then promised the now plaintiff to use due and proper care and diligence in and about defending the said action for the now plaintiff; and although such proceedings were thereupon had in the said action, that afterwards, to wit, on &c., it became and was the duty of the now defendant, under and by virtue of his said retainer and his said promise, upon using due and proper care and diligence in that behalf, to deliver (d) a proper and sufficient plea to a certain declaration before then delivered in the said action on behalf of the said E. F., nevertheless the now defendant, not regarding his said promise, did not nor would, when it was his duty so to do as aforesaid, deliver a proper or sufficient plea to the said declaration, but on the contrary thereof wholly omitted and neglected so to do, and by reason thereof, and by and through the want of the now defendant's using due and proper care and diligence in that behalf, afterwards, to wit, on &c., judgment by default was signed in the said action against the now plaintiff, and such further proceedings were then had in the said action, that afterwards, to wit, on &c. [*day of signing judgment*], it was considered and adjudged in and by the said Court in the said action, that the said E. F. should recover against the now plaintiff a large sum of money, to wit, the sum of £—; and the now plaintiff was afterwards, to wit, on the day and year last aforesaid, forced and obliged to pay and did then pay to the said E. F. the said sum of money so recovered by him as aforesaid, and also by means of the premises, he the now plaintiff was put to divers costs and charges in and about his endeavouring to defend the said action, amounting in the whole to a large sum of money, to wit, the sum of £—, and hath lost and been deprived of the means of recovering the same from the said E. F.

Declaration for
not appearing,
and for suffering
judgment.

For that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had then retained and employed the defendant as his attorney to defend a certain action then depending in the Court of &c., by and at the suit of one E. F. against the plaintiff, for the recovery of a certain sum of money, to wit, the sum of £—, then claimed to be due and owing from the now plaintiff to the said E. F. he the now defendant promised the now plaintiff to use due and proper care in endeavouring to defend the said action in a proper, careful and diligent manner, nevertheless the now defendant, not regarding his said promise, did not nor would use due or proper care in endeavouring to defend the said action in a proper, skilful, and diligent manner, but on the contrary thereof, so carelessly and negligently conducted himself in that behalf, that afterwards, to wit, on &c., judgment by default was signed against the now plaintiff in the said action, and by reason thereof he the now plaintiff afterwards, to wit, on &c., was forced and obliged to pay and did then pay to the said E. F. a large sum of money, to wit, the sum of £—.

General count
against an attorney,
for improperly
conducting a de-

For that whereas heretofore, to wit, on &c. [*day of retainer, or about it,*] in consideration that the plaintiff, at the request of the defendant, had then

(d) All pleas are now to be delivered.

retained and employed the defendant as an attorney of the Court of our lady the queen, before the queen herself, [or if in *C. P.* instead of the words "before the queen herself," say "of the bench,"] to defend and manage and conduct the defence to a certain action, before then brought and pending in the said Court, by and at the suit of one E. F. against the now plaintiff, for certain alleged claims of the said E. F. against the now plaintiff, for fees and reward (e) to the now defendant in that behalf, he the now defendant then promised the now plaintiff to conduct and manage the plaintiff's defence to the said action with due and proper care, skill and diligence. Yet the now defendant, not regarding his said promise, did not nor would conduct or manage the plaintiff's defence to the said action with due and proper care, skill and diligence, but on the contrary, by reason of the now defendant's conducting and managing the now plaintiff's defence to the said action, in a careless, unskilful, undue and improper manner, and for want of due and proper care, skill and diligence in that behalf, the said E. F. afterwards, to wit, on &c. [day of judgment, or about it,] obtained a judgment in the said action against the now plaintiff for the sum of £—, [full amount of judgment,] and which he would not otherwise have done, (f) and the now plaintiff was, by means of the premises, deprived of the means of his defence to the said action, and plaintiff hath become liable to pay and been forced and obliged to pay to the said E. F. the amount of the said judgment, and hath also incurred and paid to the defendant another large sum, to wit, the sum of £—, for the plaintiff's costs and charges in and about the defending the said action.

AGAINST
ATTORNIES.
fence to an action, whereby defendant failed therein.

See the form in 2 *Chitty on Pleading*, 278, 5th ed.

a defendant in a former action, to pay him 3s. 6d. per week, *per quod* he was discharged under

Against an attorney for not giving a note to insolvent act.

For that whereas, before and at the time of the making of the promise of the defendant hereinafter next mentioned, to wit, on &c., [day of retainer of defendant, or about it,] the plaintiff had contracted and agreed with certain persons, to wit, E. F. and G. H., for the purchase from them of certain tenements and premises, with the appurtenances, situate in the county of S—, in fee-simple, at and for a large sum of money, to wit, &c., to be therefore paid for the same, which said tenements, with the appurtenances, the said E. F. and G. H. then assumed to have sufficient power to sell and convey to the plaintiff in fee-simple. And thereupon heretofore, to wit, on &c. aforesaid, in consideration that the plaintiff, at the request of the de-

Against an attorney for not ascertaining title, *per quod* plaintiff, having bought an estate, could not re-sell it. (g)

(e) See *ante*, 274, note (q).

(f) If the defence to the former action was doubtful, omit the last allegation.

(g) See 4 M. & Sel. 53. See precedent, 4 J. B. Moore, 532, at the suit of an administrator. In the case of the death of the purchaser it may be sometimes questionable whether the representative or heir should bring the action. If the contract was broken, and a damage accrued to the testator in his life-time, the representative may sue; but this must appear on the declaration; 2 Lev. 26; 1 Vent. 176; 4 J. B. Moore, 532; and the objection as to the party to sue will be sometimes waived by demurrer; 4 J. B. Moore, 532. An attorney employed to ad-

vance his client's money on the security of a legacy given under a will to the borrower, is not justified in relying on a partial extract from the will furnished by his client, unless the latter agree to take the responsibility on himself; 3 Stark. 154; see note (q) *ante*, 273. See a precedent against attorneys, for allowing their client to execute an assignment of a lease, with a general unqualified covenant for title; and in consequence of a life upon which the lease depended having ceased, the title was insufficient, and the purchaser ousted from a moiety, and vendor (the plaintiff) sued on the covenant, and obliged to pay damages and costs; *Stannard v. Ullithorne and others*; 10 Bing. 491.

AGAINST
ATTORNIES.

fendant, had then retained and employed the defendant as an attorney, to ascertain the title of the said E. F. and G. H. to the said tenements, with the appurtenances, and to cause and procure an estate and interest therein in fee-simple, to be duly conveyed by the said E. F. and G. H. to the plaintiff, for reasonable fees and reward (*h*) to the defendant in that behalf, he the defendant then promised the plaintiff to perform and fulfil his duty in the premises; and the plaintiff in fact saith, that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, purchase from the said E. F. and G. H. the said tenements and premises, with the appurtenances, as in fee-simple, and did then pay to the said E. F. and G. H. a large sum of money, to wit, the sum of £—, for the same, and did afterwards, to wit, on the day and year aforesaid, accept and receive of and from the said E. F. and G. H. a conveyance by lease and release of the said tenements, with the appurtenances, as in fee-simple. And although it then became and was the duty of the defendant, under and by virtue of the said retainer, to use due and proper means and endeavours to cause and procure a good and sufficient title to the fee-simple of and in the said tenements and premises with the appurtenances, to be conveyed to the plaintiff; yet the defendant, not regarding his said duty in that behalf, nor his said promise, did not nor would use due or proper means or endeavours to cause or procure a good and sufficient title to the fee-simple of and in the said tenements and premises, with the appurtenances, to be conveyed to the plaintiff, but hath hitherto wholly neglected and refused so to do, and by reason of the neglect and improper conduct of the defendant in that behalf, the plaintiff hath not obtained a good or sufficient title to the said tenements and premises, with the appurtenances, in fee-simple, and thereby hath been hindered and prevented from selling and disposing thereof; and the said tenements and premises, with the appurtenances, by reason of the premises, have become and are of no use or value to the plaintiff.

Against an attorney employed to purchase an annuity, for taking as a security from the grantor of the annuity, an assignment of a lease which contained a clause of re-entry in case of assignment, in consequence of which, and of the lease being assigned to a trustee under the annuity deed, the plaintiff (grantee of the annuity) lost his security. (i)

For that whereas before the making of the promise of the defendant hereinafter mentioned, to wit, on &c. [*day of retainer, or about it,*] one E. F. was willing to grant an annuity or yearly sum of £—, during the term of the natural lives of the plaintiff and one G. H., and the natural life of the survivor of them, and then proposed to charge the same on certain premises then represented by the said E. F. to be held by the said E. F. under and by virtue of a lease and demise thereof theretofore made to the said E. F. by certain persons, to wit, &c., and then proposed to assign the said lease of the said premises as a security for the due payment of the said annuity, and thereupon heretofore, to wit, on the day and year aforesaid, the plaintiff at the request of the defendant retained and employed the defendant to use due and proper care in ascertaining whether the assignment by the said E. F. of the said lease of the said premises would be a good and sufficient security for the payment of the said annuity so proposed to be granted as aforesaid;

(*h*) See *ante*, 274, note (*g*).

(*i*) See a form and law, *M'Clel. & You.* 205, and notes, *ante*, 273, 274. If an attorney undertake to invest money for a party on a copyhold security, the law implies that he will

use due care to endeavour to obtain a sufficient security as well in value as in title; 4 *J. B. Moore*, 308; see 2 *Bing.* 464. What a prospective damage, 4 *M. & Sel.* 53.

and in case the same should appear sufficient, to obtain the proper deed and writings to secure the payment of the said annuity or yearly sum of £——. And in consideration thereof, and of certain reasonable fees and reward (*k*) to the defendant in that behalf, he the defendant then promised the plaintiff to use due and proper care in endeavouring to ascertain whether the assignment of the said lease of the said premises would be a good and sufficient security for the payment to the plaintiff of the said annuity of £——, so proposed to be granted as aforesaid, and to perform and fulfil his duty in that behalf. (*l*) Nevertheless the plaintiff in fact saith, that the defendant, not regarding his duty in that behalf nor his said promise, did not nor would use due and proper care in endeavouring to ascertain whether the assignment of the said lease would be a sufficient security for the due payment to the plaintiff from the said E. F. of the said annuity or yearly sum of £——, so proposed to be granted to the plaintiff as aforesaid, or perform or fulfil his duty in the premises, but wholly neglected and omitted so to do. And further disregarding his duty in that behalf, afterwards, to wit, on &c. falsely and deceitfully asserted and affirmed, (*m*) and caused and procured the plaintiff to believe that the said lease would be a good and sufficient security for the payment to the plaintiff of the said annuity so proposed to be granted to him by the said E. F. as aforesaid. And the plaintiff further saith, that he confiding in the said promise of the defendant and his said representation and assertion, and believing that the said assignment by the said E. F. of the said lease would be a good and sufficient security for the payment of the said annuity so proposed to be granted as aforesaid, afterwards, to wit, on &c. [*day of advance of money, or about it,*] did advance and pay to the said E. F. the sum of £—— for the said annuity or yearly sum of £——; and the defendant then caused to be prepared and executed by the said E. F. and the plaintiff and the said G. H. therein mentioned, a certain indenture for securing the payment of the said annuity, whereby the said E. F. did covenant [*here copy covenant not to assign in the past tense.*] And the plaintiff further saith, that by reason of the said indenture of lease, containing a clause and proviso that the said E. F. should not assign the said term thereby granted, without the license and consent of the lessor in writing, and a certain proviso of re-entry, in case the same should be assigned without such license, and also by reason of the defendant not having obtained the said license, authorising the said assignment, the lease by the said assignment became and was forfeited and void. And the said &c. [*the lessors,*] afterwards, to wit, on &c. on account thereof, commenced a certain action of ejectment in the Court of our said lady the queen, [before

AGAINST
ATTORNIES.

Defendant's
second breach.

Consequent
damages, &c.

Statement of
covenant not to
assign, and
clause of re-
entry.

Action of eject-
ment brought,
&c.

(*k*) See *ante*, 274, note (*g*). The omission of this, on a count framed as above, without stating defendant was retained as an attorney, would be bad, *id.*; 4 Barn. & Cres. 345; 6 D. & R. 438, S.C. But a count stating that the plaintiff had retained the defendant at his request to lay out £700 in the purchase of an annuity; that defendant promised to lay it out *securely*; that plaintiff delivered the money to him for that purpose, and that defendant laid it out *insecurely*, it was held, *after verdict*, that the consideration for the defendant's promise was sufficiently stated; 2 Bingh. 464; 10 J. B. Moore, 183,

S.C. But as the law only *implies* a contract on the part of an attorney to exert and evince *reasonable skill*, and certainly does not imply an engagement *absolutely* that there *shall* be a sufficient security, if the declaration improperly laid the promise *too extensively*, the plaintiff must be nonsuited, or have a verdict against him; *id. ibid.*

(*l*) This appears to be the correct mode of describing the *implied* contract of an attorney in such a case.

(*m*) See 4 Barn. & Cres. 345; 6 D. & R. 438, S.C.

AGAINST
ATTORNEYS.

Costs of eject-
ment, &c.

the queen herself,] for the recovery of the possession of the said tenements, with the appurtenances, and such proceedings were thereupon had, that afterwards, to wit, on &c. the said &c., [*the lessors*,] recovered the possession of the said tenements, whereby and by reason of which said several premises, the plaintiff hath wholly lost and been deprived of the benefit of the said security for the payment of the said annuity or yearly sum of £—, and hath been unable to enter into or distrain in and upon the same premises, so granted by the said E. F. as aforesaid, on the non-payment of the said annuity or yearly sum of £—; and the said annuity hath become and is of no value to him the plaintiff. And also, by reason of the premises, the plaintiff hath incurred great expenses, amounting together to a large sum of money, to wit, the sum of £—, in and about the resisting of the proceedings by and on the part of the said &c. [*the lessors*] for the recovery of the possession of the said tenements, with the appurtenances, and in divers journies and attendances of the plaintiff, and his attorney and agents, incidental thereto.

Against an at-
torney for neg-
ligence in in-
vestigating a
security.

For that whereas, before the making of the promise of the defendant hereinafter next mentioned, to wit, on &c., a certain person, to wit, one H. J. was desirous of obtaining from the plaintiff a loan of a certain sum of money, to wit, the sum of £1000, upon interest, to wit, at and after the rate of 5 per cent. per annum, and then, as a security for the repayment thereof and interest as aforesaid to the plaintiff, proposed to incumber certain lands, tenements and premises, situate in the county of S. And thereupon heretofore, to wit, on &c. aforesaid, the plaintiff at the request of the defendant, retained and employed the defendant as an attorney, for fees and reward to him in that behalf, to use due and proper care in ascertaining the title of the said H. J. to the said lands, tenements and premises, and to take due and proper care that the same should be a sufficient security for the re-payment of the said sum of money and interest. And in consideration thereof, the defendant then promised the plaintiff to use due and proper care and diligence in and about ascertaining the title of the said H. J. to the said lands, tenements and premises, and to take due and proper care that the same should be a sufficient security for the re-payment of the said sum of money and interest. Nevertheless the plaintiff in fact saith, that the defendant, not regarding his duty in that behalf nor his said promise, did not nor would take due and proper care in and about the ascertaining the title of the said H. J. to the said lands, tenements and premises, nor take due and proper care that the same should be a sufficient security for the re-payment of the said sum of £1000 and interest thereon. And the plaintiff further saith, that he, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, did advance and pay to the said H. J. the said sum of £1000, upon the security of certain tenements and premises in the county aforesaid, to wit, the said lands, tenements and premises, as and for a sufficient security in that behalf; and the defendant then, in pursuance of his said retainer, caused to be prepared and executed a certain indenture and certain securities, relating to the supposed estate and interest of the said H. J. in the said lands, tenements and premises, as and for such sufficient security for the re-payment of the said sum of £1000 and

interest as aforesaid. Nevertheless the said supposed title and estate, and interest of the said H. J. in and to the said lands, tenements and premises, and the said indenture and securities, by reason of the negligent and improper conduct of the defendant in the premises, were not, nor are, nor will be, any sufficient security for the repayment of the said sum of £1000 and interest.

AGAINST
ATTORNIES.

See a form of declaration, ante, 254.

Against an attorney employed to settle a debt due to plaintiff for not accounting for monies received.

DECLARATIONS IN DEBT.

I. BEGINNINGS
IN GENERAL.Common com-
mencement in
debt.

I. BEGINNINGS IN GENERAL.

In the Queen's Bench, (a) [or "Common Pleas," or "Exchequer of Pleas."]
On the — day of —, A. D. —. (b)

Middlesex, to wit. (c) A. B. (the plaintiff in this suit,) by E. F. his attorney, [or "in his own proper person,"] complains of C. D., (the defendant in this suit), who has been summoned to answer the said A. B. in an action of debt, (d) and the plaintiff demands of the defendant the sum of £—, (d) which the defendant *owes to* and (e) unjustly detains from him. For that whereas, &c. (f) [See common counts, ante, 37 to 66, and common conclusion, post, 286.]

By a surviving
partner.

In the Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas".]
The — day of —, A. D. —.

— to wit. A. B. (the plaintiff in this suit), who hath survived one C. D., hereinafter mentioned, by E. F. his attorney, [or "in his own proper person,"] complains of G. H. (the defendant in this suit), who has been summoned to answer the plaintiff in an action of debt; and the plaintiff demands of the defendant the sum of £—, which he owes to and unjustly detains from him. For that whereas, &c. [State the debt as ante, 66, and conclude as post, 286.]

(a) The Reg. Gen. Mich. T. 3 Will. 4, reg. 15, directs that every declaration shall be intitled in the proper Court.

(b) This title must be of the *very day* when declaration is delivered; Reg. Gen. Mich. T. 3 Will. 4, reg. 15; Reg. Gen. Hil. T. 4 Will. 4, reg. 1.

(c) The *venue* is to be stated only in the margin, and not in body of declaration; Reg. Gen. Hil. T. 4 Will. 4.

(d) It is *usual* in debt to state in the *commencement* the aggregate of all the sums claimed in the following counts. A mistake, however, in the correct sum, is not demurrable, or otherwise objectionable; 11 East, 62; 1 Saund. 288, n. 1; 1 H. Bla. 251, 547; Vin. Abr. tit. "Miscasting;" 2 Chit. Rep. 234.

(e) Debt is in general to be in the *debet et detinet*; Com. Dig. tit. "Pleader, 2 W. 8; Gilb. on Debt, 359, 399, 400, 401. But in actions by or against executors or administrators, the declaration should in strictness be only in the *detinet*"; Com. Dig. tit. "Pleader," 2 D. 1, 2; 2 W. 8; 1 Saund. 1, 112, note 1, 216; 3 East, 2; Ld. Raym. 698. But if "owes to and" be untechnically inserted by an executor or administrator, it is no ground of demurrer, nor an irregularity; Collett v. Collett, 3 Dowl. 211. Assignees of a bankrupt or insolvent sue in *debet* as well as *detinet*;

1 Tyr. & Gr. 179. In debt for specific goods, the declaration should be in the *detinet* only; Gilb. on Debt, 359, 400, 401. Husband and wife are to be sued in *debet et detinet*; Gilb. 402. The omission of both the *debet* and *detinet* has been considered demurrable; 6 Mod. 306; *sed vide* 11 East, 62.

(f) As to the substance or body of the declaration in debt on simple contract, the Reg. Gen. Trin. T. 1 Will. 4, extends as well to declarations in debt as in *assumpsit*, as regards conciseness in declarations on bills and notes, and *indebitatus* counts for money demands, and the forms there given are to be observed as far as they can be applied to a declaration in debt. The description of all common debts will be the same as in the common counts, ante, 37 to 66.

For the ancient forms, and those in use before the pleading rules of Hil. T. 4 Will. 4, see 2 Chitty on Pleading, 5th edit. 385, 386; 5 Wentw. 145; Aston's Ent. 209; 2 Mall. Ent. 177; Fortescue, 198; Rast. Ent. 176; Gilbert's Action of Debt, per tot; 3 Bar. & Ald. 208; 2 Smith's Rep. 618; and see the old form of count for money borrowed and paid, 2 Chitty on Pleading, 5th edit. 386, 387; Rich. C. P. 118; Morgan, 547; Aston's Ent. 209; 2 Mall. Ent. 177; 5 Wentw. 146.

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] BEGINNINGS IN
GENERAL.
The — day of —, A. D. —.

— to wit. A. B. (the plaintiff in this suit), by E. F. his attorney, [*or* Against a sur-
viving partner. "in his own proper person,"] complains of C. D. (the defendant in this suit), who hath survived one G. H. hereinafter mentioned, and been summoned to answer the plaintiff in an action of debt; and the plaintiff demands of the defendant the sum of £—, which he owes to and unjustly detains from him. For that whereas, &c. [*State the debt as ante*, 67, and *conclude as post*, 287.]

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] By husband and
wife.
The — day of —, A. D. —.

— to wit. A. B. and C. his wife (the plaintiffs in this suit), by E. F. their attorney complain of G. H. (the defendant in this suit), who hath been summoned to answer the plaintiffs in an action of debt; and the plaintiffs demand of the defendant the sum of £—, which he owes to and unjustly detains from them. For that whereas, &c. [*State the debt as ante*, 68, and *conclude as post*, 287.]

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] Against hus-
band and wife.
The — day of —, A. D. —.

— to wit. A. B. (the plaintiff in this suit), by C. D. his attorney, [*or* "in his own proper person,"] complains of E. F. and G. H. his wife (the defendants in this suit), who have been summoned to answer the plaintiff in an action of debt; and the plaintiff demands of the defendants the sum of £—, which they owe to and unjustly detain from him. For that whereas, &c. [*State the debt as ante*, 69, and *conclude as post*, 287.]

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] By an executor
or administrator.
The — day of —, A. D. —.

— to wit. A. B. (the plaintiff in this suit), executor of the last will and testament of one G. H. deceased, [*or* "administrator of all and singular the goods and chattels which were of one G. H. deceased, who died intestate,"] by — his attorney, [*or* "in his own proper person,"] complains of C. D. (the defendant in this suit), who has been summoned to answer the plaintiff in an action of debt; and the plaintiff demands of the defendant the sum of £—, which he unjustly detains from him. For that whereas, &c. [*State the debt as ante*, 73, and *conclude as post*, 287.]

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] Against an ex-
ecutor or ad-
ministrator.
The — day of —, A. D. —.

— to wit. A. B. (the plaintiff in this suit), by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D. (the defendant in this suit), executor of the last will and testament of one G. H. deceased, [*or* "administrator of all and singular the goods and chattels, rights and credits, which were of one G. H. deceased, who died intestate,"] who has been summoned to answer the plaintiff in an action of debt; and the plaintiff demands of the defendant the sum of £—, which he unjustly detains from the plaintiff as such executor [*or* "administrator"] as aforesaid. For that whereas, &c. [*State the debt as ante*, 75, and *conclude as post*, 288.]

**BEGINNINGS IN
GENERAL.**

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] The — day of —, A. D. —.

By the assignees of a bankrupt. — to wit. A. B. and C. D. (the plaintiffs in this suit), assignees of the estate and effects of G. H. a bankrupt, according to the form of the statutes in force concerning bankrupts, by E. F. their attorney, [*or* "in their own proper persons,"] complain of K. L. (the defendant in this suit), who has been summoned to answer the plaintiffs in an action of debt; and the plaintiffs demand of the defendant the sum of £—, which he owes to and unjustly detains from them. For that whereas, &c. [*State the debt as ante, 70, and conclude as post, 291.*]

By the assignee of an insolvent debtor.

In the Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas."] The — day of —, A. D. —.

— to wit. A. B. (the plaintiff in this suit), assignee of the estate and effects of G. H. an insolvent debtor, according to the form of the statutes in force for the relief of insolvent debtors in England, by E. F. his attorney, [*or* "in his own proper person,"] complains of C. D. (the defendant in this suit), who has been summoned to answer the plaintiff in an action of debt; and the plaintiff demands of the defendant the sum of £—, which he owes to and unjustly detains from him. For that whereas, &c. [*State the debt as ante, 72, and conclude as post, 291.*]



**II.
CONCLUSIONS
IN GENERAL.**
General conclusion in debt. (k)

Breach.

Conclusion by a surviving partner or other joint contractor.

II. CONCLUSIONS IN GENERAL.

Which said several monies [*or, if there be a special count, "last-mentioned monies"*] were to be respectively paid by the defendant to the plaintiff on request, whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant; yet the defendant hath not paid the said sum above demanded, or any part thereof. To the plaintiff's damage of £—; and thereupon he brings suit, &c.

Which said several monies [*or if there be a special count, "last-mentioned monies"*] were to be respectively paid by the defendant to the plaintiff and the said G. H., since deceased, on request; whereby and by reason of the

(k) As to the conclusion in debt.—The Reg. Gen. Trin. T. 1 Will. 4, do not affect the form of conclusion in debt; but the Reg. Gen. Mich. T. 3 Will. 4, reg. 15, directs that the statement of pledges to prosecute is to be discontinued. In an action of debt, the substance of the claim is a specific sum named in the body of the count, and not damages as in assumpsit, and it is therefore usual to insert some nominal sum (as £10) for damages, unless interest be claimed. But when the plaintiff seeks to recover interest as damages, and there is no count in the declaration for interest as due upon a contract, then it is essential to conclude *ad damnum* a sum suffi-

cient to cover such interest, for otherwise the jury cannot give a verdict for the same; see *Watkins v. Morgan*, 6 Car. & P. 661. In fact, as a general rule it is advisable to insert a sum in the conclusion sufficient to cover the entire debt and interest, and any sum that a jury may possibly give for the detention. But in debt *qui tam* the conclusion should not claim any damage, because until the plaintiff's writ has been issued he has no particular right to the debt, and therefore cannot technically complain of damages for the previous detention of it. See form of conclusion in debt *qui tam*, *ante*, 17.

non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded or any part thereof, To the plaintiff's damage of £——, and thereupon he brings suit, &c.

CONCLUSIONS
IN GENERAL.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the defendant and the said G. H., since deceased, to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant. Yet the defendant and the said G. H., in the life-time of said G. H., did not nor did either of them pay the said sum above demanded, or any part thereof, nor hath the defendant, since the death of the said G. H., paid the same or any part thereof, To the plaintiff's damage of £——, and thereupon he brings suit, &c.

Against a surviving partner,
or other joint
contractor.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the defendant to the said C. on request; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiffs to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded or any part thereof, To the plaintiffs' damage of £——, and thereupon they bring suit, &c.

By husband
and wife.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the said C. to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendants. Yet the defendants have not nor hath either of them paid the said sum above demanded or any part thereof, To the plaintiff's damage of £——, and thereupon he brings suit, &c.

Against hus-
band and wife.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the defendant to the said G. H., since deceased, on request; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiff, as such executor as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded or any part thereof, To the plaintiff's damage, as such executor as aforesaid, of £——, and thereupon he brings suit, &c. [*Profert as ante*, 73.

By an executor.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the defendant to the said G. H., since deceased, on request: And the plaintiff saith, that after the death of the said G. H., to wit, on the —— day of ——, in the year of our Lord

By an adminis-
trator.

CONCLUSIONS IN
GENERAL.

— [date of the grant], administration of all and singular the goods and chattels, rights and credits which were of the said G. H., deceased, at the time of his death, who died intestate by — [take the description from the grant], in due form of law was granted: whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff, as such administrator as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded or any part thereof, To the plaintiff's damage, as administrator as aforesaid, of £—, and thereupon he brings suit, &c. [*Profert as ante*, 77.]

Against an
executor or ad-
ministrator.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the said G. H., now deceased, to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant, as such executor [*or* "administrator"] as aforesaid. Yet the said G. H. in his life-time did not, nor hath the defendant as executor [*or* "administrator"] as aforesaid, since the death of the said G. H., paid the said sum above demanded or any part thereof, To the plaintiff's damage of £—, and thereupon he brings suit, &c.

By an executor
against an
executor or ad-
ministrator.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the said L. M. to the said G. H. on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff, as such executor as aforesaid, to demand and have the same of and from the defendant, as such executor [*or* "administrator"] as aforesaid. Yet the said L. M. in his life-time did not, nor hath the defendant as executor [*or* "administrator"] as aforesaid, since the death of the said L. M., paid the sum above demanded or any part thereof, To the plaintiff's damage, as such executor as aforesaid, of £—, and thereupon he brings suit, &c. [*Profert as ante*, 73.]

By an adminis-
trator against
an executor or
administrator.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the said L. M. to the said G. H. on request: And the plaintiff saith, that after the death of the said G. H., to wit, on the — day of — in the year of our Lord — [date of the grant], administration of all and singular the goods, chattels, rights and credits which were of the said G. H., deceased, at the time of his death, who died intestate by — [take the description from the grant], in due form of law was granted to the plaintiff; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff, as such administrator as aforesaid, to demand and have the same of and from the defendant as such executor [*or* "administrator"] as aforesaid. Yet the said L. M. in his life-time did not, nor hath the defendant as executor [*or* "administrator"] as aforesaid, since the death of the said L. M., paid the said sum above demanded or any part thereof, To the plaintiff's damage,

as such administrator as aforesaid, of £——, and thereupon he brings suit, &c. [*Profert as ante*, 25.]

CONCLUSIONS IN
GENERAL.

Which said several monies [*or if there be a special count*, “last-mentioned monies”] were to be respectively paid by the defendant to the said G. H., since deceased, on request; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiff as such surviving executor as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded or any part thereof, To the plaintiff’s damage of £——, and thereupon he brings suit, &c. [*Profert as ante*, 22.]

By a surviving
executor.

Which said several monies [*or if there be a special count*, “last-mentioned monies”] were to be respectively paid by the defendant to the said G. H., since deceased, on request: And the plaintiff avers, that afterwards and in the life-time of one X. Y., since deceased, and whom the plaintiff hath survived, and after the death of the said G. H., to wit, on the —— day of ——, in the year of our Lord —— [*date of the grant*], administration of all and singular the goods, chattels, rights and credits which were of the said G. H., deceased, at the time of his death, who died intestate by —— [*as in the grant*], in due form of law was granted to the plaintiff and the said X. Y.; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiff, as such surviving administrator as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded or any part thereof, To the plaintiff’s damage, as such surviving administrator as aforesaid, of £——, and thereupon he brings suit, &c. [*Profert as ante*, 25.]

By a surviving
administrator.

Which said several monies [*or if there be a special count*, “last-mentioned monies”] were to be respectively paid by the said G. H. to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant, as such surviving executor [*or “administrator”*] as aforesaid. Yet the said G. H. in his life-time, and the defendant and X. Y. in his life-time, now deceased, and whom the defendant hath survived (which said defendant and X. Y., in the life-time of the said X. Y., were executors of the last will and testament of the said G. H., deceased, [*or “which said defendant and X. Y., in the life-time of the said X. Y., were administrators of all and singular the goods and chattels, rights and credits which were of the said G. H., deceased, at the time of his death, who died intestate, as aforesaid,”*] after the death of the said G. H. and the defendant, surviving executor [*or “administrator”*] as aforesaid, since the death of the said X. Y., have not nor hath any or either of them paid the said sum above demanded, or any part thereof, To the plaintiff’s damage of £——, and thereupon he brings suit, &c.

Against a sur-
viving executor
or administrator.

Which said several monies [*or if there be a special count*, “last-mentioned monies”] were to be respectively paid by the said G. H. to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the said sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant, as such surviving executor [*or “administrator”*] as aforesaid. Yet the said G. H. in his life-time, and the defendant and X. Y. in his life-time, now deceased, and whom the defendant hath survived (which said defendant and X. Y., in the life-time of the said X. Y., were executors of the last will and testament of the said G. H., deceased, [*or “which said defendant and X. Y., in the life-time of the said X. Y., were administrators of all and singular the goods and chattels, rights and credits which were of the said G. H., deceased, at the time of his death, who died intestate, as aforesaid,”*] after the death of the said G. H. and the defendant, surviving executor [*or “administrator”*] as aforesaid, since the death of the said X. Y., have not nor hath any or either of them paid the said sum above demanded, or any part thereof, To the plaintiff’s damage of £——, and thereupon he brings suit, &c.

By husband and

CONCLUSIONS IN
GENERAL.

wife, the wife
being executrix.

monies"] were to be respectively paid by the defendant to the said G. H. on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the said A. B., and C. his wife, as such executrix as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded, or any part thereof, To the damage of the said A. B., and C. his wife, as executrix as aforesaid, of £—, and thereupon they bring suit, &c. [*Profert as ante*, 75.

By husband and
wife, the wife
being adminis-
tratrix.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the defendant to the said G. H., deceased, on request, and the plaintiff avers that after the death of the said G. H. [*and if such be the fact*, "and whilst the said C. was sole and unmarried"], to wit, on the — day of —, in the year of our Lord — [*date of the grant*], administration of all and singular the goods and chattels, rights and credits which were of the said G. H. deceased at the time of his death, who died intestate, by — [*as in the grant*], in due form of law was granted to the said C.; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the said A. B., and C. his wife, as such administratrix as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded, or any part thereof, To the damage of the said A. B., and C. his wife as administratrix as aforesaid, of £—, and thereupon they bring suit, &c. [*Profert as ante*, 78.

Against hus-
band and wife,
the wife being
executrix or ad-
ministratrix.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the said G. H. to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the said C. D., and G. his wife as such executrix [*or "administratrix"*] as aforesaid. Yet the said G. H. in his life-time did not, nor hath the defendants, or either of them, since the death of the said G. H., paid the said sum above demanded, or any part thereof, To the plaintiff's damage of £—, and thereupon he brings suit, &c.

By an adminis-
trator *de bonis*
non.

Which said several monies [*or if there be a special count*, "last-mentioned monies"] were to be respectively paid by the defendant to the said G. H. on request: And the plaintiff avers, that after the respective deaths of the said G. H., P. Q., and R. S., to wit, on the — day of —, in the year of our Lord — [*date of the grant*], administration of all and singular the goods and chattels, rights and credits which were of the said G. H. deceased, at the time of his death, left unadministered by the said P. Q. and R. S., executors as aforesaid, with the will of the said G. H. annexed, by — [*as in the grant*], in due form of law was granted to the plaintiff; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff, as such administrator as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum

II. CONCLUSIONS IN GENERAL.

291

above demanded, or any part thereof, To the plaintiff's damage, as such administrator as aforesaid, of £——, and thereupon he brings suit, &c. CONCLUSIONS IN GENERAL.
[*Proferet as ante*, 78.]

Which said several monies [*or if there be a special count*, “last-mentioned monies”] were to be respectively paid by the said G. H. to the plaintiff on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant, as such administrator as aforesaid. Yet the said G. H. in his life-time, and the said P. Q. and R. S. in their life-time, and the defendant, as such administrator as aforesaid, since their death, have not nor hath either of them paid the sum above demanded, or any part thereof, To the plaintiff's damage of £——, and thereupon he brings suit, &c. Against an administrator *de bonis non*.

Which said several monies [*or if there be a special count*, “last-mentioned monies”] were to be respectively paid by the defendant to the said G. H. on request; whereby and by reason of the non-payment of the said several monies respectively, making together the sum above demanded, an action hath accrued to the plaintiff, as such assignees as aforesaid, to demand and have the same of and from the defendant. Yet the defendant hath not paid the said sum above demanded, or any part thereof, To the plaintiff's damage, as such assignees as aforesaid, of £——, and thereupon they bring suit, &c. By the assignees of a bankrupt or insolvent.

III. COMMON COUNTS IN DEBT.

III. COMMON COUNTS.

N. B.—The whole of the common counts, *ante*, 37 to 66, are applicable to the action of debt as well as *assumpsit*.

For that whereas [*or if a special count precede the common*, “and whereas also”] the defendant on the —— day of ——, in the year of our Lord one thousand eight hundred and forty ——, was indebted to the plaintiff in £——, for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request. Goods sold.

And in £—— for the price and value of work then done, and materials for the same provided by the plaintiff for the defendant at his request. Work and materials.

And in £—— for money then lent by the plaintiff to the defendant at his request. Money lent.

And in £—— for money then paid by the plaintiff for the use of the defendant at his request. Money paid.

And in £—— for money then received by the defendant for the use of the plaintiff. Money received.

And in £—— for interest upon and for the forbearance of money due from the defendant to the plaintiff, and by the plaintiff forborne to defendant, at his request, for a long time then elapsed. Interest.

COMMON COUNTS. And in £—— for money found to be due from the defendant to the plaintiff on an account then stated between them. [*Conclude as ante*, 286.

Account stated.

IV. ON SIMPLE CONTRACTS.

Form of *indebitatus* count in debt for use and occupation (*j*).

IV. COUNTS IN DEBT ON SIMPLE CONTRACTS.

For that whereas the defendant, on &c. was indebted to the plaintiff in £——, for the use and occupation of certain tenements and premises, with the appurtenances, of the plaintiff by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long time then elapsed had, held, used, occupied, possessed, and enjoyed.

Payee against maker of a promissory note. (*k*)

For that whereas the defendant heretofore, to wit, on &c., made his promissory note in writing, and then delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £50, [two] months after the date thereof, which period had elapsed before the commencement of this suit. [*Add a count upon the consideration of the note, and the account stated, and common conclusion, as ante*, 286.

Debt by drawer of a bill against the acceptor.

For that whereas the plaintiff heretofore, to wit, on &c. [*date of bill*], made his bill of exchange in writing, and thereby requested the defendant to pay to the plaintiff the sum of [£100], for value received, [two] months after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then accepted the said bill, and then agreed to pay the amount thereof to the plaintiff, according to the tenor and effect of the said bill and of the said acceptance thereof, but did not pay the amount thereof when due. [*Add a count on the original consideration, an account stated, and common conclusion, as ante*, 286.

By indorsee of a bill against the drawer, on default of payment by the acceptor. (*k*)

For that whereas the defendant, on &c. [*date of bill*], made his certain bill of exchange in writing, and thereby required one E. F., two months after the date thereof, which period had elapsed before the commencement of this suit, to pay to his the defendant's order, the sum of £50, value received; and the defendant then indorsed and delivered the said bill to the plaintiff; and the said E. F. did not pay the said bill although the same was presented to him on the day when it became due; of all which the defendant then had due notice, and then agreed to pay the amount of the said bill to the plaintiff on request. [*Add a count on the consideration of the bill between plaintiff and defendant, and the account stated, and usual conclusion, as ante*, 286.

(*j*) Debt will lie for use and occupation, though there be an express demise, if it be not by deed; *Gibson v. Kirk*, 1 G. & D. 252.

(*k*) The counts on bills of exchange, before set forth as given by the judges, are applicable to debt as well as assumpsit; and where between immediate parties, they may be joined with counts in debt; *Complin v. Taylor*, 4 M. & W. 138; *Clowes v. Williams*, 3 Bing. N. C. 868; 5 Scott, 68, S. C. Debt will lie at the suit of the payee against the maker of a note, or by the drawer of a bill payable to himself, against the acceptor, although the

instrument expresses no consideration either by the words "*value received*" or otherwise; *Hatch v. Traves and Watson v. Kightley*, 3 P. & D. 408; 11 A. & E. 702. So it will lie by the first indorsee against the drawer of a bill payable to his own order; *Stratton v. Hill*, 3 Price, 253; and in all cases by indorsee against his immediate indorser; *Watkins v. Wake*, 7 M. & W. 490. Debt will not lie on a promissory note payable by instalments until the whole has become due; *Rudder v. Price*, 1 Hen. Bl. 647.

For that whereas, before the making of a certain act of parliament, made in the 47th year of the reign of our lord the late King George the Third, intituled [*set out title*], to wit, on &c., the defendant did subscribe a certain sum, to wit, the sum of £——, for and towards the making of the said road in the said act mentioned; and the plaintiff further says, that after the making of the said statute, to wit, on &c., at a certain meeting of the said trustees, then duly holden in pursuance of the said act, by and before upwards of seven of the said trustees, to wit, &c., the major part of the trustees at the meeting (to wit), G. H., &c., did by writing under their respective hands, require the defendant to pay the sum of £——, parcel of the said sum of £——, (the other part thereof, to wit, the sum of £——, having been satisfied,) unto I. K. of Croydon aforesaid, gentleman, their clerk, whom they the said last-mentioned trustees did thereby authorize to receive the same in the parts and proportions following; that is to say, one-half of the said sum on or before the tenth day of May then instant, and the remaining half-part thereof on or before the — day of — then instant, of which said request, order, and direction, the defendant afterwards, to wit, on &c., last aforesaid had notice; and by reason of the premises the defendant then became liable, and ought to have paid to the said I. K. the said sum of £——, in the part and proportion aforesaid. Yet the defendant, not regarding the said statute, hath not, although often requested so to do, as yet paid to the said I. K. the said sum of £——, or any part thereof, in the parts and proportions aforesaid, and at the times aforesaid, or otherwise howsoever, but on the contrary thereof, the said sum of £—— still continues wholly due and owing, and in arrear and unpaid from the defendant, whereby an action, &c.

ON SIMPLE
CONTRACTS.

Against a subscriber on statute for making a road for his subscription. (m)

For that whereas the defendant, heretofore, to wit, on &c., he then being the owner of divers, to wit, two shares in a certain undertaking, mentioned in a certain act of parliament made and passed in the 51st year of the reign of our lord the late King George the Third, intituled, &c. [*setting out title*], that is to say, a certain undertaking for making and maintaining the said railway or tram road, and other works mentioned in the said act of parliament, was indebted to the said company in a large sum of money, to wit, the sum of £100, for divers, to wit, five calls, of the sum of £10 each, upon each of the said shares belonging to the defendant, whereby an action hath accrued to the said company, by virtue of the aforesaid act of parliament, to demand and have of and from the defendant the said sum of £100, above demanded; yet the defendant, though often requested so to do, hath not as yet paid the said sum of £100, above demanded, or any part thereof, to the said company, but he to do this hath hitherto wholly refused, and still doth refuse, to the damage of the said company of £20, and therefore, &c.

For road calls on another statute, giving general form of declaring.

For that whereas before the making of the call of money hereinafter next mentioned, and also before the making of a certain act of parliament, made and passed in the 49th year, &c., intituled, &c. [*set out title*], to wit, on &c.,

For instalment of a subscription towards making, &c. a canal, &c. under a private act of parliament. (n)

(m) This declaration is founded on the 47 Geo. 3, sess. 1, c. 25; see other forms, 7 T. R. 36; and the forms in assumpsit, ante, 44, 45;

13 East, 232.

(n) When to declare in case, 7 T. R. 36.

ON SIMPLE
CONTRACTS.

the defendant, in and by a certain instrument in writing, then signed by him, subscribed and undertook to advance and lend a certain sum, to wit, &c., to make, with other sums of money to be subscribed by divers other persons, the sum of &c., to be applied, in addition to the sum of &c., granted by parliament in the improvement, &c., on the credit of the funds, to be vested in the commissioners by an act of parliament to be obtained for &c. [*here state the purposes of the act*], the said money to be advanced at instalments of 25 per cent., at not less than six months distance from each other, and the first call not to be sooner than six months from the then present time; and whereas the defendant having so subscribed as aforesaid, afterwards, and after the passing of the said statute so made and passed in the year &c., to wit, on &c., certain persons, to wit, &c., then respectively being commissioners for putting in execution the powers and authorities of the said first-mentioned act given and granted, did, by virtue of the powers and directions of the said act, duly make a certain call for the payment of all instalments, viz. one instalment of 20 per cent. upon the sum of &c., so subscribed by the defendant as aforesaid, and the other sums of money subscribed for the purposes in the said act mentioned; and did then duly require the defendant to pay the sum of, &c. (the same being the first instalment of and upon the said sum of, &c. so by him subscribed as aforesaid,) on or before the — day of, &c. to the plaintiff, who at the time of the making of such call, was, and from thence hitherto hath been, and still is, the treasurer to the said commissioners, whereof the defendant then had notice; and he, by reason of the premises, became and was liable to pay to the plaintiff, as such treasurer as aforesaid, the said sum of, &c., being 20 per cent. on the said sum by him subscribed as aforesaid, whereby, &c. *actio accrevit*. [*See another count in 2 Chitty on Pleading, 5th edit. 392.*]

For calls made by Vauxhall Bridge Company, against one of the subscribers to that undertaking, for his proportion of calls. (o)

For that whereas, before and at the time of the making of the several calls of money hereinafter mentioned, to wit, on &c., the defendant had subscribed to advance a large sum of money, to wit, &c., for and towards the making complete and maintaining of a certain bridge called the Vauxhall Bridge, mentioned in a certain act of parliament, made at the parliament of our said lord the king, at a session thereof holden at Westminster in the 40th year of the reign &c., and intituled &c. And whereas in respect of such subscription the defendant became and was one of the proprietors of the said Vauxhall Bridge, and was the owner of and entitled unto divers, to wit, ten shares in the undertaking in the said act mentioned. And thereupon, whilst the defendant was such proprietor, divers members of the committee for the time being of the said company, to wit, &c., duly chosen in that behalf, made, and by virtue of the powers and directions in the said act contained, to wit, on &c., and on divers other days afterwards did, by virtue of the said act, duly make divers, to wit, eight several calls of money for the purposes in the said act mentioned, of and from the said proprietors, he, the defendant, being such subscriber to and proprietor to the said Vauxhall Bridge, not exceeding the sum of £5 for every share of £100 of and in

(o) This form may be found useful in other cases, but in the act relative to Vauxhall Bridge there is a clause giving a more con-

cise form of declaration. See form in *assumpsit, ante*, 44.

the said Vauxhall Bridge, of the sum of &c. for the first call, payable on &c., £5 for the second call, payable on &c. [and so on to the end of the several calls], in respect of each and every share of £100 of which the defendant was a subscriber as aforesaid; and the said Vauxhall company aver, that the proportion of the defendant so called for, in respect of the said twenty shares of the defendant in the said undertaking, amounted to a large sum of money, to wit, &c. Of all which said several premises the defendant afterwards, to wit, on &c., had notice, according to the directions of the said act, whereby, and by force of the said act, the defendant became liable to pay to the said Vauxhall Bridge Company the said sum of, &c., according to the form and effect of the said act; and being so liable, he the defendant, in consideration thereof, afterwards, to wit, on &c. undertook and agreed to pay them the said sum of £—, when he the defendant should be thereunto afterwards requested. [In the original declaration there was a second count, see 2 Chitty on Pleading, 5th edit. 394, but which cannot, since Reg. Gen. Hil. T. 4 W. 4, be added on the same cause of action.]

ON SIMPLE
CONTRACTS.

See a form, 5 Bar. & Adol. 605.

under a navigation act, (34 Geo. 3, c. 85,) against proprietor of tolls to recover salary.

Declaration by
commissioners

V. DEBT ON LEGAL LIABILITIES.

ON AWARDS.

ON AWARDS.

For that whereas certain differences (*p*) having arisen and being depending between the plaintiff and the defendant, (*q*) the plaintiff heretofore, to wit, on &c. [date of deed,] by a certain bond of arbitration, (*r*) bearing

On an award,
where the sub-
mission was by
arbitration
bonds. (*s*)

(*p*) As to the sufficiency of this concise statement, 2 Saunders, 62, note 1, and post, note (*s*).

(*q*) What not a variance in description of parties to the deed, 3 J. B. Moore, 674; 1 B. & B. 360, S. C.; post, note (*s*).

(*r*) As to the statement of the mode of submission, see post, note (*s*).

(*s*) See the forms, post; 7 Wentw. Index, 514; 3 J. B. Moore, 674; and debt on a French award made under an agreement, 4 Tyr. 761; as to awards in general, and the remedies thereon, &c., see Tidd's Prac. 9th edit. 810 to 845; 3 Chit. Com. Law, 637 to 668; Watson on Awards; Caldwell on Arbitrations; Kyd on Awards, and notes, ante, 176, 177. There is an attempt in Chit. Gen. Prac. vol. ii. 73 to 126, to state the practice relative to arbitrations and awards, and the requisites of the latter, and the modes of enforcing payment or other observance which may assist. As to this declaration, and the action on awards in general, see the forms in assumpsit and the notes, ante, 176, and the form and notes in 2 Saund. 61, 62, 127, 128; 1 Saund. 163, 164. In general it is better to declare on the arbitration bond than on the award, per Bayley, J., 7 B. and Cres. 427; 1 Man. & Ryl. 222, S. C., et infra.

As to who may sue on the award, where there are several parties to the submission, see

3 J. B. Moore, 674; 1 B. & B. 350, S. C.; 4 Tyr. 761.

Form of Remedy.—Debt lies on an award for the payment of money, whether the submission be by rule of Court or by deed, or by writing without deed, or by parol; 2 Saund. 62 a, note 6; 1 Sid. 452; 3 B. & Ald. 57; 2 Chit. Gen. Prac. 123, 124. But to maintain debt on the award, it is necessary that the whole of the money thereby directed to be paid be due; and that the cause of action be merely for non-payment of money, and not for the non-performance of any other act; 1 Hen. Bla. 547; 2 Saund. 62, note 6; Lord Raym. 1040. And it was formerly held that debt would not lie against executors or administrators on an award made in the deceased's life-time, unless the submission were under seal, because the deceased might have waged his law; Cro. Eliz. 567, 600; but since 3 & 4 Will. 4, c. 42, has abolished law wager it would be otherwise. When the submission is by deed, with a penalty, and the award is made within the limited time, an action of debt lies upon the deed for the non-performance of the award, and that whether the award be for the payment of money, or the performance of a collateral act; 3 T. R. 529; and debt would lie on such deed for revoking it; 4 Barn. & Cres. 103; 6 D. & R. 113, S. C.

ON AWARDS.

date heretofore, to wit, the day and year aforesaid, became bound to the defendant in a certain penal sum in the said bond mentioned; and the

Where an award for the payment of money is made under *bonds* of submission, the party to whom the money is to be paid may either bring an action upon *the bond* for not performing the award, or have an action of debt for the money, and declare upon the award itself; *Freem. Rep.* 410, 415; 2 *Stra.* 923. It has been said, that when the demand is merely for money due on the award, it is in general preferable to declare on the award as above, than on the bond, in order to avoid the delay and expense of a writ of inquiry, which is necessary when the action is on the bond, and the defendant suffers judgment by default; 6 *East*, 613; *Watson*, 200. But on the other hand, many advantages are gained by declaring on the bond, especially in the proofs; and in the case in 7 *Bar. & Cres.* 427; 1 *Man. & R.* 222, *S. C.*, which decided that in debt on an award, the execution of the submission by all the parties must be proved; *Bayley, J.*, observed, "*I hope this decision will have the effect of inducing parties to declare on the arbitration bond.*" By declaring on the award, the plaintiff takes upon himself the *onus* of proving a mutual submission. By declaring on the bond, he transfers the burthen of proof on the defendant, for it lies on the latter to discharge himself from the penalty by showing a performance of the conditions." Where the submission is by *bond*, and the award is to do some *collateral act*, or the submission has been revoked, debt on the *bond* is the only safe form of remedy.

Where the parties who had submitted disputes to arbitration by mutual bonds by indorsement *under seal*, on the bonds of submission made within the time limited for making the award, agreed that the time should be enlarged to a future day; it was decided that an action of debt on the bond would lie for non-performance of an award made after the original time had expired, but within such enlarged time; for such indorsement operated as a defeazance or further defeazance to the original bond; 3 *D. & R.* 446; 2 *Barn. & Cres.* 179, *S. C.* But if the indorsement had not been under seal, no action could have been maintained on the bond for non-performance of the award; 3 *T. R.* 592, note. The remedy in the latter case would be in debt or *assumpsit* on the award, or *assumpsit* on the agreement; *Watson on Awards*, 202.

Covenant lies on a submission by *deed* for the non-performance of an award, or for the revocation of the deed, if there be a covenant in the deed to perform the award; 1 *D. & R.* 106; 5 *B. & A.* 507, *S. C.*; 5 *East*, 266; 4 *Barn. & Cres.* 103; 6 *D. & R.* 113, *S. C.* On a judgment by default in covenant for the non-performance of an award, the Court will refer it to the master to compute what is due for principal and interest on the award; *Tidd*, 9th edit. 571.

As to when *assumpsit* lies, see *ante*, 176, when matters are referred to arbitration without bond, and the arbitrators award a certain sum to be due, it may be recovered under a

count on an *insimul computassent*; 1 *Exp. Rep.* 194, *sed vide id.* 377. A sum awarded to be due upon a *parol* submission may be recovered under a count for the original claim, using the award as settling the amount of the claim; *Allen v. Milner*, 2 *Tyrw.* 113.

So in *covenant* on a lease, an award is good evidence of the quantum of damages; *Whitehead v. Tattersall*, 1 *Adol. & El.* 491.

Form of Declaration.—When the submission was by *bonds*, and the award is merely to pay money, the plaintiff may either declare on the defendant's bond, without stating the condition (as in forms, *post*; 1 *Saund.* 168; *Plead. Assist.* 352; 3 *J. B. Moore*, 674;) or may set out the bond and condition, and the award and breach. It is best to adopt the former mode of declaring; see per *Bayley, J.*, 7 *Barn. & Cres.* 427; 1 *Man. & Ryl. S. C.*

The notes to the form in *assumpsit*, *ante*, 176, will for the most part be here applicable. In debt on the award, it has been supposed to be necessary to state, by way of inducement, the nature of the differences that had arisen between the parties. The concise averment adopted in the above form will suffice; 2 *Saund.* 62, note 1. In some cases, however, it would, perhaps, be as well to state them more minutely, as in the form, *post*.

In such action on the award, the mutual submission must be stated; 2 *Saund.* 62, note 1; though the mode of submission, as whether in writing or not, need not be shown; *id.* Where, however, the parties are bound by their submission in a different manner from what they would in general be liable, it is necessary to state the terms of that submission in that particular case; 2 *Saund.* 61, note; 7 *T. R.* 352; 1 *B. & B.* 350; *Watson on Awards*, 205. The submission need not be stated at full length, but the substance and the legal effect of it should be stated. It must be so stated as to correspond with and support the award; *Show.* 81. A proof of the deed is necessary; 8 *T. R.* 571. Where six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the three latter gave a similar bond to the three former; in the recital of the bonds, the differences were stated to be depending between the above bounden three and the above named three; in setting out the bond in the declaration, the differences were laid to be depending between the six parties collectively: it was held, this was no variance; 3 *J. B. Moore*, 674; 1 *B. & B.* 360, *S. C.*

It is sufficient to state so much of the award only as to entitle the plaintiff to his action; 2 *Saund.* 62 b, note, 6; *ante*; 1 *Burr.* 280; 1 *Salk.* 72. It is safest to use the very words of the award. It will suffice to state, that, "amongst other things," it was awarded, &c. *Lit. Rep.* 312; 1 *Leon.* 72.

It must appear that the award was, in form as well as in substance, made according to

defendant then by a certain other bond of arbitration, bearing date heretofore, to wit, the day and year aforesaid, became and was bound to the plaintiff in a certain penal sum in the same bond mentioned, which said bonds were respectively conditioned to (t) [*here set out the substance of the condition, which may be thus,*] abide the award and determination of E. F., of &c., an arbitrator indifferently elected and named, as well by (u) and on the part and behalf of the defendant, as by and on the behalf of the plaintiff, to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, or any or either of them, so as the said award should be made in writing under the hand of the said E. F., (x) ready to be delivered to the said parties in difference, or such of them as should desire the same, on or before &c. And the plaintiff further saith, that the said E. F. having taken upon himself the burthen of the said arbitration, did in due manner, and within the time for that purpose appointed, to wit, on &c. [*date of award,*] duly make and publish his award in writing subscribed with his own proper hand, (y) of and concerning the said matters in difference between the said parties, ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date, to wit, the day and year last aforesaid, and did thereby award and direct (z) that the defendant should pay to the plaintiff the sum of £—, [*set out the award so far as relates to the payment of the money,*] which, when paid, should be in full satisfaction of all claims and demands of the plaintiff upon or against the defendant for or in respect of the said matters in difference; and the said

The award.

the submission; as if the submission be on the terms of the award being in writing, and under the hand and seal of the arbitrator, it will not suffice to aver only that it was in writing; and an averment that the award was duly made would not cure the defect; 2 Marsh. 301, 308; 6 Taunt. 645, S. C.; 3 M. & S. 512; 2 Saund. 62 b, n. 5; *ante*.

So where time and place are fixed in the submission for the delivery of the award, it must be shown that the award was correct in those particulars; Cro. Jac. 577; 3 Mod. 331. But where it is provided "that the award shall be made in writing, &c. ready to be delivered to the parties in difference, or such of them as shall require the same, on or before a certain day, it is sufficient to state that the arbitrator made his award without stating that it was ready to be delivered, although the precedents in common use contain this latter averment; 1 Saund. 327 b, note; Watson, 207.

There is no occasion to make any profert of the award, and this, though it be under the hand and seal of the arbitrator; Styles, 459.

There is no occasion to state that the defendant had notice of the award, unless the submission expressly require it; 2 Saund. 62, note; *ante*, 177, note (a).

Where money is awarded to be paid at a

particular time and place, it does not appear to be necessary to state the attendance of the plaintiff at the place, or a demand by the plaintiff there; 2 B. & B. 233; but it is otherwise where money is awarded to be paid at a certain time and place on a collateral thing being first done by the plaintiff, as on giving a covenant, or the like, and in that case it must be alleged that the plaintiff was ready at the place to perform his part of the award; 2 Chit. Rep. 40; Watson, 208.

(t) The submission must be so stated as to correspond with and support the award; Show. 81.

(u) This is necessary; 2 Stra. 923; 2 Saund. 61 g, note 2; 1 Burr. 278.

(x) This will depend on the terms of the bond; see 2 Marsh. 304; 6 Taunt. 645, S. C.; *ante*, note (s).

(y) As to this allegation, see 2 Saund. 62 b, note 5; *ante*, note (s). If required to be sealed or subscribed by the arbitrator, the averment must be accordingly; 2 Marsh. 301; 6 Taunt. 645, S. C.; 3 M. & Sel. 512; *ante*, note (s).

(z) It is sufficient to show so much of the award only as to entitle the plaintiff to his action; 2 Saund. 62 b, note 5; 1 Burr. 280; 1 Salk. 72; *ante*, note (s).

ON AWARDS. E. F. did thereby further award and direct that the plaintiff should pay [forty guineas] as and for the costs of that his award, (a) and that the defendant should upon demand repay to the plaintiff, or to —, his solicitor, one moiety of such sum of forty guineas, and that in all other respects the said parties respectively should bear their own costs of that reference, as by the said award, reference being thereunto had, will more fully appear; of which said award the defendant afterwards, to wit, on the day and year last aforesaid, had notice. (b) And although the defendant did afterwards, to wit, on &c., pay to the plaintiff the said sum of £—— in the said award mentioned, yet the defendant did not on the said day in the said award in that behalf mentioned, pay to the plaintiff the said sum of £—— in the said award mentioned, or any part thereof, nor hath he since paid the same, or any part thereof, (although to pay the said last-mentioned sum of money the defendant was requested by the plaintiff,) to wit, on &c., being the day and time so appointed for the payment of the said sum of £——. [*Before the pleading rules of Hil. T. 4 W. 4, reg. 5, prohibiting more than one count on the same cause of action, it was usual to add an indebitatus count in debt on an award, as ante, 65, an account stated, and sometimes an interest count; see 1 Gow, C. N. P. 18; 3 Campb. 468. Add an account stated, and common conclusion in debt, ante, .(c)*]

On an award made pursuant to a judge's order. (d)

The judge's order of reference.

For that whereas divers disputes, controversies and differences having arisen, and being depending between the plaintiff and the defendant of and concerning divers sums of money claimed by the plaintiff to be due to him from the defendant, and also of and concerning an agreement for the purchase by the defendant from the plaintiff of the lease, good-will and fixtures of a certain house and premises, used as a baker's shop, in W—— street, in the county of M——, the plaintiff heretofore, to wit, on the —— day of ——, A. D. ——, commenced an action at law in her majesty's Court of Q. B., at W——, against the defendant for the recovery from her of the said sum of money so claimed to be due to him as aforesaid; and the plaintiff also, to wit, in Trinity Term aforesaid, commenced a suit in the High Court of Chancery against the defendant to compel a specific performance of the said agreement, and which said action or suit, at the time of making the order hereinafter mentioned, was depending and undetermined. And thereupon heretofore, to wit, on &c., by an order of the Honourable Mr. Justice L——, then being one of the justices of the said Court of Q. B., made in the said action, dated &c. [*the date*] it was, amongst other things, ordered [*let the following correspond with the order*] with the consent of the attornies on both sides in the said cause, that all matters in difference between the said parties thereto should be referred to the award, order, arbitrament, final end and determination of G. H., Esq., so that he should make and publish his award in writing of and concerning the matters aforesaid, ready to be de-

(a) *Quere*, if this be legal; 8 East, 13.

(b) The reference to the award is unnecessary; and it is in general unnecessary to state that the defendant had notice of it.

(c) It has been holden, that arbitrators may recover a compensation for their trouble, and plaintiff may claim a moiety of the expense from defendant; 1 Gow's Ca. Ni. Pri. 18.

(d) See the notes to the preceding form. See other forms, 5 Wentw. 336 to 354; 2 Mod. Ent. 219, 243, 259 to 269. Where there is a reference at *Nisi Prius* which is afterwards made a rule of Court, it is said an action lies on such rule; 1 Sid. 452; 3 Bar. & Ald. 57; *ante*, 296, note.

livered to the said parties, or either of them requiring the same, on (e) or before the — day of —, in the year &c., and that the costs of the said action should abide the event of the said award to be made and published as aforesaid, and that the costs of the said reference should be in the discretion of the said arbitrator, and that the said parties did and should respectively in all things duly abide by and perform the said award as therein directed, and that neither of the said parties should bring or prosecute, or cause to be brought or prosecuted, any writ of error, or file any bill in equity against the said arbitrator, or against each other. And the plaintiff further saith, that by another order of the said Mr. Justice L—— afterwards, to wit, on &c., the time for the making of the said award was duly enlarged (f) until &c., as by such order, reference being thereto had, will more fully appear. And the plaintiff in fact says, that afterwards, and before the expiration of the said enlarged time for making the said award, to wit, on &c., [date of award] the said G. H. in pursuance of the said orders, did make and publish his award, arbitrament, final end and determination, in writing, of and concerning the said premises, ready to be delivered to the said parties in difference, or such of them as should require the same, and bearing date heretofore, to wit, the day and year last aforesaid, and did thereby award, order and direct that [here set out the award for the payment of money] the defendant was justly and truly indebted to the plaintiff, in respect of his claims in the said action as aforesaid, in the sum of £——, and that the defendant should pay to the plaintiff or his order the sum of £—— on &c.; (g) and the said arbitrator did thereby further find, that the aforesaid agreement between the parties relative to the aforesaid lease, good-will and fixtures, was not binding upon them, and the said arbitrator did therefore declare the same void accordingly; and the said arbitrator did award and declare, that the plaintiff had no claim or demand whatsoever against the defendant in respect or on account of the said agreement, and he did thereby order and award that the plaintiff should immediately cause his said suit against the defendant in the said Court of Chancery to be dismissed in due manner, with costs to be paid and sustained by himself. And the said arbitrator did also thereby further order and award the defendant forthwith to deliver up the possession of the said house and fixtures to the plaintiff, and that the defendant should, when required, and upon being duly indemnified by him the plaintiff in that respect, permit and suffer him to make

ON AWARDS.

Order enlarging time.

The award made, stating the same.

The terms of the award.

(e) If no time be limited for making the award, the arbitrator is bound to proceed within a reasonable time; 3 M. & Sel. 147. It is open to the parties to the agreement to request the arbitrator to proceed within a reasonable time, and if he neglect they may revoke his authority.

(f) In the statement of the enlargement the precise day is immaterial; 1 Gow, C. N. Pri. 6. It was said by Le Blanc, J., 1 M. & Sel. 2, that the terms of the reference ought never to render it necessary to have a judge's order to enlarge the time, but that it ought to be left to the discretion of the arbitrator alone to do as he may require; in that case there was a *proviso* in the judge's order, that the award should be made on or before a day certain; but that if the arbitrator should not

then be prepared, that the time should be enlarged as he might require, and a judge of the Court think reasonable and just; and it was held, that the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time, although the judge's order, granting such further time, was not obtained till a subsequent day.

(g) If money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, it carries interest from that day, if duly demanded at the place appointed; 3 Campb. 468. See 1 Gow, 18, as to the recovery of interest; and now 3 & 4 Will. 4, c. 42.

ON AWARDS. such use of his name, and do such other acts as he should be advised was and were necessary to be done by him to enable him to sue for and recover the rents then due and owing from any person or persons whomsoever, for or in respect of the said house and premises in — aforesaid, or any part thereof, and which said rents the said arbitrator did thereby award and declare the plaintiff to be entitled to for his own use and benefit. And the said arbitrator did thereby award, order and determine that the costs of the said reference, and of that his award, should be borne, paid for, and sustained by the plaintiff and defendant in equal shares and proportions, upon payment of the said sum of £— and the due performance of that his award; and he did thereby further award, order and direct that the plaintiff and defendant should forthwith in due manner execute to each other a general release of all matters whatsoever in dispute and difference between them as aforesaid, up to the date of the said rule or order of the said — day of —, as by the said award, reference being thereunto had, will more fully and at large appear; of which said award the defendant afterwards, to wit, on the day and year last aforesaid, had notice. (h) And the plaintiff further saith, that afterwards, to wit, on Wednesday next after the Octave of St. Martin, in Michaelmas Term, in the — year aforesaid, it was duly ordered by the said Court, that the said first-mentioned order of the Honourable Mr. Justice L. should be entered and made a rule of the said Court. And the plaintiff further saith, that the costs of the said action afterwards, to wit, on the day and year last aforesaid, were duly taxed at a large sum of money, to wit, the sum of £—. Of all which said premises the defendant afterwards, to wit, on the day and year aforesaid, had notice. Yet the defendant did not nor would on the said &c., or at any time before or since, although often requested so to do, pay to the plaintiff the said sum of £— in the said award mentioned, and the said sum of £—, or any part thereof, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do. [*Add an account stated and common conclusion in debt, as ante, 286.*]

Award as to costs.

Award of mutual releases.

The order of reference made a rule of Court.

The costs taxed at £—.

Notice to defendant.
Breach, non-payment.

ON BYE-LAWS.

Debt on a bye-law for payment of an annual sum made in pursuance of a charter granted to the College of Surgeons. (i)

ON BYE LAWS.

London, to wit.—The Royal College of Surgeons in London complain of Samuel Hunt, who has been summoned, &c. [*see ante, 284.*] For that whereas his late majesty King George the Third, by his certain letters-patent under the great seal of England, bearing date at Westminster the 22d day of March, in the 40th year of his reign, and which said letters-patent, sealed as aforesaid, the said Royal College now bring here into

(h) As to the notice of and reference to the award, *see ante*, 177, note (a).

(i) This form was drawn by the author, and settled with great care by the then solicitor-general, Sir Vicary Gibbs, after examination of the form in 7 Wentw. 383, and several MS. forms; *see also* 1 Lut. 562; Thomp. Ent. 115, 120; 2 Mod. Ent. 225, 230; Lil. Ent. 153; 5 Wentw. 166 to 222; 7 Id. 501 to 503; 1 Wils. Rep. 281; 1 Hen. Bla. 370; 1 Burr. 235; 3 Burr. 1847; 1 B. & P. 100; 2 M. & P. 164. As to bye-laws in general, *see* Com. Dig. tit. "Bye Law," *per totum*; 2 Chit. Com. Law, 217 to 224.

To secure an obedience to a bye-law, a penalty should be annexed to the breach of it; 5 Co. 63 b; 3 Leon. 265. If the bye-law do not regulate the mode of recovering the penalty, an action of debt lies for it; 1 Rol. Ab. 366, C. pl. 3; but the bye-law usually ordains that it shall be recovered by debt; 5 Co. 64 a; 1 Rol. Ab. 366, C. pl. 2; or that the chamberlain of London shall bring debt for it; *id. ibid.* But a bye-law "that none but *freemen* shall keep shop," cannot confine the action for the penalty to the portmote Court, where none but the sheriff or coroner (who must be *freemen*) can array a

Court, the date whereof is the same day and year aforesaid, after reciting &c.—[*Recites a charter granted by Edward the Fourth, by which he incorporated the barbers freemen of the city of London, and gave twelve or eight of them power to elect governors to direct the art of surgery; also a charter of the 32d Henry the Eighth, which, after stating that two companies of surgeons, one called barbers and the other surgeons, were then in existence, unites them into one body corporate, called "The Masters and Governors of the Mystery of and Commonalty of the Barbers and Surgeons of London;" and directs that they shall be impleaded by that name. It then recites the charter of 5 Car. 2, which confirms to the united company all their privileges, possessions and powers, and empowers them to elect two masters, and ten examiners of surgeons annually. It next sets forth the 18 Geo. 2, whereby the barbers and surgeons were again made distinct corporations; the incorporation effected in the reign of Henry the Eighth was declared void, and those who had been regularly admitted surgeons were made a distinct body corporate, to be called and impleaded by the name of "Master, Governors, and Commonalty of the Art and Science of Surgeons of London," and to take to themselves property not exceeding £200 per annum in value. The charter then proceeds to state, that this incorporation had been dissolved, and that his majesty thereby constituted James Earle, and the other members of the late company, a body corporate and politic, with a common seal, by the name of "The Royal College of Surgeons," enabling them to purchase and hold a hall or council-house, &c. It then authorizes the college to elect twenty-one persons to be a court of assistants, of whom ten should be examiners of surgeons for the college, one of which latter number should be principal master, and two other governors; and then proceeds to enable the master, governors, with ten of the members of the court of assistants, to hold courts to make, confirm, or annul bye laws. It then appoints the first master, governors, examiners, and assistants, the latter for life, the two former for a year, and directs the time of their meeting and the oath they are to take; it prescribes the annual election of masters and governors. It then precludes all persons not regularly educated, &c. from becoming members, and concludes with a proviso, that the parties may act under the charter without testifying their assent to it in writing.] As by the said letters-patent of his said late majesty, under the great seal of England, reference being thereunto had, will, amongst other things, more fully and at large appear. And the Royal College further say, that after the making of the said letters-patent, and within thirty days next after the date thereof, and upwards of fourteen days before the day of holding the meeting hereinafter next mentioned, to wit, on the 25th day of March, A. D. 1800, in the parish of St. M. le B. in the W. of C. the said Charles Hawkins, then being such master of the said College of Surgeons as aforesaid, and the said W. L. and G. C. then being such governors of the same college as aforesaid, did, in pursuance of the said letters-patent, give*

ON AWARDS.

Charter, 22d March, 40 G. 3, reciting prior charters and statutes.

Reference to the charter.

Notice of meeting of the members of the Court of Assistants.

jury; 3 Burr. 1847, 1858. Wherever a pecuniary benefit is given by statute to an individual, he may sue for it in debt; Com. Dig. Debt (A.) 39.

As to the Declaration.—The declaration must state the particular facts which subject the defendant to the penalty, therefore a count stating the penalty as being forfeited under and by virtue of a certain bye-law of the company before that time duly made,

without stating its terms, is bad on special demurrer; 1 B. & P. 98; and see 2 M. & P. 164. The power of making bye-laws is incident to every corporation, but the law implies the right to be in the whole body; and if it be exercisable by a select part of it, such power must be shown; 1 B. & P. 100, 101; Doug. 158, 159; see a form in 2 M. & Pay. 164, held bad for not averring a condition precedent.

ON
BYE LAWS.

and publish in the Gazette a certain notice, bearing date the 25th day of March, in the year last aforesaid, that they the said master and governors of the said college, did appoint and direct that the *members* of the said Court of Assistants of the said college, in the said letters-patent named, should meet on Thursday, the 3d day of April then next, at two o'clock in the afternoon precisely, at the hall or council-house of the said college, situate in Portugal Row, in Lincoln's Inn Fields, in the county of Middlesex (the same being the place at which the persons, members of the said late corporation, had usually held their meetings for upwards of six months then last past); and that the said members of the said court of assistants, for carrying into effect the said letters, and of such intended meeting of the said court of assistants, they the said master and governors did thereby give that public notice to all persons who were or might be concerned or interested therein.

Meeting accord-
ingly held.

And the said Royal College of Surgeons further say, that after the making of the said letters-patent, and within thirty days next after the said date thereof, and upwards of fourteen days after the giving such notice as aforesaid, to wit, on the 10th day of April, in the year of our Lord 1800 aforesaid, being the time mentioned and appointed in the said notice, the said master and governors, and the said other members of the said court of assistants in the said last-mentioned letters-patent named and appointed, did, in pursuance of the same letters-patent, and of the said notice, meet at the said hall or council-house of the said college in the said notice mentioned, and did then duly hold a court of assistants for carrying into effect his said late majesty's said letters-patent, and did administer unto each other respectively, and each of them did then take the said respective oaths, as directed and required by the said last-mentioned letters-patent as aforesaid.

Oaths adminis-
tered.

Resolution that
a meeting
should be held
of three mem-
bers of Court of
Assistants.

And the said Royal College further say, that at the said meeting it was then duly resolved by the said master, governors, and other members of the said Court of Assistants so assembled, and so constituting the said Court of Assistants as aforesaid, that in pursuance of the said clause in the *said charter* which related to the election of three new members of the Court of Assistants to fill up the then present vacancies therein, a Court of Assistants should be holden at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, for the purpose of such election, on Friday, the 2d day of May then next, at two o'clock precisely, the same being within one month next after the first meeting of the said Court of Assistants as aforesaid.

Hunt, the de-
fendant, a mem-
ber of the cor-
poration of sur-
geons.

And the said Royal College of Surgeons further say that the said Samuel Hunt, before the day of the date of the said last-mentioned letters-patent, to wit, on the 4th day of June, in the year of our Lord 1789, was a member of the said late corporation of surgeons established by the said act made and passed in the 18th year of the reign of his said late majesty King George the Second, and so remained and continued such member until the dissolution thereof.

Hunt becomes
a member of
college under
new charter,

And the said Royal College of Surgeons further say, that the said Samuel Hunt, so having been such member of the late corporation of surgeons as aforesaid, afterwards, and after the making of the said last-mentioned letters-patent, to wit, on the 21st day of April, in the year of our Lord 1800 aforesaid, was willing to become and be a member of the said college by the said

last-mentioned letters-patent established and incorporated, and did afterwards, and within six calendar months after the date of the said letters-patent, to wit, on the same day and year last aforesaid, testify his acceptance of his said late majesty's said letters-patent, and his consent to become a member of the said college, by then signifying such his acceptance and consent in writing, to the Court of Assistants of the said college; and which said acceptance and consent of the said Samuel Hunt was afterwards, to wit, on the day and year last aforesaid, duly entered in a certain book kept by the said Court of Assistants for that purpose, at the said hall or council-house of the said college, situate in Portugal Row aforesaid, to wit, at London aforesaid; and the said Samuel Hunt then became and was and still is a member of the said Royal College of Surgeons in London, to wit, at London aforesaid, in the parish and ward aforesaid.

On
By-Laws.

and signifies
such consent in
writing entered
in book of Court
of Assistants.

And the said Royal College of Surgeons further say, that after the making of the said letters-patent, and within one month next after the said first meeting of the said Court of Assistants as aforesaid, to wit, on the said 2d day of May, in the year of our Lord 1800 aforesaid, at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, in pursuance of the said resolution, the said master, and the said governors, and the said other members of the said Court of Assistants, so named and appointed in the said letters-patent as aforesaid, did then and there assemble and duly hold a Court of Assistants of the said College of Surgeons, to wit, at London aforesaid, in the parish and ward aforesaid. And the said Royal College further say, that at the said Court of Assistants so assembled as last aforesaid, the said master, governors, and other members of the said Court of Assistants, so named in the said letters patent as aforesaid, did then and there duly elect John Samuel Charlton, Edward Ford, and William Norris, to fill up the said three vacancies, then existing in the said Court of Assistants, and the said three last-mentioned persons were then and there duly elected, and then and there became members of the said Court of Assistants.

Court of Assistants held.

Three persons
elected to fill up
the vacancies in
Court of Assistants.

And the said Royal College further say, that afterwards, and within six calendar months after the date of the said letters-patent, to wit, on the said 2d day of May, in the year of our Lord 1800 aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, the said master, governors, and other members of the said Court of Assistants, so named and appointed in the said letters-patent as aforesaid, did respectively duly testify their acceptance of the said letters-patent, and their consent to become members of the said college, by then and there signifying such their acceptance and consent in writing, which said acceptance and consent was then and there duly entered in a certain book kept for that purpose, at the said hall or council-house of the said college, situate as aforesaid; and that within the said six calendar months, to wit, on the same day and year last aforesaid, divers, to wit, 100 members of the said late dissolved corporation, and also divers, to wit, twenty persons, who, since the dissolution thereof, had obtained such letters testimonial as aforesaid, under a seal, purporting to be the seal of the said late dissolved company or corporation, did, in like manner, duly testify their acceptance of the said letters-patent, and their consent to become members of the said college, to wit, at London aforesaid, in the parish and

Within six calendar months the charter accepted.

Acceptance and consent duly entered.

On Bye-Laws.	ward aforesaid, which same acceptance and consent was then and there also duly entered in the said book.
The three new members accepted their office, and were sworn.	And the said Royal College further say, that afterwards, to wit, on the 2d day of June, in the year of our Lord 1800 aforesaid, at the said college, situate in Portugal Row aforesaid, a Court of Assistants of the said Royal College of Surgeons was then and there duly holden, and that at such last-mentioned meeting of the said Court of Assistants the said John Samuel Charlton, Edward Ford, and William Norris, having respectively duly accepted the said office of members of the said Court of Assistants, the said oath, so directed by the said letters-patent to be taken by the members of the said Court of Assistants as aforesaid, was duly administered to each of them, the said John Samuel Charlton, Edward Ford, and William Norris, and they did then and there respectively take the said oath as directed and required by the said letters patent, to wit, in London aforesaid, in the parish and ward aforesaid.
A Court of Assistants duly held.	And the said Royal College of Surgeons further say, that afterwards, to wit, on the 8th day of January, in the year of our Lord 1802, at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, the said George Chandler, then and there being the principal master of the said college, and the said Thomas Keate and Charles Blicke, then and there being the governors of the said college, and the said Charles Hawkins, Jonathan Wathen, William Lucas, Samuel Howard, James Earle, William Long, Thomas Forster, John Birch, John Heaviside, John Howard, William Blizard, Henry Cline, David Dundas, John Samuel Charlton, Edward Ford, and William Norris, together with James Ware and Edward Home, then and there being the whole of the members of the said Court of Assistants, did then and there respectively duly assemble, and duly hold a Court of Assistants of the said Royal College of Surgeons, in order to treat and consult about and concerning the rule, order, state, and government of the said college; and the said last-mentioned master, governors, and Court of Assistants, being so assembled as aforesaid, did, in pursuance and by virtue of the said letters-patent, [make and ordain the following bye-law, rule, and ordinance, the same appearing to them the said master, governors, and Court of Assistants, so assembled as last aforesaid, requisite and convenient for the regulation, government and advantage of the said college, and the same bye-law, rule, and ordinance, not being contrary to law, and whereby it was then and there duly ordained] that every member of the Court of Assistants should annually pay the sum of 40s., and every other member of the college, who should reside in or within seven miles of the city of London, should pay the sum of 20s. towards defraying the necessary charges and expenses of the college, which several annual sums should be due and payable upon the 24th day of June in every year, and the first thereof should be due and payable upon the 24th day of June 1802; which said bye-law, rule, and ordinance, so made and ordained as aforesaid, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, pursuant to the directions of the said last-mentioned letters-patent, was, according to the statute in such case made and provided, examined, approved of, and allowed by the Right Honourable John Lord Eldon, then Lord High Chancellor of Great
The making of the bye-law that every member of Court of Assistants should annually pay 40s. and every other member residing within 7 miles of London 20s.	
Allowance of bye-law by chancellor and chief justice, &c.	

Britain, the Right Honourable Edward Lord Ellenborough, then Chief Justice of his late Majesty, assigned to hold pleas in the Court of our said lord the king before the king himself, and the Right Honourable Richard Pepper Lord Alvanley, then Lord Chief Justice of his late Majesty of the bench at Westminster, to wit, at London aforesaid, in the parish and ward aforesaid; of all which said several premises the said Samuel Hunt, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice. And the said Royal College of Surgeons further say, that the said Samuel Hunt, so being such member of the said Royal College of Surgeons as aforesaid, on the said 21st day of April, in the year of our Lord 1800 aforesaid, resided, and hath thence hitherto resided, within seven miles of the city of London, to wit, in Little St. Martin's Lane, in the parish of St. Martin in the Fields, in the city and liberty of Westminster, in the county of Middlesex, to wit, at London aforesaid, in the parish and ward aforesaid; and by means thereof, and by virtue of the said bye-law, he the said Samuel Hunt, after the making of the said bye-law, to wit, on the 24th day of June, in the year of our Lord 1804, at London aforesaid, in the parish and ward aforesaid, became liable to pay and ought to have paid to the said Royal College of Surgeons a large sum of money, to wit, the sum of 20s. of lawful money of Great Britain, for one year of the said contribution, ending on the said 24th day of June, in the year of our Lord 1804, aforesaid, towards defraying the necessary charges and expenses of the said Royal College; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said Royal College of Surgeons to demand and have of and from the said Samuel Hunt the said sum of 20s., parcel of the said sum above demanded. Yet the said Samuel Hunt (although often requested so to do) hath not as yet paid the said sum of forty shillings above demanded, or any part thereof, to the said Royal College of Surgeons, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, to the damage of the said Royal College of Surgeons of £10, and therefore they bring their suit, &c. [See 2d count, 2 *Chitty on Pleading*, 408, 5th edit.]

ON
BYE-LAWS.

Notice to defendant.

Residence of defendant within seven miles, and liability to pay.

See The Apothecaries' Company v. Greenhaugh, 1 *Queen's Bench Reports*, 799.

For practising as an apothecary without a certificate.

See Shaw v. Poynter, 2 *A. & E.* 312.

By the Chamberlain of the City of London for penalties under a bye-law.

Hopkins v. The Mayor, &c. of Swansea, 4 *M. & W.* 621; 8 *M. & W.* 901.

By one of the Burgesses of Swansea against the Mayor, &c., for money due under a bye-law.

ON JUDGMENTS OF FOREIGN OR INFERIOR COURTS.

Commencement, ante, 284.] For that whereas the plaintiff heretofore, to wit, at a supreme Court of judicature of our sovereign lady the Queen, holden at the town of St. Jago de la Vega, in and for the island of Jamaica, and within

ON FOREIGN JUDGMENTS AND JUDGMENTS OF INFERIOR COURTS.

(k) As to when debt or assumpsit lies on the judgment of a foreign or inferior Court, see *ante*, 177, notes; *Berquet v. Macarthy*, 2 *Bar. & Adol.* 951; 1 *Crom. M. & Ros.* 277; and see form of declaration, *Spott v. Bevan*, 2

Bar. & Adol. 78. See also as to when such judgment is conclusive, *id.*, also as to the form of the declaration, *id.*; and *Hay v. Fisher*, 2 *M. & W.* 722.

On a Jamaica judgment. (k)

ON JUDG-
MENTS OF
FOREIGN OR
INFERIOR
COURTS.

the jurisdiction of the said Court, (l) the last Thursday in August, in the — year of the reign of our said lady the Queen, and in the year of our Lord —, before the Honourable —, Esq., Chief Judge of the said Court, and his associates, then sitting Judges of the same Court, by the consideration and judgment of the same Court, recovered against the defendant, as well as the sum of £—, current money of the said island of Jamaica, for his damages, which he had sustained by occasion of the nonperformance of certain promises and undertakings made by the defendant to the plaintiff, as also the sum of £— current money of the said island of Jamaica, for his costs and charges by him about his suit in that behalf expended, to the plaintiff, by the said Court of his own assent, then adjudged, whereof the defendant is convicted, which said judgment still remains in that Court in full force and effect, in nowise satisfied, recovered, or annulled. And the plaintiff in fact saith, that he hath not yet obtained execution of the said judgment, and that the said damages, costs, and charges, so recovered as aforesaid, are of great value, to wit, of the value of £—. (m) [*Add a count for the debt upon which the judgment was obtained, and an account stated, and conclude as ante*, 286.

On a Scotch
decree. (n)

Commencement, ante, 284.] For that whereas heretofore, to wit, on &c., a certain decree and sentence was made in and by her majesty's Court of Sessions in Scotland, in a certain matter then depending in the same Court, wherein the plaintiff was pursuer, and the defendant was defender, by which said decree it was found, and the lords of council and sessions, being the judges of the same Court, did thereby then find the defendant liable to the plaintiff in the sum of £— sterling, as the plaintiff's salary for eighteen nights he had been engaged to perform by the defendant at certain theatres, &c. [*Set out the adjudicatory part of the decree carefully*,] as by the said decree and sentence more fully appears; (o) of which said decree and sentence the defendant afterwards, to wit, on the day and year aforesaid had notice, which said decree and sentence still remain in full force and effect, not in anywise reversed, set aside, or otherwise vacated; and the plaintiff hath not obtained any satisfaction of or upon the said decree or sentence for the said several sums of money so decreed and ordained as aforesaid. [*Add an account stated, and conclude as ante*, 286.

Another form
more general.

Commencement, ante, 284.] For that whereas the defendant heretofore, to wit, on the said &c. was indebted to the plaintiff in the sum of £—, upon and by virtue of a certain decree and sentence before then made in and by her majesty's Court of Sessions in Scotland, in a certain matter then depending

(l) These words are unnecessary, and the declaration would be good without them, upon special demurrer; 1 Wils. 319, 320; Com. Dig. Pleader, 2 W. 12. See form in Assumpsit, and notes, *ante*, 177.

(m) To ascertain the value in this case, multiply the current money by five, and then divide by seven, which produces the amount in sterling English money. The value to be recovered is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment; *Scott v. Bevan*, 2 Bar. & Adol. 78.

(n) See the form in assumpsit, and notes, *ante*, 177; and that assumpsit lies, see 1 M.

& P. 663; 4 Bing. 686, S. C. Debt lies upon the decree of a colonial Court which has no power to enforce its decrees in this country; 1 Campb. 253. It does not lie on a decree of a Court of equity, 3 B. & Ald. 52; nor on a mere interlocutory order of a Court of law, 2 H. B. 248; 4 Taunt. 705; when it lies on a rule of reference, 1 Sid. 452; 3 Bar. & Ald. 57. An action of assumpsit or debt may be maintained against a defendant resident in this country for costs awarded against him after appearance by a decree of the Court of Session of Scotland in a suit for a divorce; *Russell et ux. v. Smyth*, 9 M. & W. 810.

(o) As to this averment, see Doug. 1; 5 East, 473.

in the same Court, wherein the plaintiff was pursuer and the defendant was defender, by which said decree and sentence the defendant was decreed and ordained to pay to the plaintiff divers sums of money, in the whole amounting to the said sum of £——, which is still wholly unpaid and unsatisfied to the plaintiff. [*Add a count for the original debt for which the decree was obtained, and an account stated, and conclude as ante, 286.*]

ON JUDGMENTS OF FOREIGN OR INFERIOR COURTS.

Commencement, ante, 284.] For that whereas the plaintiff heretofore, to wit, on &c. [*the day when judgment given, or about it*], in the Court of Record of our lady the Queen, of the borough of Liverpool, in the county palatine of Lancaster, holden in the common hall within the Exchange, before P. W. B. Esq., the mayor of the said borough, according to the custom of the borough aforesaid, from time whereof the memory of man is not to the contrary, used and approved of within the said borough, and within the jurisdiction of the said Court, by the consideration and judgment of the said Court, recovered against the defendant the sum of £14. 7s. parcel of the said sum above demanded, which in and by the said Court was adjudged to the plaintiff for his damages which he had sustained as well by reason of his not performing certain promises then lately made to the said plaintiff by the defendant in the borough aforesaid, and within the jurisdiction of the said Court, as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof remaining, &c., which said judgment remains in full force and effect, not reversed, vacated, set aside, annulled, paid off, or satisfied, and the plaintiff has not as yet obtained any satisfaction or execution of the said judgment in form aforesaid recovered. [*Add a count on the original cause of action, an account stated, and conclude as ante, 286.*]

On a judgment recovered in the Borough Court of Liverpool. (p)

VI. ON SPECIALTIES.

ON DEEDS-POLL.

Commencement, ante, 284.] For that whereas in the life-time of the said L. F., to wit, on &c. by a certain deed-poll then made by the said L. F. in his life-time, bearing date the day and year aforesaid, sealed with his seal, and to the Court of our said lady the Queen now here shown, the said L. F. did, for the provision and relief of the said J. H. in such deed-poll described as the only son of E. H. deceased, his (the said L. F.'s) aunt's son, and first cousin, thereby grant, assign, and deliver over unto him (the plaintiff) the sum of £5000, immediately after he the plaintiff attained the age of twenty-one years, for and in consideration of the love and affection he (the said L. F.) always bore for the said E. H. his father, and in consideration of the several services he (the said E. H.) had theretofore rendered him in his life-time; and the said L. F. thereby then declared that the said sum of £5000 so granted should and might be recovered from and of all or any part of his (the said L. F.'s) estates, lands, premises, goods, chattels,

VI. ON SPECIALTIES.
ON DEEDS-POLL.

On a deed whereby testator appointed £5000 to be paid to the plaintiff on the event of his death. (y)

(p) Debt lies on the judgment of an inferior Court, see 177; and see *ante*, 177, as to assumpsit, and the note as to the form of declaring.

(y) This was the declaration in *Hodnett v. Foreman*, in which plaintiff recovered a verdict, and which was settled by an eminent barrister, A. D. 1816.

ON DEEDS-
POLL.

and so forth, wherever the same might be situated, for the sole use and behoof of the said J. H. ; and the said L. F. thereby declared that the said £5000, or any part thereof, or the interest or interests thereupon arising, or which might thereafter at any time arise or grow due, should not, upon any pretext, extend or be granted to any other person or persons after the decease of him the said J. H., wherever the same might happen to be ; but that the aforesaid grant of £5000 should be prudently and carefully appropriated for the said J. H., excluding heirs, assigns, or survivors of any description whatsoever, and in case of his (the said L. F.'s) decease at any time before the said J. H. should attain the aforesaid age of twenty-one years, that then and in such case it should and might be lawful for him the said J. H., or his lawful attorney nominated, to enter upon and recover the said sum as thereinbefore recited, in any of her majesty's Courts in Great Britain, as counsel learned in the law should direct or advise or devise ; and the said L. F. did thereby nominate, constitute and appoint J. B., uncle of the said J. H., to be principal guardian and trustee to him, in the economy and necessary arrangement of the aforesaid grant of £5000, but without any claim or demand upon any part of the same, as in and by the said deed-poll, reference being thereunto had, will appear : And the said J. H. in fact saith, that afterwards, to wit, on &c. (r) he the said J. H. attained the age of twenty-one years, whereof the said L. F. in his life-time, afterwards, to wit, on &c. last aforesaid, had notice ; yet neither the said L. F. in his life-time, nor the said M. J. and J. C., executrix and executors as aforesaid, since his decease, hath or have paid the said sum of £5000 or any part thereof to the said J. H., and, on the contrary thereof, after the said J. H. so became of age, and after the death of the said L. F., to wit, on &c. the said sum of £5000, together with a further large sum of money, to wit, the further sum of £785, for interest thereon, making together the sum of £5785, became and was and still is in arrear and unpaid to the said J. H., contrary to the form and effect of the said deed-poll, whereby an action hath accrued to the said J. H. to demand and have of and from the said M. J. and J. C., as executrix and executors as aforesaid, the said sum of £5785 above demanded, yet the said M. J. and J. C., executrix and executors as aforesaid, hath not, nor hath either of them, (although often requested so to do,) paid the said sum of £5785 above demanded, or any part thereof, to the said J. H., but have, and each of them hath, hitherto wholly neglected and refused, and still do neglect and refuse so to do ; to the damage of the said J. H. of £1000, and thereupon he brings suit, &c.

ON A
CHARTER-
PARTY.

By owner
against freighter,
for penalty in-
curred by not
loading the
cargo and not
paying freight.
(s)

ON CHARTER-PARTIES.

Commencement, ante, 284.] For that whereas heretofore, to wit, on &c. [date of charter-party] by a certain charter-party of affreightment, then made between the plaintiffs, by the name and descriptions of Messrs. A. B. and E. F. therein described as the owners of the good ship or vessel called

(r) It is advisable, though not absolutely material, to insert the *true date* of the plaintiff's coming of age, from which the interest would be calculated.

(s) See other forms, 7 Wentw. 27, 29, 34 ; and those in *assumpsit, ante*, 161 ; and in *covenant, post*. Debt lies upon a charter-party, if the sum demanded is ascertained

thereby, or it sufficiently appears how much is due ; Andr. 156 ; 2 Stra. 1069, S. C. The plaintiff has his option of proceeding for the penalty, or on the covenant which defendant has broken ; 13 East, 343. It is in some respects more advisable to sue in debt, on account of being able to insert the common counts.

the — (whereof E. H. was then master), of the burthen of — tons or thereabouts, then on the river Tyne, of the one part, and the defendant, therein described as the freighter of the said ship, of the other part; (one part of which said charter-party, sealed with the seal of the defendant, the plaintiffs now bring here into Court, the date whereof is a certain day and year therein named, to wit, the same day and year aforesaid,) the plaintiffs [*here set out the charter-party in the past tense, as thus:*] let the said ship to freight for one voyage from the Island of St. Michael's to the ports of &c., optional to the affreighter or his agent, with liberty to take on board a cargo of coals and goods, and deliver them in her way to —; and the defendant hired the same in manner and form therein mentioned, to wit, that the said ship then was and should, during the said intended voyage, be at the expense of the plaintiffs, the said owners, kept staunch, tight and strong, well manned, victualled, tackled, and provided, in every respect fit for merchant's service, and particularly for performing such intended voyage (the dangers and perils of the seas, restraints of princes and rulers, fire and enemies, during the same, always excepted); and also that [*set out the charter-party verbatim to the end, or at least such parts as are essentially connected with the cause of action.*] As by the said charter-party, reference being thereunto had, will more fully appear: And the plaintiffs in fact say, that the said G. H. with the said ship or vessel in the said charter-party mentioned, afterwards, to wit, on &c., proceeded to —, according to the meaning and effect of the said charter-party, and afterwards, to wit, on &c. aforesaid, arrived at — aforesaid, and was, to wit, on &c. last aforesaid, ready and willing to receive on board the said ship or vessel a cargo of fruit, and would have proceeded therewith to &c., according to the meaning and effect of the said charter-party, and the said ship or vessel was then fit and ready to receive on board a cargo of fruit, according to the meaning and effect of the said charter-party; and the plaintiffs were ready and willing that the said charter-party should be performed in all things on their part according to the meaning and effect of the said charter-party, of which said premises the defendant afterwards, to wit, on &c., aforesaid, had notice. Yet the defendant did not nor would load or put on board the said ship or vessel a cargo according to the meaning and effect of the said charter-party, or any cargo or part of a cargo whatever, (t) but therein wholly failed and made default, contrary to the form and effect of the said charter-party and the covenant of the defendant so made in that behalf as aforesaid; and the defendant hath not paid the plaintiffs any freight for the said voyage, or any port-charges or pilotage in respect thereof; by reason of which premises the plaintiffs have lost and been deprived of the freight and reward, and the port charges and pilotage, and of great gains, profits, and emoluments which might and otherwise would have become due and payable to them under and by virtue of the said charter-party, amounting in the whole to a large sum of money, to wit, the sum of £——, by reason of which said premises an action hath accrued to the plaintiffs to demand and have of and from the defendant the sum of £—— mentioned in the said charter-party, parcel of the said sum of money above demanded. [*A count for freight pro rata itineris may be added, see Pleading Rules, Hil. T. 4 W. 4, reg. 5, and account stated might also be added, id. ibid.*]

ON CHARTER-PARTIES.

Reference to charter-party.

Averments of performance on plaintiff's part.

Defendant's breach, in not shipping a cargo, and non-payment of port and other charges.

(t) See another mode of stating breach, *ante*, 164, 166.

ON SEA
POLICIES.

Against London
Assurance Com-
pany on a policy
on a ship. (u)

ON SEA POLICIES.

London, to wit.—A. B., by — his attorney, complains of the Governor and Company of the London Assurance, who have been summoned to answer the said A. B. in an action of debt, and the plaintiff demands the sum of £——, which the defendants owe to and unjustly detain from him. For that whereas heretofore, to wit, on &c. [*date of policy*] by a certain deed-poll, or policy of insurance, then made by the said governor and company, and sealed with the common seal of the said governor and company, and which said deed or policy of insurance, sealed with the seal of the said governor and company, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid, the plaintiff, as well in his own name, &c. [*Set forth the policy verbatim to the end.*] In witness whereof the said London Assurance had caused their common seal to be thereunto affixed, and the sum and sums by them assured to be therein under-written, under which said deed or policy of assurance a certain memorandum was then written, whereby the said governor and company declared the said policy to be free from average on corn, fish, salt, &c. [*Set forth the usual memorandum at the foot of the policy.*] And also a certain other memorandum was then written, whereby the said governor and company declared themselves to be content with that assurance for £1400 on the whole ship, valued at that sum, as by the said deed or policy of assurance and memorandum so made as aforesaid more fully appears. And thereupon the said governor and company became insurers to the plaintiff for the said sum of £1400 in the said deed or policy of assurance; and the plaintiff further says, &c. [*Averments as usual that plaintiff was interested, the ship's safety, departure and damage at sea, &c. according to the facts, and as in the precedents in assumpsit, ante, 132 to 153.*] Of all which said premises the said governor and company, afterwards, to wit, on &c., had notice; by reason whereof an action hath accrued to the plaintiff to demand and have, of and from the said governor and company, the said sum of £1400 so insured as aforesaid, parcel of the said sum above demanded.

Another form
on 6 Geo. 1, c.
18, s. 4. (x)

For that whereas after the making of a certain act of parliament, made and passed in the 6th year of the reign of his late majesty King George the First, to wit, on &c., the said governor and company became and were and still are indebted to the plaintiff in the sum of £——, parcel of the said sum above demanded, and have not paid the same according to the said act, but have hitherto wholly neglected and refused so to do, contrary to the said statute, whereby an action hath accrued to the plaintiff to demand and have, of and from the said governor and company, the said sum of £——, parcel of the said sum above demanded.

ON LEASES.
For rent on a
demise. (y)

ON LEASES.

Commencement, ante, 284.] For that whereas the plaintiff heretofore, to wit, on &c. demised to the defendant a certain messuage and premises,

(u) See *ante*, 132 to 153, and *post*, in covenant; and other form, 7 Wentw. 38, &c.

(x) This form is authorized by the statute, but it is not usually adopted in practice; 2 Marsh. on Insurance, 599, 601, note (a).

In cases where debt lies, it may be frequently better to declare in debt on the policy than in covenant, because in the former a

count for debt for money had and received may be joined, and under which in some cases the premium may be recovered; and the count on an account stated would be useful if there had been an adjustment.

(y) See form, Plead. Assist. 345, 346; Lil. Ent. 185. See a form in debt on the *reddendum* of a lease for tithes, 2 Saund. 296, and

with the appurtenances, (z) to have and to hold the same to the defendant for a certain term of years, to wit, for and during and until the full end and term of [twenty-one] years then next ensuing and fully to be completed and ended, yielding and paying therefore, during the said term, to the plaintiff the yearly rent of £—, at the four most usual feasts or days of payment in the year, that is to say, on &c. [*as in the indenture*] by even and equal portions. By virtue of which demise the defendant entered (a) into the said demised premises, with the appurtenances, and was possessed thereof from thenceforth until and upon the [feast of St. Michael the Archangel, A. D. 1835,] when (b) a large sum of money, to wit, the sum of £— of the rent aforesaid, for the space of — ending on the day and year last aforesaid, and then last elapsed, (c) became and was due and payable from the defendant to the plaintiff, and still is in arrear and unpaid to the plaintiff. Whereby an action hath accrued (d) to the plaintiff, to demand and have of and from the defendant the sum of £—, being the sum above demanded. Yet &c. [*See breach, ante, 286.*]

ON LEASES.

Entry of lessee.

Rent in arrear.

For that whereas heretofore, to wit, on &c., by a certain indenture then made between the plaintiff of the one part and one E. F. of the other part, (the counterpart of which said indenture, sealed with the seal of the said E. F., the plaintiff now brings here into Court, the date whereof is the day and year aforesaid,) the plaintiff for the consideration therein mentioned [*here set out the parts of the indenture applicable to the case, as thus,*] did demise, lease, set and to farm let unto the said E. F., his executors, administrators and assigns, a certain messuage and premises therein more particularly described, to have and to hold &c., yielding and paying &c.; and the said E. F. did, in and by the said indenture, covenant &c. [*here set out the habendum and covenant for payment of rent as in the indenture, and see*

Against assignee of lessee for rent and amount of land-tax redeemed by lessor. (e)
First for rent generally.

against an administrator on the *reddendum* in a lease of lands, 1 Saund. 1, 2. Also a form in debt for rent on the *reddendum* of a lease to commence in future, 1 Saund. 250, 251. and another form in debt for a rent-charge or annuity against the persons of the profits, 1 Saund. 276, 282, note 1; 1 T. R. 378; Dougl. 628.

As to debt on leases, stating the lease, see *ante*, vol. i. index, "*Lease*;" 1 Rich. C. P. 454, 465; 2 Rich. C. P. 252, 259, 265, 267, 270. This action cannot be supported by the lessor against the lessee after he has accepted an assignee as his tenant, his remedy against the lessee is by action of covenant; 1 Saund. 241, n.; 1 T. R. 92; *ante*, vol. i. The assignee of the lessee may be sued in debt for rent, see next precedent. The assignee of the lessor may sue in debt for rent due on a demise; 5 Bar. & Cres. 512, and see outline of a form there.

When it is doubtful whether the demise were by deed, it is advisable to declare in the above form, stating the substance of the terms of the demise, and adding a count for use and occupation. It is settled, that in debt for rent reserved by deed, the plaintiff may declare without stating the deed; (see the precedents and notes in 1 Saund. 276, n. 1, 202, 325, n. 4; *Ld. Raym.* 1503,) unless in a case of a lease of tithes, or other incorporeal hereditaments, 2 Saund. 297, n. 1; this is the only case in which the plaintiff is allowed to de-

clare generally, and to produce a deed in evidence in support of such declaration; 1 New Rep. 104, 109.

When the declaration sets out the *lease*, it is similar to the declaration in covenant for rent, except in the commencement and conclusion, see *post*, to which precedent, with the notes, the reader is referred. Though furniture, &c. be demised also by the indenture, it need not be stated; 6 Bar. & Cres. 251. If the declaration profess to set out the terms of the reservation of rent, it is a variance to omit an exception referring to a subsequent proviso, by which a deduction is to be made, if a certain event happen, although that event have not happened; 6 Bar. & Cres. 430.

(z) It is not necessary to show the local situation; 3 M. & Sel. 380; 4 Taunt. 25; 6 East, 348.

(a) As to the allegation of the lessee's entry, see 1 Saund. 203, n. 1; Com. Dig. Pleader, 2 W. 14, and *post*.

(b) In debt for rent on a demise, it must be shown at what time the rent became due; *Gilb. Debt*, 407; see 10 East, 142; 4 Bar. & Cres. 157, *post*.

(c) See 4 Bar. & Cres. 157, 159.

(d) In *Gilb. on Debt*, 414, this is said to be incorrect.

(e) But *debt* is not sustainable against the assignee of a part of the land demised; *Curtis v. Spitty*, 1 Bing. N. C. 758.

ON LEASES.

post, in covenant] as by the said indenture, reference being thereunto had, will more fully appear. And the plaintiff saith, that after making of the said indenture, to wit, on &c. (f) all the estate, interest and title of the said E. F. in the said demised premises, by assignment then legally made, came to and vested in the defendant; (g) whereupon and whereby the defendant entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the residue of the said term, and although the plaintiff hath &c. [*aver plaintiff's general performance, post,*] yet the plaintiff in fact saith, that after the said assignment, and during the continuance of the said term, and whilst the defendant was so possessed of the said demised premises, to wit, on &c., a large sum of money, to wit, £—— of the rent aforesaid, for [three years] of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due from the defendant to the plaintiff, and still is due and unpaid, contrary to the form and effect of the said indenture and the said covenant by the said E. F. in that behalf so made as aforesaid.

Second count,
on the land-tax
redemption act,
38 Geo. 3, c. 60,
for amount of
land-tax re-
deemed by
lessor. (h)

And whereas also, before and until and at the time of the making of the purchase and redemption hereinafter mentioned, the said tenements so demised as aforesaid were charged with the land-tax to a large amount, to wit, the sum of £——, by an assessment made for the parishes of —— and ——, in the county of Middlesex aforesaid, for the year 1824, that is to say, on the aforesaid messuage, with the appurtenances, with the sum of £——, land-tax; another, with the appurtenances, with the sum of £——, land-tax; and the other of the said messuages, with the appurtenances, with the sum of £——, land-tax, making together the said sum of £——; and thereupon, after the making of the said indenture, and during the continuance of the said term thereby granted, and after the making of a certain act of parliament, made and passed in the 38th year of the reign of our said lord the king, intituled "An act for making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of money now charged in Great Britain as a land-tax for one year, from the 25th day of March, 1798," to wit, on &c., at &c. aforesaid, the said rent so payable as aforesaid being the rack-rent of the said demised premises of the plaintiff, being beneficially entitled to the said rent so received and made payable by the said indenture as aforesaid, and having claimed preference to the purchase of the said land-tax, under and by virtue of the said statute, duly redeemed and purchased the said land-tax so charged on the said demised premises as aforesaid, and thereby then became and were, and from thence hitherto have been and still are entitled to demand, receive and have of and from the tenant of the said demised premises, with the appurtenances, every year during the said term, the said sum of £——, and thereby and by reason of the defendant having, by virtue of the said assignment, become and continued to be tenant of the said demised premises, and also by reason of a large sum of money, to wit, the sum of £—— for divers, to wit, four years and one half of a year aforesaid, yearly payment of £—— so charged on the premises aforesaid, having, since the said assignment to the defendant, to wit, on &c., become due and payable, whereby &c. [*See conclusion, ante, 286.*]

(f) See note (e), *ante*, 311.

(g) As to statement of assignment, see *post, in covenant*.

(h) See 42 Geo. 3, c. 116; Barn, J. tit. "Land-tax;" 10 B. & C. 636; 3 B. & Ad. 921.

ON ANNUITY DEEDS.

Commencement, ante, 284.] For that whereas heretofore, to wit, on &c. [date of deed], by a certain indenture then made between the plaintiff of the one part and the defendant of the other part, (which said indenture, sealed with the seal of the defendant, the plaintiff now brings into Court, the date whereof is the day and year aforesaid,) he the defendant, for the consideration therein mentioned, did grant &c. [*here state in the past tense the grant of the annuity and the defendant's covenant to pay it, and proceed as follows:*] As by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. Nevertheless the plaintiff in fact saith, that after the making of the said indenture and during the natural life (j) of the said E. F., to wit, on &c. [*day when the last payment to be made became due*] a large sum of money, to wit, the sum of £—— of the said annuity or yearly rent-charge, for [one year and a quarter of a year] [*the time during which the arrears were accruing due*] which expired on the day and year last aforesaid, became and was due and owing from the defendant to the plaintiff, and is still in arrear and unpaid, contrary to the form and effect of the said indenture and of the said covenant of the defendant in that behalf made as aforesaid. Whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £——, being the said sum above demanded. Yet &c. [*See breach, ante, 286.*]

ON ANNUITY DEEDS.

On an annuity deed for arrears of the annuity. (i)

Profert.

Reference to indenture. Breach.

ON MORTGAGE DEEDS.

Commencement, ante, 284.] For that whereas heretofore, to wit, on &c. [date of indenture], by a certain indenture then made between the plaintiff of the one part and the defendant of the other part, which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid, after reciting as therein is recited, the defendant, for the considerations therein mentioned, did grant, bargain, sell, alien, release and confirm unto the plaintiff certain tenements and premises, with the appurtenances therein mentioned and particularly described, (l) to have and to hold &c. [*copy the*

ON MORTGAGE DEEDS.

On a mortgage by lease and release for principal and interest. (k)

Profert.

Defendant's grant and covenant.

(i) See a form in debt for an annuity or rent-charge against the pignor of the profits, 1 Saund. 276. Debt is preferable to covenant on an annuity deed, because in debt the judgment is final in the first instance. Even in covenant, however, there could be no occasion to execute a writ of inquiry on a judgment by default, as it might be referred to the master in Q. B. or prothonotary in C. P. to compute the amount due: 2 Chit. Rep. 32; Tidd's Prac. 9th edit. 570. It is also more advisable to declare in debt on the covenant than on the annuity bond, because in the latter case damages must be assessed, in pursuance of 8 & 9 W. 3, c. 11, s. 8, which causes expense and delay; Tidd, 9th edit. 1106, 584. When debt does not lie for arrears of an annuity, see *ante*, vol. i.; 2 D. & R. 603; 4 M. & Sel. 113; 2 Saund. 304, note, *ante*, vol. i., and *Randall v. Rigby*, 3 M. & W. 130.

(j) That this is a sufficient averment of his being alive, see 1 Saund. 285, note 8.

(k) In general it is more advisable to declare in debt than in covenant on a mortgage deed, because in the former the judgment is

final in the first instance. Even in covenant, however, there would be no occasion to execute a writ of inquiry on a judgment by default, as it might be referred to the master in Q. B. or prothonotary in C. P. to compute the amount due; 8 T. R. 326; 2 Chit. Rep. 234, 265; Tidd, 9th edit. 570. Debt on the covenant is also preferable to debt on a mortgage bond, conditioned as well for payment of the money as performance of covenants in the mortgage deed, because in the latter case the damages must be assessed under the 8 & 9 W. 3, c. 11, s. 8, which creates expense and delay.

In the case of a devise of the mortgagee's interest, the action must be brought in the executor's name; 8 Taunt. 227, and see a form there.

(l) The premises ought not to be stated at length, but in this concise way; Cowp. 665, 727; 1 Saund. 233, n. 2; 2 Saund. 366. Indeed, it is not necessary to state the grant, *habendum*, or proviso, and it would suffice merely to state the covenant according to the legal effect, as in the next form.

ON MORTGAGE DEEDS. *habendum verbatim*] subject, among other things, to a certain proviso or condition, that is to say, (m) that if the defendant, his heirs, executors or administrators, did and should pay to the plaintiff, his executors, administrators or assigns, the full sum of £— and lawful interest for the same, of good and lawful money of Great Britain, on the — day of — next ensuing the date of the said indenture, then the same should be void. And the defendant did thereby covenant, promise and agree to and with the plaintiff, that he the defendant should and would well and truly pay or cause to be paid unto the plaintiff the said sum of £—, and lawful interest for the same, upon the day and time mentioned and appointed for payment thereof in and by the said proviso, according to the true intent and meaning of the said indenture, as by the said indenture (reference being thereunto had) will, amongst other things, more fully and at large appear. Nevertheless the plaintiff in fact saith, that the defendant did not nor would well and truly pay, or cause to be paid, unto the plaintiff the said sum of £—, and lawful interest for the same, on the day and time mentioned and appointed for payment thereof as aforesaid, but therein failed and made default, and there is now due and owing from the defendant to the plaintiff, for and on account of the said sum of £— and interest (n) thereon, until the said — day of —, a large sum of money, to wit, the sum of £—, being the sum above demanded, whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the sum of £— above demanded. Yet &c. [*See breach, ante, 286.*]

The like in a shorter form. (o) For that whereas heretofore, to wit, on &c. [*date of indenture*] by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part, (which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid,) after reciting as therein is recited, the defendant, for the considerations therein mentioned, did, for himself, his heirs, executors and administrators, covenant to and with the plaintiff that he the defendant should and would well and truly pay or cause to be paid unto the plaintiff the said sum of £—, and lawful interest for the same, upon the — day of — [*day mentioned in the indenture for payment of principal and interest,*] according to the true intent and meaning of the said indenture. Nevertheless the plaintiff saith that the defendant has not as yet paid the said sum of £—, and lawful interest for the same, but hath therein failed and made default, and there is now due and owing from the defendant to the plaintiff, for and on account of the said sum of £—, and interest (p) thereon, until the — day of —, A. D. —, a large sum of money, to

Covenant to pay.

Breach, non-payment.

(m) The proviso is to be copied from the deed *verbatim* in the past tense. However, it is not necessary to state the premises, the *habendum*, or the proviso; for, as in *covenant* on a deed it is sufficient to state the covenant and the breach, and the former may be stated according to its legal effect; so the declaration in *debt* on a mortgage deed may state the covenant to have been to pay the principal and interest on the day mentioned in the proviso, without stating such proviso; and see these suggestions adopted in the next form.

(n) As the covenant is usual to pay the principal money and interest on a certain day, the subsequent interest cannot be properly in-

cluded as a *debt* in the sum demanded, but may be recovered as *damages* for the detention of the principal sum and interest due beyond the named day, and a sum sufficient to cover the subsequent interest should be laid as damages at the end of the declaration, and the verdict should be taken for *damages*, including such subsequent interest; 6 Car. & P. 661; 3 & 4 W. 4, c. 42.

(o) That this shorter form may be adopted, see note (m) *supra*, and observe the other notes to the last precedent.

(p) See the note (m), *supra*, as to the interest and statement of damages.

wit, the sum of £——, being the sum above demanded, whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £—— above demanded. Yet &c. [*Common breach in debt, as ante, 286, laying the damages at the conclusion in a sum sufficient to include all interest to the time of trial, 6 Car. & P. 661.*]

ON MORTGAGE
DEEDS.

ON BONDS GENERALLY.

ON BONDS
GENERALLY. (q)
On a money-
bond. (r)

Commencement, ante, 284.] For that whereas the defendant heretofore, to wit, on the —— day of ——, in the year of our Lord ——, by his certain writing obligatory, sealed with his seal, (s) and now shown (t) to the Court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of £—— above demanded, to be paid to the plaintiff; (u)* Yet the defendant (although often requested so to do) hath not paid the said sum of £—— above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, To the damage of the plaintiff of £100, (x) and thereupon he brings suit.

Commencement, ante, 284.] For that whereas the defendant heretofore, to wit, on &c., [*date of instrument*] in the island of Jamaica, by his certain writing obligatory, sealed with his seal, and to the Court of our lady the queen, before the queen herself, now here shown, the date whereof is the

On a Jamaica
bond for current
money of the
island.

First count,
stating that the
bond was under
seal. (y)

(q) As to the declaration on bonds in general, see *Com. Dig. Pleader*, 2 W. 9.

(r) See *Forms*, Pl. Ass. 347, 357, 366; *Lil. Ent.* 185; 2 *Mall. Ent.* 178, 241; and see forms in C. P. before the uniformity of process act, 2 W. 4, c. 39; Pl. Ass. 380; *Rich. C. P.* 117; *Morg. Prec.* 494; 2 *Chit. Pleading*, 5th ed. 437, note (f). In an action against one of several obligors on a joint and several bond, it is usual only to state that the defendant made the bond; but it should seem that if it be stated that all made it, the execution of the defendant alone need be proved; 4 *Campb.* 34. It was held a fatal variance to describe a bond conditioned for payment by A. B. and C. as a bond conditioned for payment by A. B. and D., although the bond be several as well as joint, and the action be brought against A. severally; 6 *Bing.* 110. But now such a mistake would, in all probability, be amended on the trial.

There seems to be some perplexity in the cases as to what name the plaintiff should sue or the defendant be sued by, where in the body of the bond or deed he is described by one name, and he executed it by another. In a case, where in an action of covenant on a deed the declaration stated that the deed was made between the plaintiff of the first part, James Cook and Hannah his wife of the second part, and A. B. of the third part; and the deed, when produced, appeared on the face of it to be by the plaintiff as trustee of James Cook and Hannah his wife of the first part, George Cook and Hannah his wife of the second part, and A. B. of the third part, and the deed was executed by the name of George Cook, it was considered a fatal variance, and that it being uncertain, from the body of the deed, whether the party's real name was James or George, and he having

executed it by the name of George, it should have been stated to have been made by George Cook of the second part; 2 C. & P. 474; 1 M. & M. Ca. Ni. Pri. 6. Another case has been decided, that a declaration against the obligor by his right name, stating that he executed the bond by his wrong name, is bad in arrest of judgment; 3 *Taunt.* 504; 5 B. & Ald. 682; *Gilb. C. P.* 216; *Lutw.* 894; 2 *Stra.* 1218. Upon the whole it seems in general necessary to declare by or against a party in the name by which he is called in the deed or bond, and not in the name by which he executed the same. But if in the deed or bond he be called by different names, then he should sue or be sued by the name by which he signed, for the execution in that name would be considered as clearing up the ambiguity. See *Finch v. Cocken*, 2 Cr. M. & Ros. 196, where much law on this subject is collected; and *quære*, whether the proper course is not to declare, stating the defendant to have become bound to the plaintiff by the name of A. B., and then to aver that A. B. and the plaintiff are one and the same persons, and not other or different persons. See also *Brunskill v. Robertson*, 2 P. & D. 269.

(s) As to the statement of defendant having sealed, and the omission of it, see 1 *Saund.* 291, note.

(t) As to the profert and averment of excuse for not making it, see *post*, 316.

(u) Here are usually inserted the following words: *When he the defendant should be thereunto afterwards requested*; but as they are not usually in the bond, they are better omitted in the declaration.

(x) See 6 *Car. & P.* 661; and *ante*, 314, note (u).

(y) 1 B. & P. 360.

**ON BONDS
GENERALLY.**

day and year aforesaid, acknowledged himself to be held and firmly bound to the plaintiff in the sum of £ — current money of the island aforesaid, to be paid to the plaintiff; and the plaintiff avers, that the said sum of £ — current money of the said island, at the time of making the said writing obligatory, was and still is of the value of £ — of lawful money of Great Britain; whereby, and by reason of the said sum of £ — being and remaining wholly unpaid, an action hath accrued to the plaintiff to demand and have of the defendant the said sum of £ —, parcel of the said sum above demanded.

The like, stating that bond was subscribed and duly made according to usage of Jamaica. (s)

Commencement, ante, 284] For that whereas the defendant heretofore, to wit, on the day and year aforesaid, in the said island of Jamaica aforesaid, by his certain other writing obligatory, then by him subscribed with his own proper hand and name, and duly made and delivered according to the usage and custom of the said island, (a) and to the said Court of our said lady the queen now here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of £ — current money of the island aforesaid, to be paid to the plaintiff; and the plaintiff avers that the said £ — current money of the said island, in the said writing obligatory specified, at the time of the making of the said writing obligatory, was and still is of the value of £ — of lawful money of Great Britain, being other parcel of the said sum of £ — above demanded. Yet, &c. [*See breach, ante, 286.*]

Counts on several bonds, &c.

Several counts on different bonds may be joined in the same declaration, see the form, 1 Saund. 288; and id. note 1; and Lil. Ent. 167; Com. Dig. Pleader, 2 W. 9. In a case of this nature proceed as in the above form, ante, 315, to the asterisk, and then before the breach insert the count on the other bond as follows:] "And whereas also the defendant heretofore, to wit, on &c., by his certain other writing obligatory, sealed &c. [*Same as the first count, ante, 315, to the end, and then state*] which said several sums of money in the said first and second counts mentioned amount together to the said sum of £ — above demanded. Yet the defendant, &c. [*Proceed with the breach as ante, 315, to the end. There appears to be no occasion to conclude each count with the words "whereby," &c. See the form, 1 Saund. 288.*]

Averment in excuse of a profert.

As to the profert, see ante, vol. i. Index, "Profert," If a bond or other deed be pleaded with a profert, and the defendant plead non est factum, and the plaintiff cannot produce the bond &c. at the trial, he will be nonsuited, 4 East, 585. In such a case, instead of the profert in the above precedent, insert in the declaration one of the following excuses, which are to be framed according to

(s) 1 B. & P. 360.

(a) The instruments were not sealed, but merely signed by the defendant, and a cross put at the end of the name in the presence of an attesting witness; the plaintiff sued upon the bond in the island, but on a bill filed there against him in equity, an injunction was obtained for want of an answer. Mr. Wood, in A. D. 1797, gave the following opinion: "I think plaintiff may maintain an action of debt against defendant, and declare upon these instruments as bonds, though not sealed, if it be the practice of the island of Jamaica

to make such writings, and if they have there the force and obligation of bonds, the same as sealed bonds here. It will be proper to declare upon them, first, as sealed bonds; secondly, as writings obligatory, subscribed by the obligor, and duly made according to the custom of the island, and to add common counts to include the original demands for which these bonds were given." See also 1 B. & P. 360. As to the mode of calculating the value in British sterling, see *ante*, 306, note (m).

the fact. If the bond be lost, say, "and which said writing obligatory having been lost," or, "and which said writing obligatory having been destroyed by accident," or, "by fire," or, "by the defendant," the plaintiff cannot produce the same to the said Court here. See 3 T. R. 151. If the bond be in the possession of the defendant, the excuse of the profert runs thus: "and which said writing obligatory being in the possession of the defendant, the plaintiff cannot produce the same to the said Court here." It seems sufficient if an allegation of this nature be true at the time of declaring, and if the deed be afterwards found it will not vitiate the allegation; 2 Campb. 557, 558.

ON BONDS
GENERALLY.

ON BONDS STATING CONDITION.

ON BONDS
STATING CON-
DITION.
Observations.

As to the instances in which it is necessary to state the condition and breaches of the bond, the stat. 8 & 9 W. 3, c. 11, s. 8, provides that the plaintiff shall execute a writ of inquiry on a judgment for plaintiff on demurrer, or by confession or *nihil dicit*, in an action on a bond with a penalty, and show upon the record the breaches of the bond, and this act has received a very liberal construction, it having been made in favour of defendants, 5 D. & R. 636; and the statute is compulsory on the plaintiff to proceed in the manner it prescribes; 2 Wils. 377; 13 East, 3 a; Tidd, 9th ed. 584. See *ante*, vol. i. Index, tit. "Bond."

The following bonds are within the meaning of the act, and the conditions and breaches thereof must be stated in the declaration, or assigned in the replication, or suggested in the issue, as the case may require, viz. an annuity bond, 8 T. R. 126; an arbitration bond, 6 East, 613; 2 Smith, 666, S. C.; a bond for the payment of money by instalments, 6 East, 550; 2 Smith, 663, S. C. Where covenants and agreements are contained in the condition of a bond, they are within the statute, as well as where they are in a different instrument; 2 Burr. 772; 2 Ken. 492; 2 Burr. 820; 2 Bla. Rep. 843. Where a bond upon the face of it appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was *agreed* that it should be lawful for the obligees to commence an action upon the bond, and to proceed to judgment whenever they should think fit, and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees on demand of all sums of money which then were or might thereafter become due to them; and judgment having been entered up by virtue of this deed, the obligees issued execution without assigning breaches or executing a writ of inquiry; the Court held that this was a bond substantially within the meaning of the 8 & 9 Will. 3, c. 11, s. 8, and that the obligees ought to have assigned breaches thereon; 5 B. & Cres. 650; 8 D. & R. 424, S. C.

To what bonds
stat. 8 & 9 W. 3,
c. 11, s. 8, does
extend.

But the statute does not extend to bonds conditioned for the payment of a sum certain at a certain time, as *post obit* bonds, 2 Campb. 285, n.; 2 B. & Cres. 82, 89; 3 D. & R. 278, 281, S. C.; or other bonds for the payment of money, which are provided for by the 9 Ann. c. 16, s. 13; 2 J. B. Moore, 220; nor does it extend to bail-bonds, Tidd, 9th edit. 584; 2 B. & P. 446; or replevin bonds, 3 M. & Sel. 155; or a petitioning creditor's bond, 3 East,

To what bonds
the statute does
not extend.

ON BONDS
STATING CON-
DITION.

22; 7 T. R. 300. And where judgment is entered on a warrant of attorney, it is not within the act, and this although a bond be also given, 2 Taunt. 195; 3 Taunt. 74; 5 Taunt. 264; 16 East, 164; 6 Bingh. 385; 5 B. & Cres. 656; nor does the statute apply to cases where the damages assessed are calculated by the jury to meet and satisfy the entire condition of the bond; 13 Price, 715. It is not necessary for the crown to assign breaches under the act, and if any one breach be proved, the crown is entitled to judgment for the whole penalty; 1 Younge & Jervis, 171; Tidd, 9th ed. 585.

The observations when or not to state the conditions and breaches in the declaration will be found in the first volume.

Form of decla-
ration on a
bond stating
condition.

After stating the obligatory part of the bond, as ante, 315, before breach, say] Which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that, &c. [Here set out recitals and conditions in the past tense, and allege the breach in the words of the condition, as the nonpayment of money by instalments, post. If there has been more than one breach, then proceed as follows:]

Second breach.

And the plaintiff, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, further says, that [here assign another breach, and conclude] by reason of which said several breaches the said writing obligatory became forfeited, and thereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £—— above demanded. Yet the defendant (although often requested so to do) hath not as yet paid the said sum of £——, or any part thereof, to the plaintiff, but to pay the same to him hath hitherto wholly refused, and still doth refuse, To the damage of the plaintiff of £——, (b) and thereupon he brings suit, &c.

Against a
surety on a bond
conditioned for
an agent's faithfully
accounting for goods
delivered to him to sell.

See *Stothert v. Goodfellow*, 1 Nev. & Man. 202; and *Bishton v. Evans*, 2 Crom. M. & Ros. 12.

ON AN
ANNUITY
BOND. (c)

ON AN ANNUITY BOND.

Set out the bond and condition as directed in the last form mutatus mutandis, and then assign the breach as follows:]—Nevertheless the plaintiff in fact saith, that after the making of the said writing obligatory, (d) to wit, on &c., [day it fell due,] a large sum of money, to wit, the sum of £—— [state enough] of the said annuity, or yearly sum of £—— for [one quarter of a year] which expired on the day and year last aforesaid, became and was due and owing from the defendant to the plaintiff and still is in arrear and unpaid, contrary to the form and effect of the said writing obligatory and of the said condition thereof; by reason of which said breach the said writing obligatory became forfeited, and whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the sum of £——

(b) Here insert a sum sufficient to cover all damages and interest until final judgment; 6 Car. & P. 661.

(c) See ante, vol. i. Index, "Annuity;" and see ante, 313, as to its being most advisable in general to sue on the annuity deed.

(d) If the annuity be payable during the life of a third person, here insert the following allegation: "And during the life of the said E. F." which will be a sufficient averment of the life of the third person; 1 Saund. 235, note 8.

[*the penalty*] above demanded. Yet the defendant (although often requested so to do,) hath not as yet paid the said sum of money above demanded, or any part thereof to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, To the damage of the plaintiff of £500, (e) and thereupon he brings suit, &c.

ON AN ANNUITY
BOND.

ON BOND TO REPLACE STOCK.

ON BOND
TO REPLACE
STOCK.

*Set out the bond and condition as directed, ante, 318, and then proceed as follows :—*Yet the plaintiff in fact saith, that the defendant hath not, at his own proper costs and charges, transferred or caused or procured to be transferred unto or to the account of the plaintiff, in the books of the said governor and company of the Bank of England, the said sum of £—— share or interest in the said joint stock of £—— per cent. consolidated bank annuities, but hath hitherto wholly neglected and refused so to do, and the said sum of £—— share or interest in the said joint stock wholly remains untransferred and unpaid and unsatisfied to the plaintiff. And for assigning a further breach of the said condition of the said writing obligatory, the plaintiff, according to the form of the statute in such case made and provided, saith that the defendant hath not as yet answered, paid or made good to the plaintiff, all dividends, interest and produce which he the plaintiff could have received, and would have been entitled to in case the said £——, so remaining untransferred and unpaid and unsatisfied as aforesaid, had remained and continued standing in the books of the said governor and company of the Bank of England, in the names and as the property of him the plaintiff, but, on the contrary thereof, although he the plaintiff, after the making of the said writing obligatory, to wit, on &c., could have received, and would have been entitled unto certain dividends, interest and produce, to a large amount, to wit, the sum of £—— in case the said sum of £—— had remained and continued standing in the books of the said governor and company of the Bank of England, in the name and as the property of him the plaintiff as aforesaid, whereof the defendant, afterwards, to wit on the day and year last aforesaid had notice. Yet the plaintiff in fact saith, that the defendant hath not (although often requested so to do) as yet transferred, paid or made good unto the plaintiff, the said last mentioned sum of money, or any part thereof, but hath hitherto wholly neglected and refused so to do, and still neglects and refuses so to do. By reason of which said breach the said writing obligatory became forfeited, and thereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £—— above demanded. Yet the defendant hath not (although often requested so to do) as yet paid the said sum of money above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses to pay the same, or any part thereof, to the plaintiff. To the damage of the plaintiff of £——, (g) and thereupon he brings suit, &c.

On a bond to replace stock and pay dividends. (f)
First breach, not replacing principal.

Second breach. Non-payment of dividends.

(e) State enough, 6 Car. & P. 661.

(f) See *ante*, 201, a form in *assumpsit* for not replacing stock. See notes 1 Chit. Col.

Stat. tit. "Stockjobbing."

(g) State enough, 6 Car. & P. 661.

ON A BOND TO
PERFORM
COVENANTS IN
ANOTHER
INDENTURE. (h)

ON A BOND TO PERFORM COVENANTS IN ANOTHER INDENTURE.

The Indenture
stated.

Proceed as in the form on a common bond, ante, 315, to the asterisk, and then as follows :—And the plaintiff, according to the form of the statute in that case made and provided, says that the said writing obligatory was made with a condition thereunder written, that if [*set out the condition verbatim, and which may be as follows*] the above bounden defendant did well and truly observe &c. all and singular the covenants &c. whatsoever, which on the part of the plaintiff were or ought to be observed &c. in a certain indenture bearing even date with the said writing obligatory, and made between the plaintiff of the one part and the defendant of the other part, according to the true intent and meaning of the said indenture, then the said obligation was to be void, but otherwise to continue in force. And the plaintiff further saith, that by the said indenture in the condition of the said writing obligatory mentioned, which the plaintiff now brings here into Court, he did demise unto the defendant all that, &c.—[*Here set out the demise, and such of the covenants as have been broken, and assign breaches of them, as in a declaration in covenant, post, and conclude thus :*—By reason of which said breaches the said writing obligatory became forfeited, and thereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £—— [*the penalty*] above demanded. Yet the defendant hath not paid the said sum of £—— above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

ON BAIL
BONDS.

On a bail bond by the assignee against the principal or bail, where the first suit was in the Queen's Bench, Common Pleas, or Exchequer by *capias*. (m)

ON BAIL BONDS.

In the Queen's Bench [or "Common Pleas," or "Exchequer of Pleas."]

On the — day of —, A. D. —.

— (to wit.) (i) A. B., assignee of O. P., Esq., sheriff (k) [or, "late sheriff"] of the county of —, according to the form of the statute (l) in

(h) See the form in 1 Saund. Rep. 58 b.

(i) The venue is transitory; Fortes. 366; Stra. 727; Lord Raym. 1455. It is not to be repeated in body of declaration; Reg. Gen. Hil. T. 4 W. 4.

(k) In *Middlesex* the two officers constitute only one sheriff, and the declaration would be demurrable if they be described as sheriffs. In London they may be termed *sheriffs*; Bac. Abr. Sheriff, K. 162; 2 Lord Raym. 1135; 3 Chitty's Gen. Prac. by Lush, 149.

(l) 4 & 5 Ann. c. 16, s. 20. See the constructions thereon in 1 Saund. 58 a b., note (3); Tidd, 9th edit. 297 to 301; 3 Bla. Com. 290.

(m) The 1 & 2 Vict. c. 110, empowers a judge of one of the superior Courts "by a special order to direct that a defendant shall be held to bail for such sum as he shall think fit, not exceeding the amount of the debt or damages, and that thereupon it shall be lawful for the plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out a writ of *capias* in the form contained in the schedule to that act, and

that it shall bear date the day on which the same is issued." The form of the writ in the schedule to the act is similar to the form of a writ of *capias* prescribed by the Uniformity of Process Act, except that it is required to be executed within one month instead of four months.

This action, when in the name of the assignee of the sheriff, must be brought in the Court from which the process in the original action issued; 2 Saund. 61 b.; 8 T. R. 152, *acc.*; 1 H. Bl. 631, *cont.* But the sheriff may sue in any Court, Reg. Gen. Hil. T. 2 W. 4, reg. 2; and reg. 30 orders that proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more; see prior decisions, 2 Bar. & Ald. 508; 1 Chitty's Rep. 337. The defendant cannot take the objection that the action is in the wrong Court under the plea of *non est factum*, 2 Campb. 396. An attorney, by entering into a bail bond in another Court, waives his privilege; Barnes, 117; 3 Wils. 348; 2 Bla. Rep. 838, S. C.; 1 Hen. Bl. 631.

such case made and provided, by Y. Z. his attorney, complains of C. D., E. F., and G. H., who have been summoned to answer the plaintiff in an action of debt, and the plaintiff, as assignee as aforesaid, demands of the defendants the sum of £——, which they owe to and unjustly detain from him. (u) For that whereas the plaintiff, on &c., (o) according to the form of the statute in such case made and provided, and under and by virtue of a special order of —— [*naming the judge*], one of the judges of one of her Majesty's superior Courts at Westminster, to wit, one of the judges of the Court of our lady the queen, before the queen herself at Westminster [*according to the fact*], caused to be issued out of her majesty's Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas,"] (p) at Westminster, (q) in the county of Middlesex, against the said C. D., (r) [*or if the declaration be against one of the bail, say, "against one C. D."*] a certain writ of our said lady the queen, (s) called a *capias*, directed to the sheriff of ——, (t) and bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid; (u) by which said writ our said lady the queen commanded the said sheriff that he should omit not by reason of any liberty in his bailiwick, but that he should enter the same and take the said C. D., if he should be found in his bailiwick, and him safely keep until he should have given him bail, or made deposit with him according to law, in

ON BAIL
BONDS.

The writ.

If the action be by the sheriff, it is usual to declare as on a common money bond, as *ante*, §15.

(u) Although the action be by an executor of the assignee, it may be in the *debet* and *detinet*; 1 Selw. N. P. 570.

(o) This is to be the date of the writ, though the exact day would not be material.

(p) "The Court of the Bench at Westminster," means C. P.; how to describe the Court, see 3 M. & Sel. 166; 1 J. B. Moore, 19; 7 Taunt. 271, S. C.

(q) An allegation of the Court being then held at Westminster, &c. is unnecessary, and if the writ be stated to be sued out in vacation, and not under a *videlicet*, would render the declaration demurrable; 5 Burr. 2586; 3 T. R. 184; 1 Saund. 300 b, n. 7; but not so if stated under a *videlicet*, 5 J. B. Moore, 538; 2 B. & B. 659, S. C.

(r) The name of the person against whom the writ is stated to have been issued must be stated accurately; 2 Camp. 270; 1 *Id.* 14; 2 Esp. 72; 1 D. & R. 551. Where it was stated that by a writ of *latitat* the sheriff was commanded to take one "F. J. by the name of J. J.," an examined copy of the *latitat* was given in evidence, commanding the sheriff to take "J. J." The bail bond was signed by the principal, "F. J. arrested by the name of J. J.," and the plaintiffs offered to prove that this same person was their debtor, whom they intended to hold to bail, but Lord Ellenborough said, "The writ must speak for itself. I cannot hear that, instead of A. B. mentioned in the writ, it was meant that the sheriff should arrest X. Y.;" and the plaintiffs were nonsuited; *Scandover v. Warne*, 2 Camp. 270; *Wilks v. Lork*, 2 Taunt. 399. Where the declaration stated that the sheriff was commanded to take the said defendant *Thomas Atwood* to answer the plaintiff of a

plea of trespass, "and also to a bill of the said plaintiff against the said defendants," it was holden to be clearly defective, but the Court gave leave to amend on payment of costs; 1 Dowl. & R. 551. Where a *latitat* against D. and two others was stated as a *latitat* against D. and John Doe, it was ruled no variance; 1 T. R. 238. And see fully *Finch v. Cocker and others*, 3 Dowl. 678, where the declaration on the bail bond stated that the writ was against the said *W. Cocker* by the name of *W. Cocker*, and after verdict the judgment was arrested, on the ground that such misnomer on the writ made the arrest illegal, and the bail bond void, there not being an averment that the defendant was known as well by one name as the other. But a declaration, stating the writ in its very terms, and then averring that the now defendant was and is known as well by one name as the other, would be good; *id. ibid.*

As to the liability of the sheriff, where the defendant directed to be holden to bail is known by one name as well as another, and as to declaration and pleas in such a case, see *Brunskill v. Robertson*, 2 P. & D. 269.

(s) Where in an action for an escape, the plaintiffs declared on a writ of the king, and the writ produced in evidence was a writ of George the Third, but tested in the name of Best, C. J., and indorsed with the date of 1826, being in the reign of George the Fourth, it was held no variance; 4 Bing. 278.

(t) It may be stated to have been directed to the sheriff by name; 2 Camp. 525. As to the form of the writ of *capias*, and as to the proceedings thereon and on the bail bond, see 3 Chitty's Gen. Prac. by Lush, 263 to 330.

(u) This allegation is in Mr. Tidd's Supplement, of A. D. 1833, page 292, but *semble* unnecessary.

ON BAIL BONDS.	an action upon promises [<i>or</i> "in action of debt,"] at the suit of the plaintiff, or until the said C. D. should by other lawful means be discharged from his custody; (y) [and our said lady the queen did thereby further command the said sheriff, that on the execution thereof he should deliver a copy thereof to the said C. D.; and our said lady the queen thereby required the said C. D. to take notice, that within eight days after the execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our said lady the queen's Court of Q. B [<i>or</i> "C. P." <i>or</i> "Exch. of Pleas,"] at Westminster, to the said action, and that in default of his so doing, such proceedings might be had and taken as were mentioned in the warning thereunder written or indorsed thereon. And our said lady the queen did thereby further command the said sheriff, that immediately after the execution thereof he should return the said writ to our said lady the queen's said Court, together with the manner in which he should have executed the same, and the day of the execution thereof; and that if the same should remain unexecuted, then that he should so return the same at the expiration of one calendar month from the date thereof, or sooner, if he should be thereto required by order of the said Court, or by any judge thereof. (z) Which said writ afterwards, and before the delivery thereof to the sheriff of the said county of —, to be executed as is hereinafter mentioned, to wit, on the day and year first aforesaid, was marked and indorsed for bail for £—, by order of — [<i>naming the judge making the order</i>], according to the form of the statute in such case made and provided. (a) And which said writ so indorsed, afterwards, to wit, on the day and year first aforesaid, was delivered to the said O. P., who then and from thence, until and at, after eight days after the execution of the said writ on the said C. D. as hereafter mentioned, was sheriff of the said county of — in due form of law to be executed. By virtue of which said writ the said O. P., so being such sheriff as aforesaid, afterwards, and within one calendar month from the date thereof, including the day of such date, (c) to wit, on the — day of —, A. D. — [<i>date of bail bond</i>], and within his bailiwick, as such sheriff, executed the said writ, and took and arrested the said C. D. by his body, and then had and detained him in his custody as such sheriff, at the suit of the now plaintiff for the cause aforesaid. And the said O. P. thereupon and on the execution of the said writ, to wit, on the day and year last aforesaid, delivered a copy of the said writ, together with every memorandum and notice subscribed thereto, and all indorsements thereon, to the said C. D. And the said C. D., being so arrested and in custody of the said O. P., so being sheriff as aforesaid, by virtue of the said writ at the suit of the now plaintiff, the said O. P. afterwards, and within eight days
Indorsements on writ.	
Delivery to sheriff.	
Arrest. (b)	
Copy of writ delivered to original defend- ant.	
The bail bond executed.	

(y) In Tidd's Supplement, A. D. 1833, page 292, and in 3 Dowl. 678, it is suggested that after this word, the writ *throughout* should be inserted to the teste, see the form of writ of capias, 3 Chitty's Gen. Prac. by Lush, 122; but it is submitted that it is not necessary to set out the *whole of the writ*.

(s) The declaration sometimes unnecessarily sets out all the memoranda on the writ, here averring "and by certain memoranda then subscribed to the said writ, it was made known that that writ was to be executed," &c.

(a) 1 & 2 Vict. c. 110. As to a variance, 1 Ld. M. 352.

see 5 Esp. N. P. C. 133; 1 Marsh. 214; R. & M. Ca. N. P. 292; 9 Geo. 4, c. 15; 3 & 4 Will. 4, c. 42, s. 23.

(b) The allegation of the arrest is not necessary, and is not traversable; 2 Saund. 59 b.

(c) The arrest must take place whilst the writ was in force; 2 Saund. 60 a; 1 Ld. Raym. 352; 4 M. & Sel. 338; and per Bayley, J., in *Edwards v. Brown*, 1 Tyr. 201. Formerly, when writs had a return day, it was held that if a bail-bond was executed after the return day, it was void; 2 Saund. 60 a; 1 Ld.

next after the execution of the said writ as aforesaid, inclusive of the day of such execution, to wit, on the day and year last aforesaid, and within his bailiwick, as such sheriff, took bail for the said C. D., causing special bail to be put in for him to the said action in her majesty's said Court, as required by the said writ, and according to the form of the statute in such case made and provided; (d) and on that occasion the said C. D., E. F., and G. H., then, to wit, on the day and year last aforesaid, by their certain writing obligatory, commonly called a bail bond, sealed with the respective seals of the said C. D., E. F. and G. H., and now shown to the said Court of our Profert thereof. said lady the queen before the queen herself, [or, in C. P. "before her justices of the bench," or, in the Exchequer, "before the barons of her said Exchequer,"] the date whereof is the same day and year last aforesaid, acknowledged themselves to be held and firmly bound to the said O. P., so then being sheriff of the said county of — as aforesaid, as such sheriff, by the name, description, and addition of O. P., Esq., sheriff of the county of —, in the penal sum of £—, of lawful money of Great Britain, to be paid to the said sheriff or his certain attorney, executors, administrators or assigns, with and under a certain condition thereunder written, whereby [set out the condition verbatim, and which is in general as follows:] (e) after reciting that the said C. D. was, on the — day of — then instant, taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the queen's writ of capias issued out of her majesty's Court of —, bearing date at Westminster, the — day of — then instant, to the said sheriff directed and delivered, against the said C. D. in an action upon promises [or, "in an action of debt," according to the fact], at the suit of the now plaintiff, being the said writ above-mentioned and set forth, and that a copy of the said writ, together with every memorandum and notice subscribed thereto, and all indorsements thereon, was, on the execution thereof, duly delivered to the said C. D., and that he was by the said writ required to cause special bail to be put in for him in the said Court to the said action within eight days after execution thereof on him, inclusive of the day of such execution, it was conditioned that if the said C. D. should cause special bail to be put in for him to the said action in her majesty's said Court, as required by the said writ, (f) that then the said obligation should be void and of no

(d) 23 Hen. 6, c. 9; 2 Saund. 59, 61 c, d, note 5.

(e) See the form of bail-bond and condition, 3 Chitty's Gen. Prac. by Lush, 298, note (e). Before the uniformity of process act, 2 W. 4, c. 39, it was considered not to be necessary to set forth the condition verbatim; it was sufficient to state it according to its legal effect; 3 J. B. Moore, 214; 3 Stark. 76. If it appeared by the declaration that the bond was void by the provisions of 23 Hen. 6, c. 9, the declaration would be bad either upon general demurrer or upon arrest of judgment, after verdict on a plea of *non est factum*; 2 T. R. 569; 4 M. & Sel. 338.

(f) Where the declaration stated the arrest to be by virtue of *capias* sued out of the Court of our lord the king, before Sir W. D. B. and others, then his majesty's justices of the Bench at Westminster, and averred the condition of the bond to be, that if the principal should

appear according to the exigency of the said writ in the said Court, in &c., the bond was to be void, and the breach was the non-appearance according to the exigency of the writ; on the production of the bond, the condition was for the appearance of the principal, "before our sovereign lord the king at Westminster, on &c." to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of the King's Court of Common Bench, it was held no variance; 2 M. & P. 81; 6 Bing. 32. Where the condition was, that the party should appear before the king at Westminster, and the writ was to appear before the king wheresoever &c., it was held an immaterial variance; 9 East, 55; 3 J. B. Moore, 214; but see 1 Chitty's Rep. 323. But where the writ was to appear before his majesty's justices of the bench at Westminster, and the condition was to appear before the king at Westminster, it was held fatal,

ON BAIL
BONDS.

Breach of condition, not putting in bail above.

Assignment of bail bond by sheriff to plaintiff.

Reference to such indorsement.

Whereby *actio accrevit*.

Breach, non-payment.

force, or otherwise should stand and remain in full force, vigour and effect, as by the said writing obligatory and the condition thereof, reference being thereunto had, will fully and at large appear. And the plaintiff in fact saith, that the said C. D. did not cause special bail to be put in for him to the said action in her majesty's said Court, as required by the said writ in the condition of the said writing obligatory mentioned, according to the exigency of the said writ, but therein wholly failed and made default, whereby the said writing obligatory became forfeited. And the plaintiff further saith, that the said writing obligatory being so forfeited, and the money therein specified remaining unpaid and unsatisfied to the said sheriff, the said O. P. so being sheriff of the said county of — as aforesaid, (g) afterwards, to wit, on the — day of —, in the year aforesaid, (g) [date of assignment,] at the request of the said A. B., the plaintiff in the said suit, by an indorsement* on the said writing obligatory, duly made and sealed with the seal of office of the sheriff of the said county of —, assigned the said writing obligatory to the plaintiff, according to the form of the statute in such case made and provided, (h) as by the said assignment indorsed on the said writing obligatory as aforesaid, and to the said Court of our said lady the queen now here shown, the date whereof is the day and year last aforesaid, will fully appear, (i) by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the now plaintiff as assignee of the said O. P., so being sheriff of the said county of — as aforesaid, (k) to demand and have of and from the now defendants (l) the said sum of £— above demanded. Yet the defendants (although often requested so to do) have not, nor hath either of them yet paid the said sum above demanded, or any part thereof to the said O. P., before the said assignment or to the plaintiff as assignee as aforesaid, or either of them, since the said assignment, but have hitherto wholly neglected and refused, and still do neglect and refuse to pay the same, or any part thereof, to the plaintiff, assignee as aforesaid, To the damage of the plaintiff, as assignee as aforesaid, of £—, and thereupon he brings suit, &c.

being different Courts; 6 Taunt. 551; 2 Marsh. 268, S. C.; *sed vide* 2 Lev. 180; T. Jones, 46, S. C.

Where the condition of the bond was stated to be, to answer the plaintiff in a plea of trespass upon promises, and the words "upon promises" were not in the bond, it was held a fatal variance; R. & M. Ni. Pri. Ca. 93.

(g) The assignment may be made by the under-sheriff in the name of the sheriff; 2 Saund. 61 a. In 4 Campb. 36, the assignment of a replevin bond, by a person acting in the sheriff's office, under the seal of the office, was held sufficient. It is not necessary to state that the assignment was under the hand of the sheriff and executed in the presence of two witnesses; *Lewis v. Parkes*, 3 M. & W. 133; 6 Dowl. 93, S. C. The assignment of a bail bond is invalid, if executed in the presence of and attested by the plaintiff in the action and another person, the statute 4 Anne, c. 16, s. 20, requiring the as-

signment to be made to the plaintiff in the presence of two credible witnesses; *White v. Barrack and another*, 1 M. & W. 424.

(h) 4 Anne. c. 16. It is sufficient to state that the sheriff assigned the bond to the plaintiff according to the statute, without alleging that the assignment was sealed or witnessed; Willes, 408, 409, note (a); 2 Saund. 61 b; 1 Wils. 121. And a fortiori it is not necessary to state the names of the witnesses; 1 Wils. 121. If the assignment appear on the face of the declaration to have been attested by only one witness, it will be demurrable; Willes, 409, n. (a).

(i) This reference to and profert of assignment is unnecessary; 1 Wils. Rep. 121.

(k) The assignee of the sheriff is enabled to sue by 4 Anne. c. 16, s. 20.

(l) It would be bad on special demurrer in an action against a surety to state that an action accrued against the principal; 1 Bos. & Pul. 58.

ON REPLEVIN BONDS.

ON REPLEVIN BONDS.

In the Queen's Bench, [or "Common Pleas," or "Exchequer."] (n)

On the — day of — A. D. —.

— (to wit.) (o) A. B., assignee of E. F., Esq., sheriff of the county of —, according to the form of the statute in such case made and provided, by Y. Z., his attorney, complains of C. D. who has been summoned to answer the plaintiff in an action of debt, and the plaintiff demands of the defendant the sum of £—, which he owes to (p) and unjustly detains from him. For that whereas heretofore, to wit, on &c. (q) the now plaintiff (r) distrained certain goods and chattels (s) of one G. H. for a certain sum of money then claimed to be due to the now plaintiff for rent. (t) And the said goods and chattels being so distrained the said G. H. afterwards, to wit, on &c., made his plaint to the said E. F. then being sheriff of the county of —, out of the County Court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said G. H. by the now plaintiff, and then prayed the said

By the assignee of a replevin bond, where proceedings in replevin were removed by re. fa. lo. into Q. B. and the plaintiff obtained judgment there. (m) The distress for rent.

Application to the sheriff to replevy.

(m) See forms, 3 Ld. Raym. 143; Morg. 500; 7 Wentw. Index, 536, 537; 1 Lutw. 685. By assignee of the mayor of Canterbury, 4 M. & Sel. 120; see form of declaration against sheriff, for the loss of a replevin bond, and law, 5 B. & C. 284; and a form, *post*, in case, for not taking a replevin bond. The replevin bond may be assigned under 11 Geo. 2, c. 19, s. 22, to the avowant only, or to the person making cognizance, or to both of them jointly; 1 B. & P. 381, note; 3 M. & Sel. 180. Consequently they may sue jointly upon it; *id. ibid.* A declaration by such assignees, stating that they both distrained the defendant's goods for rent due to one of them, is good, without stating the other to be bailiff; 3 M. & Sel. 180. The decisions as to bail bonds are in general applicable. The action may in all cases be brought in either of the Courts at Westminster; 5 T. R. 195; 2 Sel. Pract. 267; 7 Dowl. 461. It should be in the name of the avowant, or person making cognizance; 1 B. & P. 378. Each surety may be liable to the penalty of the bond and costs of the action against himself, 1 Taunt. 218; and as to extent of liability of surety where the sheriff has taken only one, see 1 J. B. Moore, 68. The sureties are only liable for the value of the goods seized and costs; and if that value exceed the amount of rent due, they will only be liable for the rent, *Hunt v. Round*, 2 Dowl. 558; and a rule to stay proceedings, on payment of either, will be made absolute; *id. ibid.* As to when discharged where avowant proceeds to judgment under writ of inquiry, in pursuance of 17 Car. 2, c. 7, s. 2; see 4 J. B. Moore, 606. The Court will not set aside the proceedings on a replevin bond, on the ground that the action was commenced before the condition was broken, because it will be a good defence to the action, 5 Taunt. 776; but the Court will relieve where execution has been issued on the judgment, and the sum levied and paid to avowant, before the action was brought on

the bond; 4 J. B. Moore, 619. The sureties are liable only for the rent due at the time of the distress and costs, and they are entitled to relief when those are paid, 1 Yo. & Jerv. 285; and see further as to the liability of sureties, and when discharged, Tidd, 9th edit. 1078, 295; 6 Taunt. 379; 2 Marsh. 392; 7 Price, 233. When discharged by reference to arbitration, see 1 Moore & P. 285. This action is not within the 8 & 9 W. 3, c. 11, s. 8; 3 M. & Sel. 155. Interest was not allowed on affirmance of judgment in this action, 4 Taunt. 30; but now see 3 & 4 W. 4, c. 42, s. 30; and see *id.* sect. 28.

(n) The assignee of a replevin bond is not obliged to sue in the Court into which the plaint has been removed; *Wilson and another v. Hartly*, 7 Dowl. P. C. 461.

(o) The venue may be laid in any county; *ante*, 320, note (i).

(p) If the plaintiff declare in *detinet* only, it will suffice; 4 M. & Sel. 120.

(q) This is generally the day when in fact the distress was made, and corresponding with the proceedings therein.

(r) If a distress were made by the plaintiff, as bailiff of another person, it is usual to say, "as bailiff of one —, and by his command distrained," &c., 5 T. R. 195; but it has been held sufficient to allege, that A. B. and C. D. distrained for rent due to A. B., without averring that C. D. acted as bailiff; 3 M. & Sel. 180.

(s) The goods ought not to be enumerated; 3 M. & Sel. 180; 3 Taunt. 81.

(t) If the distress was a *rent-charge* or *annuity*, then say, "for a certain sum of money then due to the now plaintiff for the arrears of a certain rent-charge issuing out of and charged upon certain lands and premises, situate &c. in and upon which the said distress was made, and to which said distress the said goods and chattels were liable." A replevin bond taken under a distress for a rent charge is assignable; 2 Bingh. 349.

ON REPLEVIN BONDS.	sheriff that the said goods and chattels might be forthwith replevied by the said sheriff, and delivered to the said G. H. And thereupon the said E. F., so being sheriff of the said county of —, according to the form of the statute in such case made and provided, (u) did take from the said G. H. and from the now defendant and one I. K., as two responsible sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, (the value of the said goods and chattels having been on that occasion first ascertained by the oath of a credible witness duly sworn according to the form of the statute in such case made and provided.) (v) And the said G. H. and the now defendant, and one I. K. on the said &c., by their certain writing obligatory, (x) sealed with their respective seals, and now shown to the Court here, the date whereof is the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said E. F., so being sheriff of the said county of —, in the said sum of £— above demanded, to be paid to the said sheriff; with a condition thereunder written, that if the said G. H. did appear at the then next County Court for the county of —, to be holden at &c. in the said county, and prosecute his action with effect and without delay (z) against the plaintiff, for taking and unjustly detaining of certain goods and chattels in the said condition mentioned, (a) and should make return thereof, if return should be adjudged by law, (b) and should well and truly keep harmless and indemnified (c) the said sheriff of —, his under-sheriff, deputy and bailiffs, touching and concerning the replevying and delivery of the said goods and chattels, and also from and against all actions, suits, damages, losses, costs and charges that might arise or happen unto him in consequence or by means thereof, then the said obligation was to be void and of none effect, otherwise to be and remain in full force. And thereupon the said sheriff afterwards, to wit, on &c. last aforesaid, at the prayer of the said G. H., replevied and made deliverance of the said goods and chattles to the said G. H. according to the duty of his said office.* (d) And afterwards, to wit, at the then next County Court for the said county of &c., to wit, at the County Court of the said sheriff, holden in and for the said county on &c., before
The replevin bond taken.	
The condition of the replevin bond. (y)	
Replevin granted.	
Plaint in County Court.	

(u) 11 Geo. 2, c. 19, s. 23.

(v) *Id.* This allegation seems unnecessary, and in many forms is not inserted; see Morg. 500; and 7 Went. 1 k. The oath need not be in writing, and as to stamp, see 4 Bingh. 193.

(z) The bond must be stated accurately, but after a nonsuit on account of a variance, when the cause has not been defended, the Court will permit the record to be amended, and a new trial had; 3 Taunt. 81.

(y) This must be carefully examined with the original. A variance would be fatal, unless allowed to be amended under the 9 Geo. 4, c. 16, or 3 & 4 W. 4, c. 42, s. 23.

(z) This means with success; 5 B. & C. 296. The condition of the bond is not satisfied by a prosecution of the suit in the County Court; but the plaint, if removed by *re. fa. lo.* into a superior Court, must be prosecuted *there with effect*, and a return made, if adjudged *there*; 1 B. & P. 410. The condition of the bond must be carefully set forth. The

proper form of the condition is for the defendant to appear at the then next County Court and prosecute his suit with effect and without delay; *Jackson v. Hanson*, 8 M. & W. 487.

(a) See Morg. 501. It is not necessary, nor indeed prudent, to set forth the goods distrained; 3 M. & Sel. 180. A variance would be fatal; 3 Taunt. 81. If the goods are not stated in the condition, but in an inventory, say, "*the goods and chattels mentioned in the schedule or inventory thereunto annexed.*" "For taking goods and chattels mentioned in the said condition," was held sufficient, though growing crops were mentioned in the condition; 1 Bingh. 6; 7 J. B. Moore, 231, S. C.

(b) 7 J. B. Moore, 231, S. C.

(c) As to this part of the condition, see 1 Lutw. 687. The bond may be for indemnifying the plaintiff from all charges and damages by reason of the replevin; 2 Bingh. 349.

(d) See Forms, Morg. 501, 502; 3 M. & Sel. 180.

— and —, (e) then suitors of the said Court, the said G. H. did appear, and then in the same Court, without the writ of our said lady the queen, levied his plaint against the now plaintiff, for the taking and unjustly detaining of the said goods and chattels of the said G. H.; and then found pledges as well for prosecuting his said plaint as for returning the said goods and chattels, if return thereof should be adjudged by law, to wit, the now defendant, and I. K. (f) Which said plaint afterwards, to wit, on &c., [day of issuing re. fa. lo. or teste,] was duly removed, at the instance of the plaintiff, from and out of the County Court of the said sheriff(g) of — into the Court of our said lady the queen, before the queen herself, to wit, at Westminster, by virtue of her said majesty's writ of *recordari facias loquelam*, before then duly sued and prosecuted out of the Court of our said lady the queen of her Chancery, at Westminster aforesaid, returnable before &c., on &c. [as in the writ of re. fa. lo.] And thereupon the said G. H. afterwards, to wit, in — term, in the — year of the reign of our said lady the queen, in the Court of our said lady the queen, before the queen herself, by —, his attorney, declared against the now plaintiff in the said plea of taking and unjustly detaining his said goods and chattels, and by the said declaration the said G. H., by the said —, his attorney, complained that the now plaintiff, on &c. aforesaid, in a certain street or place there, called —, took the goods and chattels of the said G. H., in the said declaration more fully and particularly described, and them unjustly detained, against sureties and pledges, &c., To the damage of the said G. H. of £—, and thereupon he brought suit, &c. [According to the note infra, the declaration may proceed to state the judgment, as post, 328, omitting the proceedings subsequent to the avowry, and for brevity the following statement between brackets of such proceedings may be omitted:] [And afterwards, to wit, in that same — term, in the — year of the reign &c., in the said Court, the now plaintiff, by —, his attorney, came and defended the wrong and injury, when &c., and well avowed the taking of the said goods and chattels in the said declaration mentioned, in a certain messuage or dwelling-house, with the appurtenances, situate and being in &c. in the said street or place there, called &c., and justly &c., because he said that one L. M. for a long space of time, to wit, for the space of — next before and ending on —, and from thence until and at the said time when &c., held and enjoyed the said messuage or dwelling-house, in which, &c. with the appurtenances, as tenant thereof to the now plaintiff, by virtue of a certain demise thereof to the said L. M. theretofore made, at and under the

ON REPLEVIN
BONDS.Removal by re.
fa. lo. into Q. B.Declaration in
Q. B.Avowry
thereto. (h)

(e) As to a variance in names, see 2 Barn. & Cress. 2; 3 D. & R. 226, S. C.

(f) These pledges are taken under the statute Westm. 2, 13 Edw. 1, c. 2; see Gilb. 98; and are not the pledges under the 11 Geo. 2, c. 19, s. 23.

(g) Though the party was not sheriff at the time of the removal, this would be no variance; 5 B. & C. 284; 7 D. & R. 709, S. C.

(h) It is usual to state the avowry or cognizance, or both, when the avowant and the bailiff join in the action on the bond, in order to show that the plaintiff is entitled to sue

under the 11 Geo. 2, c. 19, s. 23; see 1 B. & P. 378; 5 T. R. 196; but this does not seem necessary, it being sufficiently disclosed in the commencement of the declaration that the distress was for rent, and that the condition of the bond was to proceed in an action of replevin against the plaintiff with success, or return the goods to him; see 5 T. R. 195, 197, and 7 Went. 21. The declaration on the replevin bond, after stating the declaration in replevin as above, may proceed immediately to the statement of the judgment, omitting the avowry or cognizance.

ON REPLEVIN
BONDS.Judgment for
defendant in
replevin *pro*
retorno habendo.G. H. did not
prosecute with
effect or return
the goods.Whereby bond
forfeited to
sheriff, who as-
signs to plain-
tiff. (o)

yearly rent of £——, payable on &c., in every year, and because £——, part of the said sum of £—— of the rent aforesaid, for the space of ——, ending on &c. as aforesaid, and from thence until and at the said time when &c. was due and in arrear from the said L. M. to the now plaintiff, the said now plaintiff well avowed the taking of the said goods and chattels in the said declaration mentioned, in the said messuage or dwelling-house, and justly, &c. as for and in the name of a distress, for the said sum of £—— so due and in arrear as aforesaid, and which said sum of £—— so due and in arrear to the plaintiff still remains wholly due and unpaid.]

And such proceedings were thereupon had in the said plea in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, (i) that afterwards, to wit, in —— term, in the —— year of the reign &c., in the said Court of our said lady the queen, before the queen herself, it was considered and adjudged in and by the [same Court, (k) that [*here set out the judgment, which may be thus:*] the said G. H. should take nothing by his said plaint, (l) but that he and his pledges to prosecute should be in mercy, &c., and that the now plaintiff should go thereof without day, and that the now plaintiff should have a return of the said goods and chattels, as by the record (m) and proceedings thereof now remaining in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid more fully appears. And the now plaintiff further saith, that the said G. H. did not prosecute his said action with effect against the now plaintiff for the taking and alleged unjustly detaining the said goods and chattels, or make a return of the said goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, (n) but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do. Whereby the said writing obligatory became forfeited to the said E. F. so being sheriff of the said county of —— as aforesaid. And the same being so forfeited, the said sheriff afterwards, to wit, on &c., [*date of assignment,*] at the request and costs of the now plaintiff, by an indorsement, &c. [*The statement of the assignment of the bond and the conclusion of the declaration are to be precisely the same as in the precedent on a bail-bond, ante, 324, from the asterisk to the end.*]

(i) As to this allegation of *taliter processum* *est*, see 1 Saund. 92, note 2; Carth. 53.

(k) Examine carefully with the judgment.

(l) *Quere*, if writ or plaint; see Com. Dig. Pleader, 3 K. 8.

(m) If the proceedings have been removed by writ of error, say, "*as by the record and proceedings thereof, which have since been removed from the said Court into the Court of our said lady the queen, before the queen herself, for certain alleged causes of error therein, and which are now remaining in the said last-mentioned Court in all things affirmed, more fully appears.*"

(n) The declaration is not double, because it alleges that the defendant did not prosecute his suit with effect, and hath not made a return; 3 M. & S. 180; Morg. 503, 504. The declaration, however, need not negative both parts of the condition; 4 J. B. Moore, 606; 2 B. & B. 107, S. C. The breach need not be formally assigned, and the plaintiff will be entitled to recover if a sufficient breach otherwise appears; 5 Barn. & Cress. 284. When

the condition is to prosecute the suit with effect and *without delay*, a breach in those words would suffice, and proof of two years delay would suffice without proving a judgment of *non pros*; 4 Bingh. 586; see *post*, 329, note (r).

The issuing of a writ of *retorno habendo* is sometimes stated; 7 Wentw. 1; but is unnecessary; Willes, 6; 2 Sel. Prac. 267. The sureties are not discharged by a writ of inquiry, on the 17th Car. 2, c. 19, s. 23, and a judgment thereon; *id.*; 5 Barn. & Cress. 284.

(o) A replevin bond may be taken and assigned by any person who has power to grant replevin; see *Thompson v. Farden and others*, 1 M. & G. 535; and therefore it was held that one of the sheriffs of London having such power, without his companion, might take such assignment; *ibid.* An assignment by a clerk at the sheriff's office on behalf of the sheriff is sufficient; 4 Campb. 36; 2 Saund. 61; *ante*, 324, note (g).

See form of declaration on replevin bond, where bond forfeited by *delay in prosecuting* replevin suit, 5 B. & Adol. 146. Where the bond is conditioned to prosecute the replevin suit with effect and *without delay*, it is a sufficient breach that due diligence has not been used, though it may not appear that the suit is determined; *id. ibid.* The plaintiff in the replevin suit is not, however, responsible for delay occasioned by the neglect of the sheriff; *id. ibid.*

ON REPLEVIN
BONDS.

Other forms.

When the declaration is for not prosecuting the action of replevin in the County Court, proceed as in the last precedent to the asterisk 326, and then as follows:—And although afterwards, to wit, on &c., the County Court of the said sheriff of the said county of — was duly holden at &c., aforesaid, before — and —, then suitors of the said Court, the same being the next County Court of the said county of —, after the making of the said writing obligatory as aforesaid. Yet the said G. H. did not appear (q) at the said County Court, so holden next after the making of the said writing obligatory as aforesaid, and prosecute his said action with effect and without delay against the now plaintiff, according to the form and effect of the said condition, but wholly omitted and neglected so to do. Whereby the said writing obligatory became forfeited, &c. [*State the forfeiture and assignment of the bond to the plaintiff, and proceed to the end, as in the last precedent.*]

The like when the bond was forfeited by the replevin suit not being prosecuted in the County Court. (p)

Same as ante, 326, as far as the asterisk, and then proceed as follows:—And the now plaintiff further saith, that afterwards, to wit, at the next County Court for the said county of —, to wit, at the Court of the said sheriff, held at the [booth hall] in —, [being the common shire hall for the said county of —,] on &c., before — and —, then suitors of the said Court, the said E. F. appeared in his proper person, and then and there in the same Court, without the writ of our said lady the queen, levied his plaint against the now plaintiff, for the taking and unjustly detaining the said cattle, goods and chattels of the said E. F., and then and there found pledges as well for prosecuting his said plaint as for returning the said cattle, goods, and chattels if return thereof should be adjudged by law, to wit, the said [*names of pledges*]. And the now plaintiff also appeared in the said Court to answer the said E. F. in the plea of his said plaint, and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the [fifth] County Court of O. L., Esq., then sheriff of the said county of — holden at the [booth hall] in —, [being the common shire hall of and for the said county of —,] on &c. aforesaid, and in the year of our Lord —, before — and —, gentlemen, suitors of the said Court, the said E. F. did not prosecute his said action with effect, according to the condition of the said writing obligatory; and thereupon it was then and there

By the assignee of a replevin bond, where the party replevying levied his plaint, but was afterwards non-prosecuted for not declaring in the County Court. (r)

(p) See 5 T. R. 196; and see *Axford v. Perrett*, 4 Bingh. 586. As to the mode of showing a determination of the suit in the County Court, where the plaintiff in replevin appeared, but was afterwards nonsuited for not declaring, see 12 East, 585, and *post*.

(q) See note (n), *ante*, 328; and *Jackson v. Hanson and others*, 8 M. & W. 477; 1

Dowl. N. R. 69, as to the form of the breach.

(r) This was the precedent held sufficient in 3 M. & Sel. 180; and see 5 Bar. & Adol. 146. It is no breach that the plaint was removed, and that after the removal the suit abated by the death of the plaintiff; *Morris v. Matthews*, 1 G. & D. 677.

**ON REFLEVIN
BONDS.**

considered in and by the last-mentioned Court, that the said E. F. should take nothing by his said plaint, but that he and his pledges to prosecute should be in mercy &c., and that the now plaintiff should have return of the said cattle, goods and chattels, as by the remembrance and proceeding thereof still remaining in the said Court more fully appears, which said judgment still remains in the said County Court in full force and effect, in no wise reversed, satisfied or made void. (s) And the now plaintiff further saith, that the said E. F. hath not yet made a return of the said cattle, goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but hath wholly neglected and refused so to do, and therein failed and made default, whereby the said writing obligatory became forfeited to the said O. L. [name of sheriff], so being sheriff of the said county of — as aforesaid, and the same being so &c. [State assignment to plaintiff, and conclude as ante, 328.

**ON BONDS
RELATING TO
THE CHARACTER
IN WHICH
PLAINTIFF SUES,
OR DEFENDANT
IS SUED.**

By baron and
feme, on bond
given to feme
before cover-
ture. (t)

**ON BONDS RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES,
OR THE DEFENDANT IS SUED.**

Commencement, ante, 285.] For that whereas the defendant heretofore, and whilst the said C. D. was sole and unmarried, to wit, on &c., [date of bond] by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the said C. D. in the said sum of £—— above demanded, to be paid to the said C. D. Yet the defendant hath not paid the said sum of £—— above demanded, or any part thereof, to the said C. D. whilst she was sole and unmarried, or to the plaintiffs, or either of them, since their intermarriage; but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse to pay the same, or any part thereof, to the plaintiffs. To the damage of the plaintiffs of £——, and thereupon they bring suit &c.

By a surviving
obligee against
obligor. (u)

Commencement, ante, 284.] For that whereas the defendant heretofore, and in the life-time of the said C. D. since deceased, to wit, on &c., [date of bond] by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the plaintiff and to the said C. D. in the said sum above demanded, to be paid to the plaintiff and the said C. D. Yet the defendant hath not as yet paid the said sum of £——, or any part thereof, to the plaintiff and C. D., or either of them, in the life-time of the said C. D. or to the plaintiff, since the death of the said C. D. But he to do this hath hitherto wholly neglected and refused, and still neglects and refuses to pay the same

(s) The declaration need not negative both parts of the condition, if the plaintiff was non-prossed; the treach may be, that defendant did not prosecute his suit with effect, without stating he had not made a return, &c. *ante*, 328, note (n).

(t) See a form, 2 Rich. C. P. 292; 1 Raym. 285; 1 Vent. 119.

(u) 2 Rich. C. P. 452; Morg. 495. The plaintiff must declare as surviving obligee; see 4 B. & Ald. 374.

or any part thereof to the plaintiff. To the damage of the plaintiff of £—, and thereupon he brings suit &c.

ON BONDS,
CHARACTER,
&c.

Commencement, ante, 286.] For that whereas the defendant heretofore, and before the said G. H. became bankrupt, to wit, on &c., [*date of bond*] by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the said G. H. in the said sum of £— above demanded, to be paid to the said G. H. Yet the defendant hath not as yet paid the said sum of £— above demanded, or any part thereof, to the said G. H. before he became bankrupt, or to the plaintiffs, assignees as aforesaid, since the bankruptcy of the said G. H., but to pay the same or any part thereof to the said G. H. before he became bankrupt, or to the plaintiffs, assignees as aforesaid, since the bankruptcy of the said G. H. he the defendant hath wholly neglected and refused, and still doth neglect and refuse to pay the same to the plaintiffs, assignees as aforesaid. To the damage of the plaintiffs, as assignees as aforesaid, of £—, and thereupon they bring suit &c.

By the assignees
of a bankrupt's
obligee against
obligor.

Commencement, ante, 285.] For that whereas the defendant heretofore, and in the life-time of the said G. H. since deceased, to wit, on &c., [*date of bond*] by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the same day and year aforesaid, acknowledged himself to be held and firmly bound to the said G. H. in the said sum of £— above demanded, to be paid to the said G. H., or his certain attorney, executors, administrators or assigns. Yet the defendant hath not paid the said sum of £—, or any part thereof, to the said G. H. in his life-time, or to the plaintiff, executor as aforesaid, since the death of the said G. H., but hath hitherto wholly refused, and still doth refuse to pay the same or any part thereof to the plaintiff, executor as aforesaid. To the damage of the plaintiff, as executor as aforesaid, of £—, and thereupon he brings his suit &c. And the plaintiff brings into Court here the letters testamentary of the said G. H. deceased, whereby it fully appears to the Court here that the plaintiff is executor of the last will and testament of the said G. H. deceased, and hath the execution thereof, &c.

Executor of
obligee against
obligor. (z)

Breach.

Proferit.

Commencement, ante, 285.] For that whereas &c. [*State the making of the bond &c. as in the last precedent, and conclude as follows:*] Nevertheless the defendant hath not paid the said sum of £— above demanded, or any part thereof to the said G. H. in his life-time, or to the plaintiff since the decease of the said G. H., to which plaintiff after the death of the said G. H., to wit, on &c., [*date of grant of administration,*] administration of all and singular the goods, chattels and credits which were of the said G. H.

By an adminis-
trator. (y)

Breach.

Grant of letters
of administra-
tion. (s)

(z) See forms, 2 Rich. C. P. 294, 446, 453; Lil. Ent. 144; see a form against executors in C. P. 2 Saund. 216; and by executor of a surviving executor, Co. Ent. 1.

(y) See form, Lil. Ent. 167; Plead. Ass. 734.

(s) As to the statement of the grant of letters of administration, see *Hughes v. Williams*, 4 Dowl. 169.

**ON BONDS,
CHARACTER,
&c.**

Profert.

deceased, at the time of his death, who died intestate, by —, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, in due form of law was granted, but he so to do hath hitherto wholly refused, and still refuses to pay the same or any part thereof to the plaintiff, administrator as aforesaid. To the damage of the plaintiff as administrator as aforesaid of £——, and thereupon he brings suit &c. And the plaintiff brings into Court here the letters of administration of the said archbishop [*or*, "bishop," &c.] which give sufficient evidence to the said Court here of the grant of administration to the plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned, &c.

**Against baron
and feme on a
bond given by
feme before
coverture.**

Commencement, ante, 285.] For that whereas the said G. H. whilst she was sole and unmarried, to wit, on &c. [*date of bond*] by her certain writing obligatory, sealed with her seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged herself to be held and firmly bound to the plaintiff in the said sum of £—— above demanded, to be paid to the plaintiff. Yet the said G. H. whilst she was sole and unmarried, and the said C. D. and G. H. his wife, since their intermarriage, have not, nor hath either of them paid the said sum of £—— above demanded, or any part thereof to the plaintiff, but they to pay the same or any part thereof to the plaintiff have hitherto wholly neglected and refused, and still do neglect and refuse. To the damage of the plaintiff of £——, and thereupon he brings suit &c.

Against an executor or administrator. (a)

Commencement, ante, 285.] For that whereas the said G. H. in his lifetime, to wit, on &c. [*date of bond*] by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the plaintiff in the said sum of £—— above demanded, to be paid to the plaintiff. Yet the said G. H. in his life-time did not pay, nor hath the defendant, executor [*or* "administrator"] as aforesaid, since the death of the said G. H. paid the said sum of £—— above demanded, or any part thereof to the plaintiff, but the said G. H. in his life-time so to do wholly refused, and the defendant, executrix as aforesaid, ever since the death of the said G. H. hitherto hath wholly refused, and still doth refuse to pay the same or any part thereof to the plaintiff. To the damage of the plaintiff of £——, and thereupon he brings suit &c.

Against an heir on the bond of his ancestor. (c)

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

The — day of —, A. D. —.

— (b) A. E., by Y. Z. his attorney, complains of C. D., heir of

(a) See the form against an executor in C. P. 2 Saund. 216; 2 Rich. C. P. 229, 245; 1 Rich. C. P. 454; Plead. Ass. 366, 369, 374.

(b) As to the venue, see Vin. Ab. Heir, K. 2; Hob. 37; it appears to be transitory.

(c) See forms, 7 Wentw. Index; Plead. Ass. 363. As to the liability of an heir, and

the declaration in general against him, see the valuable note, 2 Saund. 7, n. 4; Com. Dig. Pleader, 2 E. 2; Vin. Ab. Heir, K. 2; Bac. Ab. Heir and Ancestor; Plowd. 439, 440. He is not chargeable unless he be expressly named in the deed, Com. Dig. Pleader, 2 E. 2; Vin. Ab. Heir, K. 2; or have legal assets by descent from the obligor. A rever-

E. F. (*d*) deceased, who has been summoned to answer the plaintiff in an action of debt, and the plaintiff demands of the defendant the sum of £—— which he owes to (*e*) and unjustly detains from him. For that whereas the said E. F. in his life-time, whose heir the defendant is, to wit, on &c., by his certain writing obligatory, sealed with his seal, and now shown to the Court here &c., acknowledged himself to be held and firmly bound to the plaintiff in the said sum of £—— above demanded, to be paid on request, for which payment to be well and truly made, he the said E. F. bound himself and his heirs (*f*) firmly by the said writing obligatory. Nevertheless the said E. F. in his life-time, and the defendant since the death of the said E. F. have not, nor hath either of them, paid the said sum of £——, or any part thereof to the plaintiff, but the said E. F. in his life-time, and the defendant since his decease, have hitherto wholly refused, and the defendant still wholly refuses so to do. To the damage of the plaintiff of £——, and thereupon he brings suit &c.

ON BONDS,
CHARACTER,
&c.

In the Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas."]

The —— day of ——, A. D. ——.

Against an heir
and the devisee
of the obli-
gor. (*g*)

—— A. B., by Y. Z. his attorney, complains of C. D. and E. F. (which said C. D. is heir of G. H., deceased, and which said E. F. is devisee of the said G. H. of divers lands and tenements of the said G. H., deceased, by his last will and testament,) who have been summoned to answer the plaintiff in an action of debt, and the plaintiff demands of them the sum of £—— which they owe to and unjustly detain from him. For that whereas the said G. H., of whom the said C. D. is heir, and the said E. F. is devisee as aforesaid, in his life-time, to wit, on &c., by his certain writing obligatory, sealed with his seal, and now shown to the Court here, [*profert as ante*, 332,] acknowledged himself to be held and firmly bound unto the plaintiff in the said sum of £—— above demanded, to be paid to the plaintiff, and for

sion is legal assets, but an equity of redemption is not; *id. ibid.*; Com. Dig. tit. Assets, A. and B.; Barnes, 164; Cro. Car. 151; Carth. 126; 3 B. & P. 643. In the latter case the obligee must proceed in equity; 2 Saund. 7, n. 4.

(*d*) The defendant must be described as heir, and in the old precedents he is so described in the body of the declaration as well as in the commencement; see Rast. Ent. 172. In general it need not be shown how he became heir, whether as son, grandson, &c. that matter not lying in the plaintiff's knowledge, 2 Saund. 7, n. 4; Com. Dig. Pleader, 2 E. 2; 1 Salk. 355; Vin. Ab. tit. Heir, K. 2; but if the action be against the heir of an heir of the obligor, the declaration must state that fact specially; for if the declaration were against him as heir generally to the obligor, and the defendant should plead *riens per descent*, the plaintiff would fail; Cro. Car. 151; 2 Saund. 7, n. 4; Vin. Ab. Heir, K. 2, pl. 16. It need not be averred that the defendant had assets by descent; Dyer, 344 b.

(*e*) The declaration should be in the *debet* and *detinet*; Com. Dig. Pleader, 2 E. 2; Vin. Ab. Heir, K. 2; but the omission of the *de-*

bet will be aided by verdict; *ib. ibid.*; 3 East, 2; 2 Saund. 7, n. 4.

(*f*) It must be shown in the declaration that the heir was expressly bound, for otherwise he is not chargeable; Com. Dig. Pleader, 2 E. 2; Vin. Ab. Heir, K. 2; 2 Saund. 134, n. 1, 136, &c.

(*g*) See the precedents, Clift. Ent. 243, pl. 19; Lil. Ent. 145, 529, 530; 2 Rich. C. P. 241, 297, 448; 5 Wentw. 374, Index, vol. vii. 539; 2 Mall. Ent. 186, 187. In some of the precedents the date and substance of the will, and that the obligor died seized, are stated, see 2 Mall. Ent. 186, 187; 2 Rich. C. P. 241; Lil. Ent. 145, 529, 530; but in others these facts are not stated, see Clift. Ent. 243; 5 Wentw. 374; see vol. xviii. Mr. Chitty's MS. 35, where the declaration was holden good on demurrer, and this, according to the principle in 1 Salk. 355; 2 Saund. 7, n. 4, seems sufficient. The liability of the devisee depends on stat. 3 W. & M. c. 14, and the 11 Geo. 4 & 1 Will. 4, c. 47. See the constructions on the former statute, 1 Chit. Col. Stat. 1128, n.; 2 Saund. 7, n. 4; Bac. Ab. Heir; Vin. Ab. Heir, Z. d. The parol is no longer to *demur* on account of the *infancy* of the heir; 1 Will. 4, c. 47, s. 10.

ON BONDS,
CHARACTER,
&c.

which payment well and truly to be made the said G. H. did, by the said writing obligatory, bind himself and his heirs to the plaintiff. Nevertheless, the said G. H. in his life-time, and the defendant C. D. so being his heir, and the said E. F. so being such devisee as aforesaid, have not, nor hath either of them, paid the said sum of £—— above demanded, or any part thereof to the plaintiff, but to pay the same have wholly neglected and refused, and the said C. D. and E. F. still neglect and refuse to pay the same, or any part thereof: To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

Against the devisee of the obligor alone. (h)

This form may be easily framed from the last precedent.

At the suit of the treasurer of a friendly society established before the 10 Geo. 4, c. 56, and not conformed according to that act. (i)

In the Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas."]

The —— day of ——, A. D. ——.

—— (to wit), [venue]. A. B., the plaintiff in this suit, and treasurer of a certain friendly society, called and known by the name of ["The Loyal Britons," in the county of ——, held at ——, in the town of D——, in the county aforesaid,] by Y. Z. his attorney, complains of C. D., who has been summoned to answer the plaintiff in an action of debt, and the plaintiff demands of the defendant the sum of £——, which he owes to and wrongfully detains from him as such treasurer. For that whereas the said society was and is a society established before the passing of a certain act of parliament, made in the 33d year of the reign of his late Majesty King George the Third, intituled "An Act for the Encouragement and Relief of Friendly Societies." And whereas after the passing of the said act, and before the feast day of St. Michael, in the year of our Lord 1794, all the rules, orders and regulations under which the said society was thereafter to be governed had been and were duly and according to the form of the statute exhibited, confirmed and filed at the general quarter sessions of the peace holden at ——, in the county of ——, to wit, on the —— day of ——, in the year of our Lord 1794; and whereas, after the exhibiting, confirming, and filing of the said rules, orders and regulations as aforesaid, the defendant heretofore, to wit, on the —— day of ——, in the year of our Lord ——, by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged himself to be held and firmly bound to one E. F. and to one G. H. (the then stewards of the said society) (k) as such stewards, (l) in the said sum of

(h) As to the liability of the devisee alone, see vol. i. p. 60, and the 11 Geo. 4 & 1 Will. 4, c. 47.

(i) The statutes now in force relative to these societies are the 10 Geo. 4, c. 56, repealing all the prior acts, and 3 & 4 Vict. c. 73. The 40th section of the 10 Geo. 4, c. 56, requires all societies previously enrolled to conform to that act within three years after the passing of it, viz. the 19th June, 1829, otherwise their privileges are to cease. The act provides, that societies so previously enrolled shall have the privileges given them by the prior acts during the above space of three years, or until they sooner conform themselves to the new act. The 21st section allows the action to be brought in the name of the trea-

surer or trustee. See note (n), *ante*, 93.

When the bond was given to the plaintiff himself, whether as treasurer or otherwise, he may sue on it, as on a common money bond, and as at common law; and the action is sustainable though the rules of the society have not been confirmed at the quarter sessions pursuant to the statute; 2 Chit. R. 322; 5 B. & A. 769; 1 D. & R. 393, S. C. For the law and decisions on the subject, see Chitty's *Burn, J. tit. "Friendly Societies."* See form in assumpsit on a note, *ante*, 93.

(k) Though these words be not inserted in the bond, it would be no variance; 1 Bar. & Ald. 57.

(l) See 1 Chit. Col. Stat. 394, n.

£— above demanded. Yet the defendant hath not paid the said sum of £— above demanded, or any part thereof, to the said E. F. and G. H. or either of them, or to the plaintiff, so now being such treasurer as aforesaid, or to any other steward or treasurer of the said society, but to pay the same, or any part thereof, the defendant hath hitherto wholly refused, and still refuses so to do. To the damage of the plaintiff, as such treasurer as aforesaid, of £—, and thereupon he brings suit, &c.

ON BONDS,
CHARACTER,
&c.

— (to wit), [*venue*]. A. B., the plaintiff in this suit, and treasurer of a certain friendly society called and known by the name of ["The Seaman's Society"] held at —, in —, in the county of —, according to the statute in such case made and provided, by Y. Z. his attorney, complains of C. D., who has been summoned to answer the plaintiff in an action of debt, and the plaintiff as such treasurer demands of the defendant the sum of £—, which he owes to and unjustly detains from him. For that whereas the said society, at the time of the making the writing obligatory, and accruing of the cause of action hereinafter mentioned, was and is a society established under and by virtue and according to a certain act of parliament, made in the 10th year of the reign of his late Majesty King George the Fourth, intituled "An Act to consolidate and amend the Laws relating to Friendly Societies." And whereas also at that time all the rules, orders and regulations under which the said society was thereafter to be governed, had been and were duly and according to the form of the statute exhibited, confirmed and filed at the general quarter sessions of the peace holden at —, in the county of —, to wit, on the — day of —, in the year of our Lord 1794, and the said society then was in every respect entitled to the benefit of the said statute. And whereas after the exhibiting, confirming and filing of the said rules, orders and regulations as aforesaid, the defendant heretofore, to wit, on the — day of —, in the year of our Lord —, by his certain writing obligatory, sealed with his seal, and now shown to the Court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged himself to be held and firmly bound to one E. F. and to one G. H. (the then stewards of the said society,) as such stewards, in the said sum of £— above demanded. Yet the defendant hath not paid the said sum of £— above demanded, or any part thereof, to the said E. F. and G. H. or either of them, or to the plaintiff, so now being such treasurer as aforesaid, or to any other steward or treasurer of the said society, but to pay the same, or any part thereof, he the defendant hath hitherto wholly refused, and still refuses so to do. To the damage of the plaintiff, as such treasurer as aforesaid, of £—, and thereupon he brings suit, &c.

At the suit of
the treasurer of
a friendly so-
ciety established
under the 10
Geo. 4, c. 56.

VII. ON RECORDS.

ON RECOGNIZANCES OF BAIL.

ON
RECOGNIZANCES
OF BAIL.

— [*venue*]. (m) *Commencement in debt, ante, 284.* For that whereas the defendant heretofore, to wit, on &c., came into the Court of our lady

On a recogni-
zance of bail in
Q. B., the ori-
ginal action

(m) The *venue* is local, as in actions on other records; Hob. 196; Tidd, 9th edit. 427.

But there is a difference in effect between a recognizance taken in Court and one taken

ON
RECOGNIZANCES
OF BAIL.

having been by
capias in as-
sumpsit. (n)

the queen, before the queen herself here, at Westminster, in the county of Middlesex, in his proper person, and then became pledge and bail for one E. F., that if the said E. F. should happen to be convicted at the suit of the plaintiff (o) in an action upon promises, to the damage of the plaintiff of £—, [or if in debt, "in a certain action of debt for £—,"] then depending in the said Court by and at the suit of the plaintiff against the said E. F., then the defendant consented and agreed that all such damages [or if in debt, "that as well the said debt as all such damages,"] as should be adjudged unto the plaintiff in that behalf, should be made of his lands and chattels, and levied to the use of the plaintiff, if it should happen that the said E. F. should not pay unto the plaintiff those damages, [or if in debt, "the said debt and damages,"] or render himself on that occasion to the prison of the Marshalsea of our lady the queen, before the queen herself. (p) As by the record of the said recognizance still remaining in the said Court fully appears. And although the plaintiff afterwards, that is to say, on &c.,

before a judge at chambers, for a *scire facias* in the former case must be in the county in which the Court sits, in the latter it may be either in that county, or in the county in which it is taken; Hob. 195; 2 W. Bla. 768. In an action on a recognizance of bail, taken at Durham before a commissioner there, the venue was laid in Middlesex, and it was held properly so, because the recognizance was filed, and must be ultimately returned there; 2 J. B. Moore, 66; 8 Taunt. 171, S. C.

(n) The above form is upon a recognizance of bail taken upon a writ of *capias* since the 2 Will. 4, c. 39, and will apply in each of the superior Courts; and see forms of *scire facias* on similar recognizance, Tidd's Forms, and T. Chitty's Forms, 5th edit.

See the older forms, 2 Chitty on Plead. 5th edit. 312 to 336. In framing the declaration care must be observed to describe the recognizance accurately. See bail-piece and concise form of recognizance, and forms of entry of recognizance on the roll, from which the declaration in either Court is to be framed, 3 Chitt. Gen. Prac. by Lush, 316, and T. Chitty's Forms, 5th edit. 2 Ld. Raym. 966; 5 East. 461. See an old form in *scire facias*, Tidd's Forms, 6th edit. 502, 510; 2 Mod. Ent. 243; 7 Went. 54 to 88; *Id.* Index, 549; Morg. Prec. 537. See a form on a recognizance taken before a commissioner at Durham, 2 J. B. Moore, 66; 8 Taunt. 171, S. C. The conusee of a recognizance may have an action of debt or a *scire facias*; and he may have an action of debt upon the judgment obtained upon the recognizance, 2 Leon. 14; and although he has before obtained judgment, and has had execution awarded, he may again proceed upon the instrument itself, for both the recognizance and judgment are matters of record and of equal degree, and one cannot be determined by the other; Cro. Eliz. 608, 817, *accord*; 1 Roll. Ab. 601, lib. 10 to 20, *contra*. If the tenor only of a recognizance taken in Chancery be removed into another Court, the conusee must bring an action of debt, and cannot have a *scire facias*. A *scire facias* cannot be awarded unless the Court is in possession of

the record itself. If the recognizance has been entered into in pursuance of an order of the Court of Chancery, that Court will compel the conusee to sue by a *scire facias* in Chancery; 1 Vern. 313. If the bail be bound jointly and severally, the action may be brought against one of them only; Cro. Jac. 45.

(o) See the form of entry of recognizance, of which this declaration should be a description, T. Chitty's Forms, 5th edit. It should be stated at whose suit the defendant became bail, and for what sum, &c.; 1 Wils. 284; Willes, 19, n. (a); Com. Dig. Pleader, 2 W. 10. As to variance, see 11 East, 516.

(p) Before the former numerous writs were abolished by 2 Will. 4, c. 39, the description of the recognizance was to be taken from the entry of the recognizance by *bill*, with which it should precisely correspond. See Tidd's Prac. Forms, 107, 6th edit. Though the recognizance were taken before a judge at chambers, it was the practice to enter it as if it were taken in Court; 4 B. & C. 407. Where the condition was not incorporated in the recognizance, it was not necessary to set it out in the declaration or *scire facias*; Barnes, 93, 339; Willes, 18. It must have been stated accurately before whom and where the recognizance was taken. Where the recognizance in K. B. was stated to have been taken before a judge at chambers, as appeared by the record thereof, when on production it appeared it was taken in Court, the variance was held fatal, though in fact the entry in the filazer's book stated it to have been taken before a judge; 4 B. & C. 403; 6 D. & R. 483, S. C. So where a recognizance in C. P. was alleged to have been taken in Court, and it appeared to have been taken before a judge at chambers, the variance was held fatal, on the plea of *nul tiel record*; 6 Mod. 42; Salk. 561, 659, S. C. See the present forms of entering a recognizance of bail Q. B., C. P., and Exchequer, T. Chitty's Forms, 5th edit. and which this declaration should accurately describe. See several forms of declaration on the former entries of recognizance, 2 Chitty on Pleading, 5th edit. 471 a to 482.

in the said Court, (q) by the consideration and judgment of the said Court, recovered (r) in the said action against the said E. F. £— for his damages which he had sustained as well on occasion of not performing certain promises [or “promise”] (s) then lately made by the said E. F. to the plaintiff, [or if in debt, “the said debt, and also £— for his damages which he had sustained, as well by means of the detaining of the said debt,”] as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted, as by the record and proceedings thereof still remaining in the same Court here more fully appears. (t)* Yet the said E. F. hath not paid to the plaintiff the said damages, [or if in debt, “debt and damages,”] or any part thereof, nor rendered himself on that occasion to the prison of the marshal of the Marshalsea of our said lady the queen, before the queen herself, (u) according to the form and effect of the said recognizance, and as well the said recognizance as the said judgment still remain in full force and effect, in no wise satisfied, vacated or discharged. And the plaintiff hath not obtained any execution of the said judgment, whereby and according to the form and effect of the said recognizance an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £— in form aforesaid recovered [if by original, say “acknowledged,”] and above demanded. Yet &c. [See breach, ante, 286.]

ON
RECOGNIZANCES
OF BAIL.

Judgment recovered against the principal.

ON JUDGMENTS.

Middlesex (to wit). (x) [Commencement in debt, ante, 284.] For that

ON JUDGMENTS.

Declaration on a final judgment in Q. B. or C. P. or Exchequer, in assumpsit, against the original defendant. (y)

(q) *Seemle*, that since 2 W. 4, c. 39, it would be demurrable to state that the proceedings had been by bill; *Peacock v. Day*, 3 Dowl. 291; *Darling v. Gurney*, 2 Dowl. 101; 2 Cr. & M. 226, S. C.

(r) As to variance in statement of the judgment, see 1 Taunt. 221; *post*, 338. The declaration need not show how judgment was obtained, it is sufficient to aver generally *taliter processum fuit*, that the plaintiff recovered; *Cio. Jac.* 46.

(s) See *Edwards v. Lucas*, 5 B. & C. 339.

(t) If the condition of the recognizance were, that the principal should appear within eight days after warning, it was necessary to aver that the plaintiff gave the warning, since that constituted a condition precedent; *Cro. Jac.* 46.

(u) The breach must be stated according to the terms of the recognizance. Where the condition was that the principal should render himself or pay the money, the declaration must show that he had neither rendered nor paid the money; and if the plaintiff only averred that he did not render, it would be bad, for he might nevertheless have paid the money; *Skin.* 100. For if that were to be allowed, several executions might be taken out in different Courts upon the same record; *Dyer*, 369; *Bro. Ab. tit. Record*, 39 Hen. 6, p. 3. Where in an action against two, a recognizance of bail was given, “in case the said C. and D. should happen to be condemned, and should not pay or render themselves,” and a *scire facias* thereon, after show-

ing that C. was condemned, but not D., assigned a breach that C. and D. did not pay nor render, &c. it was held that the breach, though in the words of the recognizance, was defective, since with that allegation, it was quite consistent that C. had paid, or had rendered himself, which would have satisfied the recognizance, and as D. was not condemned, he was not bound either to pay or to render; *Wilkinson v. Thorley*, 4 M. & Sel. 33. But where two were sued in an action of assumpsit, and a recognizance of bail was given, in case the said C. and D. should happen to be condemned, and it was averred in the declaration that C. was condemned, but no notice taken why D. was not also, it was considered sufficient, since D. might have died, or become a certificated bankrupt before judgment, and which fact would be presumed; *id.* 34.

(x) The venue is local, and must be where the record is, which is now *always* in *Middlesex*; *Gilb. Debt*, 413; *ante*, vol. i. Index, tit. “Venue.” It is not to be repeated in body of declaration; *Reg. Gen. Hil. Term*, 4 Will. 4.

(y) Debt lies in the *superior Courts* on a judgment obtained in either of *them*, or in an *inferior Court*, and *vice versa*; see a form of declaration on a judgment of *non pros.* in *Queen’s Bench*, for not declaring, *post*, 339; *Gilb. Debt*, 392, 393. The Courts, however, discourage actions of debt on judgment; *id. ibid.*; and by 43 Geo. 3, c. 46, s. 4, the plaintiff in such action is not entitled to costs,

ON JUDGMENTS. whereas the plaintiff heretofore, to wit, on &c (x) in her majesty's Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas,"] at Westminster, in the county of Middlesex, (a) by the consideration and judgment of the said Court, recovered against the defendant* the sum of £—— (b) above demanded, which in and by the said Court were then adjudged to the plaintiff (c) for his damages, which he had sustained as well by reason of the non-performance by the defendant of certain promises and undertakings, (d) then lately made by the defendant to the plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said Court fully appears; (e) which said judgment still remains in full force and effect, (f) not reversed, satisfied, or otherwise vacated; and the plaintiff hath not obtained any execution or satisfaction of or upon the said judgment; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £—— above demanded. Yet &c. [See *breach, ante*, 286, and insert damages sufficient to cover interest, &c.]

The like on a judgment in debt. (g)

As in the above form, to the asterisk, and then proceed as follows:— As well a certain debt of £—— as also £——, which in and by the said Court of our said lady the queen, before the queen herself, [or if in *Common Pleas*, "which in and by the said Court of our said lady the queen of the bench,"] were then adjudged to the plaintiff for his damages which he had sustained, as well by reason of the detention of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the de-

unless the Court will make an order for that purpose. If defendant, however, instead of applying to the Court to stay the proceedings, plead *nul tiel* record, or the like for delay, the plaintiff ought to have his costs; 5 Taunt. 264. The act also does not extend to judgments against *plaintiffs* of nonsuit or *non. pros.*; 14 East, 343. No action lies on the judgment if defendant has been once taken or charged in execution on it, and this although discharged with plaintiff's concurrence; 7 T. R. 420; 5 M. & Sel. 103; 2 East, 243. Error in the judgment is no ground of objection to an action upon it; 2 Lev. 161. As to the declaration in general, Gilb. Debt, 412, &c.; Com. Dig. Plead. 2 W. 12; 1 Saund. 92, n. 2, 329, n. 1, 2, 3; *ante*, vol. i. Index, tit. "Debt;" 1 Selwyn, N. P. tit. "Debt." See Forms, Morg. 541, 558; 1 Rich. C. P. 203, 440, *post*.

(x) The term and parties, and the sum recovered, were formerly to be stated; Com. Dig. Pleader, 2 W. 12. As to pleading a judgment in an *inferior Court*, *id. ibid.*; 1 Saund. 22, n. 2; *ante*, vol. i. Index, tit. "Declaration." *Read v. Pope*, 1 C. M. & R. 302. In declaring on a judgment signed in vacation, on a certificate by a judge at *nisi prius*, for immediate execution (under 1 Will. 4, c. 7, s. 2), the day of signing judgment should be stated according to the fact; *Engleheart v. Eyre*, 5 B. & Ad. 68.

(a) What a variance in this, see *supra*, note (y).

(b) A variance in the sum was formerly fatal. Where there was a judgment for £388. 0s. 1d. and debt was brought on it, stating the judgment was for £388, omitting the penny, it was held a variance, and that it could not be cured by a remittitur of the penny; 2 Stra. 1171.

(c) The judgment must be set forth accurately, and a variance was formerly fatal. If the parties names be misplaced, &c. it would be bad; 7 Taunt. 271. *Sed query*, that was a decision on a sham plea, and see as to misnomer of parties, 1 Roll. 754, l. 40; 7 T. R. 447. See form, 2 Chit. on Plead. 5th edit. 484, where a defendant was sued in the first action by a wrong name.

(d) If the judgment was on one count only (as is usual where the action is on a bill of exchange or promissory note, and there is a reference to the master or prothonotary on a judgment by default,) instead of the words "promises and undertakings," say "promise and undertaking," otherwise there would be a variance; see 5 B. & Cres. 339; Stra. 892; 2 Stark. 7.

(e) This is necessary; Co. Lit. 303 a; 1 Lord Raym. 35; 3 Salk. 565. However, the omission is only ground of special demurrer; 11 East, 565.

(f) As to this allegation, see Com. Dig. Pleader, 2 W. 12. It is not necessary; 1 Saund. 330, n. 4.

(g) See 2 Mall. 186.

defendant was convicted, as by the record, &c. [*As in the last precedent to the end.*]

ON JUDGMENTS.

Commencement as ante, 284.] For that whereas the now plaintiff, before and at the time of the obtaining and giving the judgment hereafter mentioned, according to the form of the statute in such case made and provided, had been served with a copy of a certain writ of our lady the queen, called a [summons,] issued out of the Court of our lady the queen, before the queen herself, and thereby requiring the now plaintiff, within eight days after the service of that writ on him, inclusive of the day of such service, he should cause an appearance to be entered for him in the Court of Queen's Bench, in an action upon promises, at the suit of the now defendant, and the now plaintiff had in due time, to wit, on &c., duly appeared in the said action by — his attorney, according to the form of the statute in such case made and provided; and the now defendant did not declare on the said writ, or otherwise in the said Court, in any personal action or ejectment against the now plaintiff, before the end of [Trinity] term, in the — year of the reign of our said lady the queen, being the next term after the said appearance of the now plaintiff, at the suit of the now defendant. And thereupon such proceedings were duly had, that afterwards, to wit, on &c., it was considered and adjudged in and by the said Court of our said lady the queen, before the queen herself at Westminster, that the now defendant should take nothing by his said writ, but that he should be in mercy, &c.; and it was then further considered and adjudged in and by the said Court, that the now plaintiff should recover against the now defendant [£3. 10s.] for his costs and charges by him laid out about his defence in that behalf by the said Court of our said lady the queen, before the queen herself there, then adjudged to the now plaintiff, with his assent, according to the form of the statute in such case made and provided, as by the record and proceedings thereof remaining in the Court of our said lady the queen, before the queen herself, more fully appears; which said judgment still remains in full force and effect, not in the least reversed, annulled, set aside, paid or satisfied; and the now plaintiff hath not obtained any execution or satisfaction of or upon the the said judgment; whereby an action hath accrued to the now plaintiff, to demand and have of and from the now defendant the said sum of [£3. 10s.] above demanded. Yet the now defendant, although often requested so to do, hath not as yet paid the said sum of [£3. 10s.] above demanded, or any part thereof, to the now plaintiff, but he to do this hath hitherto wholly refused, and still doth refuse. To the damage, &c.

On a judgment of non pros. in Q. B. for not declaring.

Same as the form, ante, 337, 338, to the asterisk, and then proceed as follows:] The sum of £—— above demanded, which in and by the said Court of our said lady the queen, before the queen herself, were adjudged to the now plaintiff and with his assent for his costs and charges by him laid out and expended in and about his defence of a certain action on promises, [*or as the action was,*] then lately prosecuted in the said Court by the now defendant against the now plaintiff, whereof the now defendant was convicted, as by the record, &c. [*Same as the precedent, ante, 338, to the end.*]

On judgment for the defendant on verdict.

ON JUDGMENTS.

The like on
other judg-
ments.

For the description of a judgment of *non pros.* for not entering the issue—or as in case of a nonsuit—or on a nonsuit, see Tidd's forms, 6th edit. 169, 291, 314, 390; 7 Wentw. 120. A declaration in debt on judgment of inferior Court must show that the original cause of action arose within its jurisdiction; *Read v. Pope*, 1 Cr. M. & R. 302

On a judgment
recovered in
Q. B. when defendant was sued by a wrong name.

See the form, *Chitty on Pleading*, 5th edit. 484.

Debt by baron
and *feme*, ad-
ministratrix,
against baron
and *feme*, who
was also an ad-
ministratrix, on
a judgment
against intestate,
revived by
scire facias
suggesting a
devastavit. (h)

For that whereas the said E. F. in his lifetime, to wit, on &c., before the Right Honourable Sir —, Knt. and his companions, then her majesty's justices of the bench here, to wit, at Westminster, in the county of Middlesex, by the consideration and judgment of the said Court, recovered against the said G. H. in his lifetime, [*here state the judgment, which if in assumpsit will be as in form, ante, 338, or if in debt, thus:*] as well a certain debt of £—, as also — shillings, which in and by the said Court of our said lady the queen of the bench were then adjudged to the said E. F. for his damages, which he had sustained as well by reason of the detention of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said G. H. was convicted, as by the record and proceedings thereof remaining in the said Court of our lady the queen of the bench aforesaid, at Westminster aforesaid, more fully appears. And thereupon afterwards, and after the death of the said E. F. and G. H., that is to say, in — term, in the — year of the reign of our said lady the queen, it was considered and adjudged in and by the said Court of our said lady the queen of the bench, before Sir —, Knt., and others, his companions of the bench, then her said majesty's justices of the bench here, to wit, at Westminster aforesaid, in the county aforesaid, that the said A. and B. administratrix aforesaid, should have execution against the said C. and D. administratrix aforesaid, of the debt and damages, [*or if in assumpsit, say "damages"*] aforesaid, to be levied of the goods and chattels, which were of the said G. H. at the time of his death, in the hands of the said D. administratrix as aforesaid, before her intermarriage with the said C. to be administered, or in the hands of the said C. and D. in right of the said D. as such administratrix, since her intermarriage, to be administered by the default of the said C. and D. his wife, administratrix as aforesaid, as by the record

Execution
awarded on
scire facias.

(h) See other forms, Morg. Prec. 566, 563; 7 Went. 83, 112; 3 T. R. 685; 3 East, 2. The action of debt on a judgment suggesting a *devastavit* was introduced instead of the proceedings by *scire fieri* inquiry, and it is now usually adopted; 2 Sid. 102, 103; 1 Saund. 219 a. This action will not lie without a judgment previously obtained against the executor or administrator; see Carter, 2; 1 Vent. 321. The executor is precluded from setting up that he had not assets, unless he pleaded *plene administravit* to the original action, or admitted assets to a certain extent, and *rien ultra*, &c.; 3 T. R. 685, 689; 1 Salk. 310; 3 East, 2; the action may be brought without any writ of *fieri facias* first taken out; 1 Sid. 397. The law upon this subject is collected by Mr. Sergeant Williams, 1 Saund. 219; see also Williams' Exe-

cutors, 3d edit. 1565. The executor may be charged in the *debet* and *detinet*; 1 Saund. 216; 1 Roll. Ab. 603, ss. 24, 25, 29, but the plaintiff may waive that right, and sue the executor in the *detinet* only; 3 East, 6. The issue upon *non detinet* lies upon the defendant to prove the due administration of assets; 3 East, 2. The defendant formerly pleaded not guilty, or *non debet*, 2 T. R. 462; but he now usually traverses the *devastavit*. In debt upon a judgment by default against defendant as executor, the production of the judgment and of the *testatum fi. fa.*, upon which the sheriff had returned *nulla bona testatoris*, and a levy of costs *de bonis propriis*, was held sufficient evidence of a *devastavit*; *Leonard v. Simpson*, 2 Bing. N. C. 176.

and proceedings thereof, remaining in the said Court of our said lady the queen of the bench aforesaid, more fully appears, which said judgments still remain in full force and effect, not in the least reversed, annulled, set aside, or satisfied. And the plaintiffs in fact say, that at the time of the said award of the said execution as aforesaid, to wit, on &c., divers goods and chattels, which were of the said G. H. at the time of his death, of great value, to wit, of the value of the debt and damages [or if in *assumpsit*, say "damages"] aforesaid, in form aforesaid recovered, had come to the hands of D. as administratrix as aforesaid to be administered; and which said goods and chattels the said C. and D. administratrix aforesaid, afterwards, to wit, on the same day and year last aforesaid, eloigned, (i) wasted and converted and disposed of to their own use; whereby an action hath accrued to the said A. and B. as administratrix as aforesaid, to demand and have of and from the said C. and D. the said sum of £— above demanded, yet neither the said C. nor the said D. (although often requested so to do) have as yet paid the said sum of £— or any part thereof to the said B. before her said intermarriage (to which said B. after the death of the said E. F. and before her marriage with the said A. B. to wit, on &c., [date of grant] administration of all and singular the goods, chattels, and credits, which were of the said E. F. deceased, at the time of his death, who died intestate, by —, by Divine Providence, Archbishop of Canterbury and Primate of all England, in due form of law, was granted,) or to the plaintiffs since their intermarriage, or any or either of them, but they to do this have hitherto wholly refused, and the said C. and D. administratrix as aforesaid, still refuse to pay the same, or any part thereof, to the said A. and B. administratrix as aforesaid; wherefore the said A. and B. as administratrix as aforesaid, say that they are injured and have sustained damage to the amount of £—; and thereupon they bring suit &c.; and the plaintiffs bring into Court here the letters of administration of the said archbishop, which give sufficient evidence to the said Court here of the grant of the administration to the said B. the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned, &c.

ON JUDGMENTS.

Suggestion of a *devastavit*.

Grant of administration to present defendant.

Profert of letters of administration.

For that whereas the plaintiff heretofore, that is to say, on &c. (l) in her majesty's Court, before the barons of the Exchequer, holden at the queen's Courts, Dublin, in the kingdom of Ireland, by the consideration and judgment of the same Court, recovered against the defendant as well a certain debt of £— sterling money of the kingdom of Ireland, as also £— of like sterling money which were then in and by the said Court adjudged to the plaintiff and with his assent for his damages occasioned by detaining that debt, whereof the defendant was convicted, as by the record and pro-

On a judgment obtained in the Court of Exchequer or C. P. in Ireland. (k)

(i) As to this averment, see 1 Saund. 307.

(k) An Irish judgment, whether before or since the Union, is not matter of record; 4 B. & C. 411, and cases there cited; and see notes, *ante*, 177. It is best to declare in *assumpsit* when the original consideration for the judgment cannot be stated in an action of debt, and that plaintiff may declare in *assumpsit*; see *ante*, 177, n.; 3 Taunt. 85. Although the defendant cannot contest the merits of the action or the propriety of the

decision, yet he may show that the Court had not properly jurisdiction; *Ferguson v. Mahon*, 11 Ad. & E. 179.

(l) If in C. P. say, "in the Court of our said lady the queen of her common bench of her kingdom of Ireland, holden at the Queen's Court in the city of Dublin, in and for the said kingdom of Ireland, to wit, at &c., in &c., before &c., and his brothers, then her majesty's justices of the bench aforesaid, by the consideration and judgment, &c."

ON JUDGMENTS. proceedings thereof remaining in the said Court, before the said barons of the Exchequer aforesaid, may more fully appear, which said judgment still remains in the said Court in its full force and effect, not in anywise reversed, annulled, set aside, paid off, satisfied or discharged. And the plaintiff in fact saith, that the debt and damages aforesaid in form aforesaid recovered, at the time of the recovery thereof, were, and from thence hitherto have been, and still are of great value, to wit, of the value of £—— (m) of lawful &c., and that the plaintiff hath not as yet obtained execution of the said judgment, whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £——, parcel of the said sum above demanded. [Add a count on the original consideration, if it be the subject of an action of debt, account stated, and breach, as ante, 286.]

By the conusee of an Irish judgment, being assignable by the Irish Act, 9 Geo. 2, c. 5, and 26 Geo. 2, c. 14. See the form in 2 Chitty on Pleading, 5th edit. 487 to 494; and see 3 Taunt. 82; Douglas, 1; 5 East, 473.

On a judgment obtained in the County Court. As to the proper form of this declaration, see Jones v. Jones, 5 M. & W. 523.

VIII. ON STATUTES.

BY PARTY GRIEVED.

VIII. ON STATUTES. BY PARTY GRIEVED.

Landlord against tenant, on stat. 4 Geo. 2, c. 28, s. 1, for double value for not quitting in pursuance of the landlord's notice. (n)

[Commencement, ante, 284.] For that whereas the defendant, before and at the time of the giving of the notice and making the demand as hereinafter mentioned, and from thence until and upon the —— day of ——, A. D. ——, [the day when the tenancy determined] held and enjoyed a certain messuage,

(m) This is unnecessary if the judgment was since 6 Geo. 4, c. 79.

(n) See form of declaration, 1 Bing. N. C. 713. By the 4 Geo. 2, c. 28, s. 1, tenants holding over lands, &c. after the expiration of the term, and after demand made, and notice in writing given by the landlord, are to forfeit double the yearly value of the premises, to be recovered by action of debt, and it cannot be recovered by distress, 3 Burr. 1605; Vin. Ab. Distress, E.; Bla. Rep. 533; 4 Bar. & Cres. 922; 7 D. & R. 411, S. C.; and see the precedents and law on this act, 5 Burr. 2694; 1 New Rep. 174; 8 East, 358, 361; 9 East, 310; 10 East, 48; 2 Campb. 463; Selw. N. P. 628; 7 Wentw. Ind. 564; and 1 Chit. Col. Stat. 666; Wilkinson and another v. Hall and another, 1 Bing. N. C. 713, where it was held that tenants in common cannot sue jointly for double value for holding over unless there had been previously a joint demise from them. As to the liability of a joint tenant for the wilful holding over of his co-tenant, see Hirst v. Horn, 6 M. & W. 393.

When the tenant gives notice to quit, and holds over, he forfeits double rent, under the 11 Geo. 2, c. 19, s. 18, recoverable either in

assumpsit, or debt, or by distress; see 3 Burr. 1603, and form in that act in assumpsit, ante, 40; in debt, post, 344, and notes, post, 344.

The stat. 4 Geo. 2, c. 28, is a remedial law, and should therefore be construed liberally; 5 Burr. 2694. It has been considered that a tenant, holding over under a *fair claim* of right, is not within the act, although it has been decided eventually that he has no right, 5 Esp. 203; and see 9 East, 313; but this is questionable. The statute extends only to tenants for life or years, and not to tenants for a less term, as a week or the like; 2 Campb. 453; *sed vide* Co. Lit. 64, b.

To entitle the plaintiff to recover under the act, the notice to quit must be by the landlord, and the demand in writing, 3 Burr. 1607; 1 New R. 180, n.; and it must also be a valid notice, binding on each party; 7 D. & R. 411; 4 B. & C. 922, S. C. A notice to quit, stating that "or else I shall insist upon double rent," does not give the tenant an option of continuing tenant at the double rent; Dougl. 175. A second notice to quit, given before or after the expiration of the first, will not bar the landlord's right to the double rent; 1 Term Rep. 63. A receiver appointed by the Court of Chancery

and lands, tenements and premises, (o) with the appurtenances, as tenant thereof to the plaintiff, that is to say, as tenant thereof from year to year (p) for so long time as the plaintiff and defendant should respectively please, the reversion of the said premises, with the appurtenances, during all that time belonging to the plaintiff; and thereupon, whilst the defendant so held and enjoyed the said premises, with the appurtenances, as tenant thereof as aforesaid, and whilst the said reversion (q) so belonged to the plaintiff, to wit, on &c., [the date of the notice] the plaintiff gave a notice in writing (r) to the defendant, and then demanded (s) and required the defendant to deliver up the possession of the said premises, with the appurtenances, to the plaintiff, on the said &c., on which day the term, estate and interest of the defendant in the said premises, with the appurtenances, determined.

By PARTY
GRIEVED.

in a suit depending, is a sufficient agent to give the notice; 6 Burr. 2694; 1 B. & P. 385.

A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is a sufficient demand within the statute; *Hirst v. Horn*, 6 M. & W. 393. See further as to the notice, *Paole v. Warren*, 8 A. & E. 582.

Also to entitle the landlord to recover, he must have demanded the delivery of the possession of the premises; it seems, however, that the notice to quit in writing is of itself a sufficient demand; 2 Bl. Rep. 1075; 5 Burr. 2694.

Though a demise be for a certain time, a demand of possession and notice in writing, &c. are necessary to entitle the landlord to double rent or value, but such demand may be made above six weeks after the expiration of the tenancy, if the landlord have done no act in the mean time to acknowledge the continuation of it; and if the tenant hold over, he will be entitled to double value from the time of such demand; but if the rent be reserved quarterly, and the demand be made in the middle of the quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter; 8 East, 368.

If the notice have been given to a woman who afterwards marries, the action for not delivering up possession may be maintained against the husband, without any new demand, and the wife need not be joined; 1 New R. 174.

An administratrix of an executor cannot sustain an action on this act, although the tenant has attorned to her, without taking administration *de bonis non* to the first testator; 1 B. & P. 310.

In an action for double rent on the statute for holding over after notice, the jury may find for so much as the tenant appears to have over-held, without reference to the sum demanded, so that it be not more than that sum; *Lofft*, 275. And after a landlord has recovered in ejectment against his tenant, he may maintain debt upon the above stat. 4 Geo. 2, c. 28, s. 1, for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit; 9 East, 310. In an action for double value, and also for use

and occupation, the defendant paid the single rent into Court upon the latter count, and the plaintiff, by taking it out, was held not to waive his right under the former, so as to be subject to nonsuit thereon, but that the case ought to have gone to the jury; 10 East, 48.

(o) The words of the act are, "lands, tenements, or hereditaments," and therefore where the plaintiff, being the owner of a woollen-mill and steam engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine, by means of a revolving shaft in the room, it was held, in an action for double value under 4 Geo. 2, c. 28, against the tenant, for holding over after the expiration of a notice to quit, that in estimating such double value, the value of the power supplied could not be included; *Robinson v. Leary*, 7 M. & W. 48.

(p) The act does not seem to extend to a tenant for less than a year; 2 Campb. 453; *sed vide*, Co. Lit. 54, b.

(q) The act mentions only reversioners or remainder-men.

(r) A notice in writing is necessary, by the express words of the statute; 1 New Rep. 180, n. a; Burr. 603, 1607.

(s) The precedents sometimes run, "and thereby then and there demanded," &c. founded on the decision in 5 Burr. 2694; and 1 New Rep. 174, 179, that the notice itself is a sufficient demand, and that therefore no fresh demand after the expiration of the tenancy needs be averred or proved. It may, however, be advisable, when in fact demand of possession has been made after the expiration of the notice to quit, before the statement of the holding over, to aver, "And the plaintiff in fact saith, that after the determination of the said tenancy of the defendant as aforesaid, and whilst the defendant continued in the possession of the said tenements, with the appurtenances, as aforesaid, and the plaintiff was entitled to the possession thereof, to wit, on &c., the plaintiff, by a certain notice in writing then made and signed by him, and delivered to the defendant, demanded and required the defendant to deliver the possession of the said tenements, with the appurtenances, to the plaintiff: nevertheless, &c.;" 8 East, 368.

By PARTY
GRIEVED.

Nevertheless the defendant, not regarding the statute in such case made and provided, did not nor would, on the determination of the said term as aforesaid, deliver the possession of the said premises, with the appurtenances, to the plaintiff, according to the said notice so given, and the said demand so made as aforesaid, but wholly neglected and refused so to do, and on the contrary thereof, he the defendant wilfully held over the said premises, with the appurtenances, after the determination of the said term, and after the said notice so given, and the said demand so made as aforesaid, for a long space of time, to wit, for the space of — then next following, during all which time the defendant did keep the plaintiff out of the possession of the said premises, with the appurtenances (he the plaintiff being during all that time entitled to the possession thereof), contrary to the form of the statute in such case made and provided. (t) And the plaintiff avers, that the said premises, with the appurtenances, during the said time of holding over the same, and keeping the plaintiff out of the possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of £——, of lawful &c. And by reason of the premises, and by force of the statute in such case made and provided, the defendant became liable to pay to the plaintiff a large sum of money, to wit, the sum of £—— of like lawful money, being at the rate of double the yearly value of the said premises, with the appurtenances, for so long a time as the same were so detained as aforesaid; and thereby, and by force of the said statute, an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £—— parcel of the said sum above demanded. [*A count for use and occupation may be added; Thoroton v. Whitehead, 1 M. & W. 14; 4 Dowl. 747, S. C.*]

By landlord
against tenant,
on the 11 Geo.
2, c. 19, s. 18,
for double rent,
for not quitting
in pursuance
of tenant's no-
tice. (u)

Commencement in debt as usual, ante, 284.] For that whereas the defendant, before and at the time of the giving of the notice hereinafter mentioned, held and enjoyed a certain messuage and premises with the appurtenances, as tenant thereof to the plaintiff, from year to year, (v) for so long a time as they the plaintiff and the defendant should respectively please, at and under a certain yearly rent, to wit, the yearly rent of £——, payable quarterly, to wit, on &c., [*stating days of payment*] the reversion of the said messuage and premises with the appurtenances during all that time belonging to the plaintiff, and the defendant then had power to determine (x) the said tenancy by six months' notice to quit the said messuage and premises so by him holden as aforesaid, and thereupon whilst the defendant so held and enjoyed the said messuage and premises, with the appurtenances as aforesaid, as

(t) The forms in 5 Burr. 2694; 1 New Rep. 174, and some of those referred to in 7 Wentw. Index, 464, 465, do not conclude *contra formam*, &c. but other forms do so conclude; Com. Dig. "Action on Statute," G.; Reg. Brev. 73; Lutw. 1548; Dyer, 85, a; 1 Saund. 135, n. 3.

(u) See the form in 7 Wentw. 133, which appears to have been hastily framed. See the form for double value where notice was given by landlord, on the 4 Geo. 2, c. 28, *ante*, 342; 3 Burr. 1603. See a form in *assumpsit*, *ante*, 40. Tenant may afterwards quit without notice, and not liable after quitting; 1

B. & Adol. 904.

(v) Any tenancy for any term, however short, seems to be within the meaning of 11 Geo. 2, c. 19, s. 18.

(x) See the preamble of the 18th section of 11 Geo. 2, c. 19. The statute only applies to cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given a *valid* notice sufficient to determine his tenancy, or the bad notice has been assented to by landlord in writing; 7 D. & R. 411; 4 B. & C. 923, S. C.

tenant thereof as aforesaid, to wit, on &c., [*day when notice given*] the defendant gave notice (y) to the plaintiff of his the defendant's intention to quit the said messuage and premises on the &c., [*day when notice expired*] then next. Nevertheless the defendant, not regarding the statute in such case made and provided, did not nor would, according to the said notice, deliver up the possession of the said messuage and premises with the appurtenances, or any part thereof, at the said time so fixed and determined on by the said notice as aforesaid, that is to say, on the said &c., [*day of expiration of notice*] (although the defendant was afterwards, to wit, on the day and year last aforesaid, requested (x) by the plaintiff so to do,) but on the contrary wrongfully and injuriously held over and kept and withheld the possession of the said messuage and premises, with the appurtenances, from the plaintiff for a long space of time &c., from the day and year last aforesaid, until and upon &c., [*day when he left the premises, or if not left, say, "from thence, hitherto," &c.*] contrary to the said statute in such case made and provided, by reason whereof [and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to demand and have of and from the defendant a large sum of money, to wit, the sum of £— being at the rate of double the amount of the yearly rent or sum which the defendant had paid to the plaintiff before the time when he the defendant so refused to deliver up the possession of the said messuage and premises as aforesaid, in respect of his being tenant to the plaintiff of the said messuage and premises, and which said last-mentioned sum of money hath arisen and accrued due and payable to the said plaintiff during the time when he the defendant so wrongfully kept possession of the said messuage and premises as aforesaid.]

By PARTY
GRIEVED.

See form, 2 Bar. & Ald. 652.

By a landlord
against his tenant, on 11 Geo. 2, c. 19, sect. 12, for not giving notice of declaration on ejectment.

See form, Butcher v. Harrison, 4 B. & Adol. 129.

Debt by assignees against insolvent on 13 Eliz. c. 5, to recover penalties for fraudulent conveyances.

Commencement in debt, ante, 284.] For that whereas one E. F., before and at the time of the committing of the grievance and the fraudulent and clandestine removal of the goods and chattels hereinafter mentioned, held and enjoyed a certain messuage and premises, with the appurtenances, as tenant thereof to the plaintiff from year to year [*or if for a less time, state it accordingly, or if under a lease for a longer term, state the tenancy, as ante,*

By landlord, on 11 G. 2, c. 19, s. 3, for assisting the tenant in fraudulently removing his goods to prevent a distress for rent. (a)

(y) In 7 Wentw. 133, a notice in writing is stated to have been given, but according to 3 Burr. 1603; 1 Bla. Rep. 538, S. C., parol notice by a tenant, under the 11 Geo. 2, c. 19, s. 18, is sufficient. A notice that the tenant will quit as soon as he can get another situation does not bring a case within the act; 2 Campb. 591.

(x) Neither by the words of the act, nor according to the precedent in Wentworth, does this averment of request appear to be necessary, though it cannot vitiate, but may be rejected as surplusage, according to the

principle laid down in Cowp. 683; 1 T. R. 430; Ld. Raym. 171.

(a) See the law and cases on the 3d section of 11 Geo. 2, c. 19, 1 Chit. Col. Stat. 669.

The enactment is remedial as well as penal. To make a *third person* liable for assisting in the fraudulent removal, it must be proved not only that he so assisted, but also that he was privy to the fraudulent intent; 8 B. & C. 537. But to make the *tenant* liable, it is not necessary to show an actual participation in the removal, if the removal was with his

BY PARTY
GRIEVED.

224,] for so long a time as they the plaintiff and the said E. F. should respectively please, at and under a certain [yearly] rent payable [quarterly] to wit, on, &c. [*stating the days of payment*] the reversion of and in the said messuage and premises, with the appurtenances, during all that time belonging to the plaintiff. And under and by virtue of which said tenancy the said E. F. held the said messuage and premises, until, at, and after the time of the fraudulently conveying and carrying away of the goods and chattels hereinafter next mentioned off and from the same. And the plaintiff further says, that a certain sum, to wit, the sum of [£10. 10s.] (b) of the rent aforesaid, for [one] quarter of a year, became and was due and payable to the plaintiff, on, &c. [*when it fell due,*] and was due and in arrear and unpaid from the said E. F. to the plaintiff at the time of the said fraudulently conveying and carrying away the said goods and chattels, (c) and still is wholly in arrear and unpaid to the plaintiff. And the plaintiff further says, that the said tenancy so being in full force, thereupon, afterwards, and just before the said sum of £10 of the said rent became due and in arrear as aforesaid, that is to say, on, &c. [*day of removal, or about it,*] certain goods and chattels, to wit, &c. [*set them out shortly*] (d) of the said E. F. were upon the

privity; 3 D. & R. 501; 1 C. & P. 121, S. C. over-ruling 3 Esp. Rep. 15.

It has been considered, that to bring a case within the meaning of the enactment, the rent must be actually *overdue* and in arrear at the time of the removal; see 3 Esp. 16; and though that point was doubted, 4 Campb. 137; 2 Saund. 284; it has been so settled; *Rand v. Vaughan*, 1 Hodges, 173.

The enactment does not extend to the goods of a stranger, not a tenant; 5 M. & Sel. 38; nor to the goods of an under-tenant, though removed to avoid the distress of a ground-landlord; *id.*; 2 Stra. 787.

With respect to what is a removal within the enactment, it is to be observed that the words of it are, "*fraudulently remove or carry away,*" which differs from the 1st section, wherein the words are "*fraudulently or clandestinely.*" The statute applies to all cases where a landlord is, by the conduct of his tenant, in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for such rent; and therefore where a tenant openly and in face of day, and even with notice to his landlord, removed his goods, without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods; it was held, that although the removal might not be clandestine, yet, if it was fraudulent, (which was a question for the jury,) the landlord was justified under the statute; 4 D. & R. 33. Nor is it necessary to show, in proof of fraudulent removal or concealment of cattle, that they were withdrawn from sight. If they have been removed to a neighbour's field, so as to cause the landlord difficulty to find them, it is sufficient; 9 Price, 301. Nor is it necessary to prove that a distress was in progress, or about to be put in execution, or even contemplated; 10 Price, 138.

On the other hand, a creditor, with the assent of his debtor, may take possession of

the goods of the latter, and remove them from the premises, for the purpose of satisfying a *bond fide* debt, without incurring the penalty inflicted by the above enactment against persons assisting a tenant in removing his goods from the premises, although the creditor takes possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord would distrain; 5 M. & Sel. 200.

In an action against a person for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it, and circumstances of suspicion may be laid before the jury, to prove such a fraudulent co-operation as the legislature contemplated; 10 Price, 138.

The 4th sect. of the 11 Geo. 2, c. 19, enacts, that if the value of the goods does not exceed £50, the landlord may have recourse to, and have a summary remedy before two justices, but that enactment does not take away the jurisdiction of the superior courts, and the landlord may sue; see M. & M. C. N. P. 175; Holt, C. N. P. 147; 1 Stark. 169, S. C.; and see 5 D. & R. 558; 3 B. & C. 649, S. C. The landlord's having, in the first instance, made his complaint before a magistrate, will not preclude him from afterwards maintaining an action; 1 Stark. 169.

See the form of plea and avowry, justifying seizing goods, &c. under a fraudulent removal, *post*, vol. iii.

(b) The precise sum due need not be stated; 3 T. R. 643.

(c) They must be the tenant's goods; 5 M. & Sel. 38; see note *supra*.

(d) It is not, it seems, necessary to specify the goods; and see 6 D. & R. 341.

said messuage and premises; and the said tenancy so being in full force as aforesaid, the said E. F., during the continuance of the said tenancy so being in full force as aforesaid, and just before the said sum of £10 so became due and payable and in arrear to the said plaintiff as aforesaid, (e) that is to say, on the day and year last aforesaid, did fraudulently convey and carry away the same goods and chattels off and from the said messuage and premises, with intent to prevent and hinder the plaintiff from distraining the same for the said sum of £10 for the rent aforesaid so due and payable and in arrear to the plaintiff as aforesaid, and the said goods and chattels so fraudulently conveyed and carried away off and from the said messuage and premises with such intent as aforesaid, from the time of so fraudulently conveying and carrying away of the same as aforesaid, hitherto kept and continued, and still keeps and continues from off the said messuage and premises, and the defendant, on the day and year last aforesaid, did wilfully and knowingly aid and assist the said E. F. in the said fraudulent conveying and carrying away of the said goods and chattels so fraudulently conveyed and carried away off and from the said messuage and premises as aforesaid, with intent to prevent and hinder the same from being distrained by the plaintiff for the said [£10] of the rent aforesaid, contrary to the form of the statute in such case made and provided; and the plaintiff avers that the said goods and chattels so fraudulently conveyed and carried away off and from the said messuage and premises as aforesaid, at the time of the so carrying and conveying away the same off and from the said messuage and premises as aforesaid, were of great value, to wit, of [£25] whereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff to demand and have of and from the defendant a large sum, to wit, the sum of £50, being double the value of the said goods and chattels so fraudulently conveyed and carried away as aforesaid, parcel, &c. [According to the facts. The declaration may be for charging defendant with wilfully and knowingly concealing the goods.]

By PARTY
GRIEVED.

[Commencement, ante, 284.] For that whereas the plaintiff, before and at the several times hereafter in this count mentioned, was and still is *farmer*,

On 2 & 3 Edw. 6, c. 13, s. 1, for treble value of tithes not set out. (f)

(e) As *supra*.

(f) See forms, 5 T. R. 260; 7 Wentw. Index, 558, 559; 2 Morg. 662; 2 Rich. C. P. 301; Lil. Ent. 75, for tithe of *sylvæ cædua*; and see 2 Rich. C. P. 195, 301, for tithe of hay; Morg. 625; Lil. Ent. 148, of coppice wood. For law as to tithes and requisites of declaration, see *Eagle on Tithes*, *Mirehouse on Tithes*, *Gwillim on Tithes*, *Toller on Tithes*. And as to the remedy for tithes under the yearly value of £10, see 5 & 6 W. 4, c. 74. As to the right of an incumbent *de facto* to sue, see *Alston v. Atlay*, 7 A. & E. 289.

The statute 2 & 3 Edw. 6, c. 13, s. 1, affords the only common law remedy for subtraction of tithe; 8 East, 178. It is a remedial act, and the Court will grant a new trial for a mistake of the jury; 6 Taunt. 297. The act only extends to *predial* tithe, and therefore where the declaration was for not setting out *predial* and other tithes, as wood, &c.,

and a general verdict was given, judgment was arrested; 1 Brownl. 65. And it extends only to such tithe as can be set out in kind; therefore, though agistment is a *predial* tithe, it is not within the act; 3 Anst. 763; B. N. P. 191; but the statute extends to small tithes as well as great; Moore, 915. Mere non-payment of tithe is no answer to a claim under this statute; 2 Bing. N. C. 1.

By 53 Geo. 3, c. 127, s. 5, the action must be brought in six years from the time the tithes became due. Before that act there was no limitation; Cro. Car. 513. *Semble*, the treble damages being in the nature of a debt, and not a penalty, should be pleaded specially; Salk. 278; Ld. Ray. 153, 538; 1 Saund. 283; 2 Saund. 63.

The farmer of the whole of a partible rectory under lease from the different proprietors, may declare as farmer for the whole; Yelv. 63. Two farmers may join in this action,

BY PARTY
GRIEVED.

[*or*, "rector of the parish of, &c." *or*, "vicar of the parish of, &c."] and proprietor (*g*) of the tithes of corn, grain, and hay, (*h*) yearly arising, growing, renewing, and happening, in, upon, and from divers, to wit, — (*i*) acres of land, situate, lying and being in the parish of — in the county of — and within the bounds, limits, and titheable places of the same parish, (*k*) and the defendant during all the time aforesaid was the occupier of the said land. And whereas all and singular the tithes of corn, grain and hay yearly arising, growing, renewing and happening, in, upon, and from the said land, within forty years (*l*) next before, and at the time of the making of a certain act of parliament passed in the reign of Edward the Sixth, (*m*) formerly King of England, &c. (*n*) of right *ought* (*o*) to have been set out and paid in kind to the farmer or proprietor of those tithes for the time being. And thereupon the defendant heretofore, to wit, on &c. [*day of the subtraction, or about it,*] and on divers other days and times between that day and the commencement of this suit, reaped, mowed, and cut

Where there has been a composition, this count cannot be supported, and the plaintiff must sue upon the contract, as *ante*, 48. The notice to determine such a composition is analagous to a notice to quit land; 12 East, 83. The validity of a custom as to tithing is triable in this action; 8 East, 178. The jury cannot give other than treble value nor costs; Moore, 915. *Nil debet*, or not guilty, is considered a good plea; Cro. Eliz. 621, 766; Hob. 218; 2 Inst. 651; see 5 A. & E. 213; 3 M. & W. 155.

The plaintiff has his option to issue a writ of inquiry or not in an action of debt founded on the statute 2 & 3 Ed. 6, c. 13, brought to recover the treble value of tithes; and where in such an action the declaration contained a count for treble value, and other counts for tithes bargained and sold, and on an account stated, the defendant suffered judgment by default, and the jury, on a writ of inquiry, assessed the plaintiff's damages at £17. 4s. 9d. on the first count, for the treble value, and £9 for the single value on the other counts, but omitted to find costs, the Court ordered the return of the inquisition to be amended, by the insertion of nominal damages as to the last counts, on which costs *de incremento* might be added; and it seems that the statute 8 & 9 W. 3, c. 11, s. 3, which gives the plaintiff his costs in all actions of debt for not setting out tithes, where the damage found by the jury should not exceed twenty nobles, is confined to cases where a plaintiff obtains judgment after plea pleaded, or demurrer joined, and does not apply to a case where a defendant suffers judgment by default; 7 J. B. Moore, 602; 1 Bingham, 182, S. C. If in debt for not setting out tithes, the jury do not find that the single value did not exceed twenty nobles (£6. 13s. 4d.) the plaintiff is not entitled to costs, on the 8 & 9 W. 3, c. 11; Tidd, 9th edit. 946. And on account of costs it is frequently better to proceed in equity; 2 Inst. 651.

(*g*) As to this allegation and the evidence, see 5 Price, 334; Moore, 915; 4 Mod. 422;

3 T. R. 636, n. (*a*); 4 T. R. 367; 6 T. R. 663; 1 B. & P. 211.

(*h*) This should correspond with the tithes not set out.

(*i*) Any quantity sufficient to cover that occupied by the defendant.

(*k*) Where the plaintiff averred that there was a certain immemorial custom as to setting out the tithes "within the parish, and the limits, bounds, and titheable places thereof," it was held that this averment was proved by evidence that the custom prevailed in all parts of the parish where tithes of hay was set out, and that proof of a modus for hay in one township made no difference; Littledale, J. *duh*. 6 B. & C. 18; 9 D. & R. 12, S. C.

(*l*) See 1 Saund. 139. The omission of this averment would be bad after verdict; 4 B. & Ald. 655. But it is not necessary that tithes should appear to have been actually paid, the presumption being in favour of the general liability, and the plaintiff will recover in such case upon a declaration that the tithes were due and payable within forty years before the statute; 5 T. R. 260. But it has been supposed that if it is alleged that tithes were paid within the forty years, evidence must be given thereof, *ibid.*; but see 2 N. R. 173; from which it should seem that actual payment will be presumed in support of the allegation, that tithes of turnips and potatoes were rendered, although some writers say they were introduced since that time; 1 Chit. Col. Stat. 1052.

(*m*) It is improper to state that the statute was passed on the 4th Nov. in the 2d and 3d, &c. See Com. Dig. tit. "Action on Statute;" 1 J. B. Moore, 302; Cowp. 474; *Rex v. Biers*, 1 Adol. & El. 327.

(*n*) In the second edition of this work, the title of the act is incorrectly stated. It is better in general not to state the title.

(*o*) As to this allegation, see 5 T. R. 260. As to the evidence, see 2 New Rep. 174. How composition is to be determined by notice, see 12 East, 83; 4 M. & W. 198; *ante*, 48.

down divers quantities of [corn, grain and hay,] to wit, — acres of wheat, &c. [state enough] then growing upon the said land, (p) the tithe whereof then &c. belonged to the plaintiff, and of right ought to have been set out and paid to him as such farmer and proprietor as aforesaid. Yet the defendant, being a subject of this realm, and well knowing the premises, but not regarding the statute in such case made and provided, after the said reaping, mowing, and cutting down of the said corn, grain, and hay respectively, and before the commencement of this suit, to wit, on the day and year last aforesaid, and on the several other days aforesaid, did take and carry the said [corn, grain, and hay,] from the said land, where the same had so grown, and been so reaped, mowed, and cut down as aforesaid, and where the same ought to have been tithed, the tenth (q) part of the same respectively, or of any part thereof, not having been separated, divided, or set out from the nine parts, residue thereof, nor any composition or agreement made with the plaintiff for the tithe thereof, or any part thereof, (r) contrary to the form of the statute in such case made and provided. (s) And the plaintiff further saith, that the tenth part of the said corn, grain, and hay, so as aforesaid taken and carried away, at the time of taking and carrying away the same, was reasonably worth a large sum of money, to wit, the sum of £——, whereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff to demand and have of and from the said defendant, the said sum of £——, parcel of the said sum above demanded, being treble the value of the said tenth part of the said corn, grain, and hay, so taken and carried away as aforesaid. [Add a count for tithes bargained and sold, if it be not clear there was no composition, and conclude as ante, 286.]

BY PARTY
GRIEVED.

For that whereas the plaintiff, before and at the several times hereafter in this count mentioned, was rector of the parish of —, in the county of —, and proprietor of the tithes of coppice wood, being *sylva cædua*, and under the age and growth of twenty-[one] years, growing from divers, to wit, twelve acres of woodland, situate, lying, and being in the said parish of —, and within the limits and bounds and titheable places of the same

On 2 & 3 Edw. 6, c. 13, for treble value of the *sylva cædua*, &c. not set out. (t)

(p) Or, "dug up and gathered divers large quantities, to wit, — of potatoes, &c." according to the fact.

(q) *Quære* if by custom an eleventh is due, whether an action will lie for not setting it forth, at least the declaration must be special; 15 East, 644, 645.

The common-law mode of tithing hay is in the cocks, into which the grass is first collected after cutting and tedding, and of wheat in the sheaf. The occupier must in all cases leave the nine parts in the field a reasonable time for the person to compare them with the tithe set out, or he will forfeit treble the value; 2 Taunt. 55.

(r) *Vide ante*, 48; Carth. 304, 384; Cro. Jac. 70.

(s) As to this allegation, see *ante*, 344, n. (i).

(t) See law and notes, *ante*, 347, n. (f). This action is grounded on the 2 & 3 Edw. 6, c. 13, which declares that every person shall set forth and pay his prædial tithes, &c. under

pain of forfeiture of treble the value thereof. The term *sylva cædua* includes every sort of wood, except gross wood of the age of twenty years; Bac. Abr. tit. "Tithes," C. N 4. Gross wood does not mean high and large wood, but such wood as is generally used as timber, and all such wood, if twenty years of age, is exempted from the payment of tithe; 2 Inst. 642; Cro. Eliz. 1^b; 12 Mod. 524. The wood of a coppice, which has usually been felled for firing, is liable to pay tithe, although the same be of the age of forty years; 1 Lev. 189; Sid. 300. With respect to the loppings of trees, it is laid down, that if a tree was lopped before it was of the age of twenty years, all future loppings whatever are liable to the payment of tithe. But where the loppings were not of twenty years growth, and the trees were, no tithe is due of the loppings; for if a tree be once privileged from paying tithe, the privilege extends to all future loppings whatever; 3 Burn's Eccl. Law, 452; Cro. Eliz. 478; 1 Roll. Abr. 640, pl. 3.

By PARTY
GRIEVED.

Second count,
for not setting
out tithes of
wood and
bark. (a)

parish, (u) and the defendant during all the time aforesaid was occupier of the said woodland; and whereas the tithes of all coppice wood, being *sylva cædua*, growing, arising, reverting, or coming on or from the said woodland thereof, within forty years (x) next before and at the time of the making of a certain act of parliament, passed in the reign of Edward the Sixth, formerly King of England, &c., of right ought (y) to have been set out and paid in kind, by the occupier of the land for the time being, to the farmer or proprietor of those tithes for the time being; and thereupon the defendant heretofore, to wit, on &c., and on divers other days and times, between that day and the commencement of this suit, cut down great quantities of coppice wood, being *sylva cædua*, then growing on the said woodland, for sale thereof, the tithe whereof then belonged to the plaintiff, and of right ought to have been set out and paid to him as such rector and proprietor as aforesaid. Yet the defendant, being a subject of this realm, and well knowing the premises, but not regarding the statute in such case made and provided, after the cutting down of the said coppice wood, being *sylva cædua*, for sale as aforesaid, and before the commencement of this suit, to wit, on the day and year aforesaid, and on the several days and times aforesaid, did take and carry away the said coppice wood from the places where the same was so cut down, and where the same ought to have been tithed, the tenth part of the same, or of any part thereof, not having been separated, divided, or set out by the defendant from the nine (x) parts, residue thereof, nor any composition or agreement made by the defendant with the plaintiff for the tithe thereof, or of any part thereof, contrary to the form of the statute in such case made and provided. And the plaintiff in fact says that the tenth part of the said coppice wood, so cut down as aforesaid, taken and carried away, at the time of the taking and carrying away of the same, was reasonably worth a large sum of money, to wit, the sum of £—, whereby, and by force of the said statute, an action hath accrued to the plaintiff to demand and have of and from the defendant the sum of £—, parcel of the said sum above demanded, being treble the value of the said tenth part of the coppice wood so taken and carried away as aforesaid. And whereas also the plaintiff, before and at the several times hereinafter mentioned, was the proprietor of the tithes of the wood and underwood, growing and renewing in the parish aforesaid, in the county aforesaid, and within the bounds and limits and titheable places of the same parish, (and of the bark arising therefrom,) and the defendant during all the time last-mentioned was the occupier of divers, to wit, [100] acres of land, with the appurtenances, in the parish aforesaid, and within the bounds, limits and titheable places of that parish; and whereas the tithe of the wood and underwood, lops and tops of the wood (arising) growing, renewing, and happening in and upon the said last-mentioned land, being coppice wood, and under the growth of twenty years, within forty years next before the making of the said act, of right ought to have been paid, in their proper kind and species, by the occupiers of the same for the time being, to the proprietor of the same tithe; and the defendant

(u) See ante, 347, note (f).

(x) Ibid.

(y) Ibid.

(z) See ante, 349, note (g).

(a) See ante, 347, note (f).

so as aforesaid being occupier of the said last-mentioned land, and the plaintiff so being proprietor of the said tithe as last aforesaid, heretofore, to wit, on the said &c., the defendant the wood and underwood in and upon the said last-mentioned land then growing, and being coppice wood, and under the growth of twenty years, did cut down and lop, the tithes of which said wood and underwood, in and upon the said last-mentioned wood and underwood, did belong and of right ought to have been paid and yielded to the plaintiff, so being such proprietor thereof as aforesaid, nevertheless the defendant, being a subject of this kingdom, after the said cutting and lopping and topping of the said wood and underwood as aforesaid, that is to say, on the &c., and on the several other days and times aforesaid, took and carried away the said wood and underwood from the places where the same were so cut down, lopped, and topped as aforesaid and where the same ought to have been tithed (the tenth part thereof not having been separated, divided, thrown out, set out, or set forth by the defendant from the nine parts, residue thereof, nor any agreement or composition made by the defendant with the plaintiff for the tithe thereof,) contrary to the form &c.; and the plaintiff avers, that the tenth part of the said last-mentioned wood and underwood and bark, so as aforesaid taken and carried away as aforesaid, was of the value of £——, whereby, and by force, &c. [*actio accrevit*] for treble value, other parcel, &c. [*Add a count for tithes bargained and sold generally, if there be any doubt as to there being a composition, and conclude as ante, 286.*]

By PARTY
GRIEVED.

The precedent of a declaration on the 5 Geo. 3, c. 14, s. 3, by the owner of a fishery, for £5 penalty against a person fishing there, inserted in the first four editions of this work, is omitted in this, that statute being wholly repealed by the 7 & 8 Geo. 4, c. 27, and none of the re-enactments of the 7 & 8 Geo. 4, c. 29, enable a party to sue for any penalty (not more than £5,) the sum being recoverable only before magistrates, see the 7 & 8 Geo. 4, c. 29, s. 34; and Burn's J. tit. "Fish," vol. 2, 27th edit.

By owner of a
fishery for a £5
penalty.

See form, Robinson v. James, 1 Dow. N. R. 756.
rates from the landlord of premises under the provisions of the 11 Geo. 4, c. 10, the local act for regulating the affairs of the parishes of St. Giles'-in-the-Fields and St. George's, Bloomsbury.

For the reco-
very of poor-

Commencement in debt, ante, 284.] For that the defendant, within three months next before the commencement of this suit, to wit, on &c. [*any day within three months before the date of the writ*], was indebted to the plaintiff in the sum of [£20], by force of the statute made and passed in the ninth year of the reign of our late Queen Anne, intituled "An Act for the

On the 9 Anne,
c. 14, s. 2, by
the loser, for
money lost at
play at one
sitting, to re-
cover it back
from the win-
ner. (b)

(b) The statute allows a general form of declaring at the suit of the party grieved, see forms, 2 Wils. 36; 2 H. Bla. 308; Lil. Ent. 168; and money lost at play cannot be recovered back in a common law form of action of debt for money had and received, not founded on the statute, and the plaintiff must declare particularly on the act; 1 M. & Sel. 500.

In such an action a defendant may plead in abatement, that the money was due from

others as well as himself, and that they are not, but ought to have been, made parties; 7 T. R. 257.

But a stakeholder, upon a wager on a horse-race for £20, or other illegal wager, is liable to a common law action for money had and received, if the money be demanded before he pays it over to the winner; 6 D. & R. 26.

The right to sue is a vested interest, and on bankruptcy passes to the assignees; 2 Ves.

By PARTY
GRIEVED.

better preventing of excessive and deceitful Gaming," being money then lost and paid by the plaintiff to the defendant, and by the defendant then won of the plaintiff, by playing with dice at a certain unlawful game, commonly called or known by the name of [French hazard,] at one sitting, contrary to the form of the said statute in such case made and provided, whereby and by force of the statute an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £20, parcel of the said sum above demanded. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, prohibiting more than one count on the same transaction, it was usual to insert a second count as follows:—*

The like in
betting at a
horse-race.

And also for that the defendant, within three months next before the commencement of this suit, to wit, on the day and year aforesaid, was indebted to the plaintiff in the further sum of £20, for monies then lost and paid by the plaintiff to the defendant, by [playing at a certain game, to wit, a game called French hazard,] at one sitting, [or "by betting on the sides of the persons playing at a certain game, to wit, a horse-race, at one time,"] contrary to the statute in that case made and provided, whereby, and according to the force of the said statute, an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £20, residue of the said sum above demanded.

On 29 Eliz. c. 4, and 43 Geo. 4, c. 46, s. 5, against the sheriff for extortion on final process. (c)

Commencement, ante, 284.] For that whereas A. B. heretofore, to wit, on the — day of —, A. D. — [*the day of signing final judgment*], in the Court of our lady the queen, before the queen herself, [*or if in C. P. say,*

jun. 514; 2 H. Bla. 308. And in an action brought by the assignees, where the bankrupt had obtained his certificate, it was held he was a good witness to prove the loss, being (by three releases; 1st, by bankrupt to assignees; 2d, by creditors to bankrupt; 3d, by assignee, who was not a creditor, to bankrupt) restored to his competency; 1 B. & C. 444; 2 D. & R. 575, S. C. In that case it was also held that such release did not destroy the assignee's right of action; *id. ibid.*

The proceedings upon a bill of discovery filed against the defendant for the purpose of a former action on the former part of section 2, for the money lost, may be given in evidence; 1 Marsh. 497; 6 Taunt. 141, S. C.; 2 Marsh. 126, note.

If company never part, though dinner intervene, the loss is considered to have been at one sitting within the act; 2 Bla. Rep. 1226; and see further, 1 Chitty's Col. Stat. 421; Burn, J., "Gaming," vol. ii.

(c) The 1 Vict. c. 55, expressly repeals the 23 Hen. 6, c. 9, so far as the same relates to fees to be taken by the sheriffs, and enacts that from and after the passing of that act, it shall be lawful for sheriffs or their officers, concerned in the execution of process directed to sheriffs, to demand, take and receive such fees and no more as shall from time to time be allowed by any officers of the several courts of law at Westminster, charged with

the duty of taxing costs in such courts under the sanction and authority of the judges of the said courts respectively, and makes the sheriff, &c., liable to punishment by the Court as for a contempt if he take more than the fees allowed; and therefore no action can now be supported on the statute of 23 Hen. 6, c. 9. See a list of the fees settled by the judges under this statute, Ch. Arch. 7th edit.

As to the effect of the 1 Vict. c. 55, on the 28 Eliz. c. 4, it is quite clear if the latter is not virtually repealed, so far as the action for treble damages is concerned, and the extortion was in taking more poundage and other fees than allowed by law, that the declaration should show that the sheriff took more poundage *eo nomine* than he ought to have done, and more by way of the other fees particularly described than he ought to have done. The declaration should in fact allege in what manner the 1 Vict. c. 55, s. 2, has been acted upon, what new fees have been established, and also in what respect the sheriff has exceeded; see *Usher v. Walters*, 12 L. J. R. N. S., Q. B. 246. But it seems that the provision of 28 Eliz. c. 4, which makes treble damages recoverable against the sheriff for exceeding the fees thereby allowed, does not give an action for treble damages against the sheriff for exceeding fees allowed by the subsequent statute.

"in the Court of our lady the queen of the bench at Westminster, before the Honourable Sir Nicholas Conyngham Tindal, Knt., and his companions, then her said majesty's justices of the bench at Westminster, in the county of Middlesex," or "in the Court of Exchequer of Pleas,"] by the consideration and judgment (k) of the same Court, recovered against the now plaintiff a certain debt, [or if the judgment were in *assumpsit*, state it as ante, 338.] of £—, and also £— costs, which in and by the same Court were adjudged to the then plaintiff and with his assent for his damages, which he had sustained as well by occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the now plaintiff was convicted, as by the record and proceedings thereof still remaining in the same Court at Westminster aforesaid will more fully appear. (l) And the plaintiff further saith, that the said judgment being in full force, and the said debt and damages [or if in *assumpsit*, "damages,"] remaining unpaid and unsatisfied, the then plaintiff, on &c. (m) for the obtaining satisfaction thereof, sued and prosecuted out of the said Court a certain writ of our said lady the queen, called a *feri facias*, directed to the sheriff of —, by which said writ our said lady the queen commanded the said sheriff, (n) that of the goods and chattels of the said E. F. (the now

By PARTY
GRIEVED.

riff for extortion
on final process. (i)

Statement of the
judgment.

The writ of *feri facias* therein.

(i) The sheriff's right to poundage on executing a *fi. fa.* is not affected by the 1 Vict. c. 55, or the table of fees under it; *Davies v. Griffiths*, 4 M. & W. 377; but he is only entitled to his poundage under that statute, and to such fees as are allowed by the table of fees framed under 1 Vict. c. 55; *Slater v. Hewes*, 7 M. & W. 413. No poundage is now payable on executing a writ of *capias ad satisfaciendum*, but the sheriff is entitled to such fees only as may be allowed to be taken by sheriffs concerned in the execution of process under the sanction and authority of the judges of the Court of common law at Westminster, pursuant to the 1 Vic. c. 55.

This action may be supported against the sheriff, he being liable for his bailiff's acts; 2 T. R. 154. But where more than the sum allowed had been taken by an officer of sheriff, who kept a lock-up house, but who was not the officer to whom the warrant was directed, but to whose house the defendant was brought after the arrest, it was held that no action lay against the sheriff; 4 Esp. 63.

An action for money had and received may be maintained against the sheriff, to recover the surplus of excessive poundage taken; 3 B. & B. 145; 6 J. B. Moore, 338, S. C.; 2 Bing. 255; 1 Stark. 345.

Where the sheriff retained out of the proceeds of a sale under an execution the expenses of keeping possession under an injunction out of Chancery, it was held that this being an indirect way of taking more than the poundage allowed by this statute, he thereby incurred the penalty of 29 Eliz. c. 4; 5 D. & R. 495; 3 B. & C. 688, S. C. And where it appeared by the sheriff's return of a writ of execution, that greater fees have been taken for the levy than are allowed by this statute, the sheriff was held liable to an action on the statute for treble damages at the suit of the party grieved; *Woodgate v. Knatchbull*, 2 T.

R. 148. Under this statute the sheriff could not take any other charge but for poundage, *id. ibid.*

An action for money had and received at the suit of the plaintiff, who has sued out a *fi. fa.* lies against the sheriff who executed it, if he retain more in his hands than he is entitled to do, the party injured not being bound to proceed by motion in banc; 1 Stark. 345.

So if sheriff's officer takes money *colore officii* for any thing done in the course of his duty, and to which he is not entitled by law, though there is no evidence that the money came to his hands; 2 Esp. Rep. 507.

The statute was made at a session of parliament began on the 29th day of October, in the 28th year of the reign of Queen Elizabeth, and therefore where it was stated in a declaration to have been made at a session of parliament began on the 29th day of October, in the 29th year of her reign, the judgment was arrested; 2 Bing. 255.

The party grieved was entitled to recover treble the amount of damages found by the verdict; 6 D. & R. 1; 4 B. & C. 154, S. C.

(k) The judgment must be accurately described. As to what is a variance, see 5 B. & C. 339; 8 D. & R. 98, S. C.; 11 East, 516; 9 East, 298; 2 Campb. 525; 4 Taunt. 13.

(l) There seems to be no occasion to state, in an action for extortion, the original judgment; and it would suffice to state the issuing of the writ of execution. But before the recent pleading rules, if the judgment were stated, and *nil debit* pleaded, it must have been proved; 2 Bla. Rep. 1101; 6 T. R. 49. At all events, there is no occasion to refer to the record of the judgment by a *prout patet per recordum*; 3 B. & C. 2; 4 D. & R. 624, S. C.

(m) The teste of the writ.

(n) Examine the statement with the writ

A A

By PARTY
GRIEVED.

Indorsement on
writ what to
levy.

The levy.

plaintiff,) in his the said sheriff's bailiwick, he should cause to be levied the debt and damages [*or if in assumpsit*, "damages,"] aforesaid, and that he should have that money before our said lady the queen [*or if in C. P.* "justices of the bench,"] at Westminster aforesaid, on —, (o) to render to the said plaintiff for his debt and damages [*or if in assumpsit*, "damages,"] aforesaid; and that the said sheriff should have there then that writ. Which said writ afterwards, and before the delivery thereof to the said sheriff, as hereinafter mentioned, to wit, on the said &c., was duly indorsed with a direction for the said sheriff to levy £—, besides sheriff's poundage, officer's fees, and all other incidental expenses; (p) and which said writ, so indorsed, afterwards, to wit, on &c. last aforesaid was delivered to the now defendant, who then and from thence until and at and after the committing of the offence hereinafter mentioned was sheriff of the said county of —, to be executed (q) in due form of law.* By virtue of which said writ, the now defendant, so being sheriff of the said county of —, afterwards, to wit, on &c. last aforesaid, and within his bailiwick, as such sheriff seized and took in execution divers goods and chattels of the now plaintiff (r) of great value, to wit, of the value of the monies so indorsed on the said writ, and directed to be levied as aforesaid, and then and there levied the same thereout. Nevertheless the now defendant, not regarding his duty in that behalf, nor the statute in such case made and provided, afterwards, to wit, on the day and year last aforesaid, by reason and colour of his said office, under and by colour of the said writ, wrongfully, illegally and oppressively, had, received and took, of and from the now plaintiff, for the serving and executing of the said writ of execution, and for poundage, fees and expenses of the same execution and in respect and on account thereof, a much larger sum of money, and more and other consideration and recompense than then was or is by law allowed, limited or appointed in that behalf, that is to say, (s) divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of [£10] more than and over and above the legal and reasonable consideration and recompense for serving and executing the said writ of execution, and for poundage, fees and expenses of the said execution, and on account thereof in that behalf demandable, due and incurred, and over and above the said sum of £— so indorsed to be levied as aforesaid, whereby the now plaintiff was and is damaged and aggrieved to the amount of the said sum of money, to wit, to the sum of [£10], contrary to the form of the statute in such case made and provided; and thereby, and by force of the said statute, an action hath accrued to the now plaintiff, to demand and have of and from the now defendant the sum of £30, being treble the amount of the said damages, and parcel of the said sum above demanded.

of *fi. fa.* For the different descriptions of writs, see Tidd's Prac. Forms, and J. Chitty's Forms, Index, tit. *Fieri Facias*.

(o) Examine with the writ of *feri facias*.

(p) What a variance, 2 Bing. 255; 9 Moore, 425, S. C.; 6 Esp. Rep. 133; Ry. & Moo. C. N. P. 291. Examine with the indorsement on the writ.

(q) See the effect and proof of this averment, 2 Bing. 479; 10 Moore, 210, S. C.

(r) If the *fi. fa.* were against two, and it

be alleged that the goods of both were taken, it will suffice to prove that the goods of one were taken; 4 M. & Sel. 349.

(s) This is too general; *Ashby v. Harris*, 5 Dowl. 742; 2 M. & W. 673. If the action can now be sustained it should be alleged how much he took for poundage, and how much for the other expenses, and the excess should be clearly shown; see *ante*, 352, note (c).

Commencement ante, 284.] For that whereas heretofore, to wit, on the — day &c. [*teste of fi. fa.*] a certain writ of our lady the queen, called a *fi. fa.*, was issued, &c. [*here state fi. fa. and the delivery to the sheriff, ut supra,*] by virtue of which said writ so indorsed, afterwards, to wit, on &c. last aforesaid, the now defendant, as such sheriff, seized and took in execution divers goods and chattels of the now plaintiff, and then levied the said sum of money so indorsed. Nevertheless the now defendant, not regarding his duty in that behalf, nor the statute in such case made and provided, but contriving and wrongfully and injuriously intending to harass, oppress and injure the now plaintiff, heretofore, to wit, on &c. last aforesaid, wrongfully, illegally and oppressively took, had and received of the now plaintiff, for the serving and executing of the same execution, more and other consideration and recompence than by the statute in that behalf is allowed, that is to say, the sum of £10 more than in the said act is limited and appointed, contrary to the form of the statute in such case made and provided. By means whereof the now plaintiff was and is damaged and aggrieved to the amount of the said last-mentioned sum of £10, contrary to the form &c. [*Conclude as in last precedent, and add the common count for money had and received, account stated, and usual breach, as ante, 286.*]

By PARTY
GRIEVED.

Another form
on the 29 Eliz.
c. 4, alone, for
treble damages.
(1)

Commencement, ante, 284.] For that whereas heretofore, to wit, on the — day of —, A. D. —, there issued out of the Court of our lady the queen, before the queen herself, [*or "C. P." or "Exchequer of Pleas," according to the fact,*] at Westminster, a certain writ of our lady the queen called a *capias*, whereby [*state the writ and indorsement for bail according to the fact, and see the statement, ante, 322,*] and which said writ so indorsed as aforesaid, afterwards and before the return thereof, to wit, on &c., was delivered to T. M., Esq., who then and from thence until and at and after the committing the offence hereinafter next mentioned was sheriff of the county of N., to be executed in due form of law; by virtue of which said writ the said T. M., Esq., so being sheriff of the said county of N. as aforesaid, afterwards and before the return thereof, to wit, on &c., in &c. aforesaid, for having execution of the said writ, duly made his warrant in writing directed to the defendant, who then and from thence until and at and after the committing of the offences hereinafter mentioned was bailiff of the said sheriff of the said county of N., by which said warrant the said sheriff of the said county of N. commanded the defendant to take the plaintiff, if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the said justices of our said lady the queen at Westminster at the return of the said writ, to answer to the said W. V., A. W. and W. T. in the plea aforesaid, which said warrant was also then and there marked for bail for £—, and which said warrant so marked for bail, after and before the said return of the said writ, to wit, on &c. last aforesaid, in &c. aforesaid, was delivered to the defendant, then being one of the bailiffs of the said sheriff of the said county of N., to be executed in due form of law; by virtue of which said writ and warrant he the said defendant, afterwards and before the said

Against a
sheriff's officer
for taking a de-
fendant to a
public house,
contrary to the
32 Geo. 2, c. 28.
(u)

(1) See *ante*, 352, note (c), and *ante*, 354, note (s).

(u) See form *Dewhurst v. Pearson*, 1 Dowl.

664; see form against the sheriff under the same statute, *Barham v. Bullock*, 10 A. & E. 23.

BY PARTY
GRIEVED.

return of the said writ, to wit, on &c. and within the bailiwick of the said sheriff, took and arrested the plaintiff by his body, and then and there had and detained him in his custody at the suit of the said W. V., A. W. and W. T. for the cause aforesaid. And the plaintiff avers that he having been so arrested and so being in the custody of the defendant by virtue and under colour of the said writ and warrant for the cause aforesaid, to wit, on &c. last aforesaid, in &c. aforesaid, he the defendant then and there being bailiff of the said sheriff of the said county of N. as aforesaid, conveyed and carried the plaintiff, so arrested and so being in the custody of the defendant by virtue and under colour of the said writ and warrant as aforesaid, to a public victualling and drinking house, situate and being in &c. in the county aforesaid, without the free and voluntary consent of the plaintiff, contrary to the form of the statute in such case made and provided; whereby and by force of the same statute the defendant, then being bailiff of the said sheriff of the said county of N. as aforesaid, forfeited and became liable to pay for his said offence to the plaintiff, being the party thereby aggrieved, the sum of £50, and thereby and by force of the said statute an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £50 so forfeited as aforesaid, being the sum above demanded.

Against the sheriff for a penalty under 32 Geo. 2, c. 28, for taking plaintiff when arrested within 24 hours to prison, the plaintiff not having refused to be carried to a safe and convenient dwelling-house of her own nomination.(v)

Commencement, ante, 284.] For that whereas heretofore, to wit, on &c. [state the issuing of the writ of *capias*, the indorsement for bail, the delivery to the defendant as sheriff to be executed, and the arrest, as *ante*, 322, and then proceed as follows:] And the plaintiff avers that the said defendant so being such sheriff as aforesaid, and the plaintiff so being in the custody of the defendant as such sheriff as aforesaid by virtue and under colour of the said writ of *capias*, he the said defendant as such sheriff as aforesaid, afterwards, to wit, on the day and year last aforesaid, carried the said plaintiff so arrested and being in custody as aforesaid to a certain gaol or prison, to wit, the gaol or prison commonly called —, in the county of —, within twenty-four hours from the time of the said arrest, to wit, within the space of twenty-two hours from the time of the said arrest, without the free and voluntary consent of the plaintiff, and though she the said plaintiff did not refuse to be carried to a safe and convenient dwelling-house of her own nomination or appointment within three miles from the place where the plaintiff was so arrested, such place not being a city, borough, corporation or market town, and such dwelling-house not being the house of the plaintiff, contrary to the form, &c. whereby and by force, &c. the defendant forfeited and became liable to pay for the said offence to the plaintiff, being the party thereby aggrieved, the sum of £50, &c.

Declaration on 13 Eliz. c. 5, by assignees of insolvent debtor, to recover value of property fraudulently conveyed.

See 4 Bar. & Adol. 129. *The assignees of an insolvent are "parties grieved" within the meaning of this act; id. ib. On a fraudulent alienation of lands the offending parties forfeit (by sec. 3 of the above act) a year's value of the estate, but not the consideration money named in the conveyance; id. ib.*

Declaration on 28 Hen. 8, c. 11, s. 3. to recover profits of benefice during vacation.

See 1 Bar. & Adol. 538; 10 Bing. 352. *To support this action there must be a vacation of the benefice de facto; id. ib.*

(v) See form *Silk v. Humphery*, 4 A. & E. 959. See also the second count in *Dewhurst v. Pearson*, 1 Dowl. 664.

BY COMMON INFORMERS.

BY COMMON
INFORMERS.

Commencement qui tam for poor of parish as ante, 17.] For that the defendant heretofore, to wit, on &c. in the parish &c. did enter a certain horse for the purpose of running for a certain prize, then being of less value than £50, to wit, for a certain silver cup of the value of £5, against the form of the statute in that case made and provided; whereby, and by force of the said statute, the defendant forfeited for his said offence the sum of £—, and an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the defendant, for himself and the poor of the said parish of — the sum of £—, parcel of the said sum of money above demanded. [*Another count was added for "starting a certain horse for the purpose of running;" and another "for running a certain other horse called a pony." See general breach and conclusion qui tam, post, 358.*

On 13 Geo. 2, c. 19, s. 2, for running a horse for a plate of less value than £50. (x)

Commencement qui tam for queen and informer as ante, 17.] For that whereas heretofore, to wit, on, &c. one A. B., was taken and arrested by the defendant, (then being sheriff of the county of —), by virtue of a certain writ of our lady the queen of *capias* [*state the writ according to the fact, and see the statement of the writ, ante, 322,*] before then sued and prosecuted out of her said majesty's court of Q. B. [*or "C. P." or "Exchequer of Pleas,"*] at Westminster, at the suit of E. F., directed to the sheriff of the said county of &c. by which said writ the said sheriff was commanded that he, &c. [*set out the writ of capias, the indorsement for bail, the delivery of the writ to the defendant, and the arrest, as ante, 322, and then proceed as follows:*] And the plaintiff further saith, that the said A. B. having been so arrested as aforesaid, continued and remained in the custody of the defendant as such sheriff for the cause aforesaid, until the said A. B. afterwards, to wit, on &c., tendered and offered to the said sheriff sufficient sureties, to wit, I. K. and L. M., two good and lawful men of the said county, they the said I. K. and L. M. having sufficient within the bailiwick of the said sheriff of the said county, and who then were willing and offered to become bail or sureties for the appearance of the said A. B. according to the exigency of the said writ. Yet the defendant, not regarding the statute in such case made and provided, did not take such bail or sureties, or any other bail or sureties, but wholly neglected and refused so to do, and detained the said

Declaration in debt *qui tam* against the sheriff, on the 23 Hen. 6, c. 9, for £40 penalty for refusing to take bail on a writ of *capias*. (y)

Indorsement for bail.

Sufficient bail tendered to the sheriff.

Breach of duty, refusal to accept bail tendered.

(x) See 1 Chit. Col. Stat. tit. "Gaming," "Horses;" Burn's J. tit. "Horses," 26th edit.

(y) See the statute 23 Hen. 6, c. 9; Chit. Col. Stat. 87; and see a form, *Evans v. Moseley*, 2 Cro. & M. 490; 4 Tyr. 169, S. C.

It is the duty of the officer, if required, and not of the defendant, to prepare the bond; *Milne v. Wood*, 5 C. & P. 587. To charge sheriff with the act of the bailiff in an action for extortion, it is not sufficient to produce a copy of the precept with the bailiff's name indorsed upon it, although the sheriff has returned *cepi corpus*; the plaintiff in such case must either produce the warrant or prove some recognition of the act of the bailiff by the sheriff; 1 Stark. 413. But it is not essential in such case to produce the warrant,

as the privity between the sheriff and the bailiff may be proved by showing that upon the arrest a bail-bond was executed and delivered to the bailiff, who returned it to the sheriff, upon which the latter made his return of *cepi corpus*; *id. ibid.*; 7 T. R. 118. And in another case, in an action against the sheriff to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody, on giving bail, it was held that the indorsement of the name of the officer on the writ was sufficient to connect him with the sheriff, without showing that such indorsement was made with his authority; 5 J. B. Moore, 183, and see *id.* 184, n.; and 7 B. & C. 535.

By Common Informers.

Whereby £40 penalty incurred.

General breach and conclusion *qui tam*.

On 29 Eliz. c. 4, against sheriff, for £40 penalty, for extortion on a *feri facias*. (2)

A testatum *feri facias* issued.

A. B. in custody as aforesaid, under colour and pretence of the said writ, for a long time, to wit, for the space of five days, after the said A. B. had so tendered bail and sureties as aforesaid, contrary to the form of the said statute in such case made and provided. Whereby, and by force of the said statute in such case made and provided, an action hath accrued to the now plaintiff, who sues as aforesaid, to demand and have of the defendant, for our said lady the queen and himself the now plaintiff, the sum of £40, being the said sum above demanded.

Yet the defendant hath not paid to our said lady the queen and the now plaintiff, who sues as aforesaid, or either of them, the said sum above demanded, or any part thereof, but to pay the same to them, or either of them, the now defendant hath wholly refused, and still doth refuse, and thereupon, as well for our said lady the queen as for himself, the now plaintiff brings suit, &c.

Commencement in qui tam as usual, as ante, 17, venue local.] For that whereas [one J. H.] heretofore, to wit, on &c., in the Court of our said lady the queen, before the queen herself, [or if in C. P. say "before Sir N. C. Tindal, Knt. and his companions, her majesty's justices of the Bench at Westminster," or "in the Exchequer of Pleas at Westminster,"] by the consideration and judgement of the same Court, recovered against the now plaintiff a certain debt [or if in *assumpsit*, describe the judgment as ante, 338.] of £300 and also £73. 5s. costs, which in and by the same Court were adjudged to the said [J. H.] and with his assent, for his damages which he had sustained as well by occasion of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the now plaintiff was convicted, as by the record and proceedings thereof still remaining in the same Court will more fully appear. And the now plaintiff further saith, that the said judgment being in full force, and the said damages remaining unpaid and unsatisfied, the said J. H. on &c. [teste of *fi. fa.*] for the obtaining satisfaction thereof, sued and prosecuted out of the said Court a certain writ of our said lady the queen called a *feri facias* [or "a testatum," according to the fact, and describing it accordingly,] directed to the sheriff of the county of Lincoln, by which said writ our said lady the queen commanded the said sheriff that [here set forth the writ, which may be thus,] of the goods and chattels of the now plaintiff in his the said sheriff's bailiwick, he should cause to be levied the [debt and] damages aforesaid, and that he should have that money before our said lady the queen [or in C. P. "before the justices of our said lady the queen,"] at Westminster aforesaid, on &c. [return day,] to render to the said J. H. his [debt and] damages aforesaid, and that the said sheriff should have there [then] that writ. Which said writ afterwards, and before the delivery thereof to the said sheriff as hereinafter mentioned, was indorsed with a direction for the sheriff to levy [£154. 1s.] besides sheriff's poundage, &c. [as in indorsement,] and which said writ so indorsed afterwards, to wit, on &c. [day of levy or about it,] was delivered to the now defendant, who then and from thence, until and at and after the return of the

(2) *Quære* whether this action can now be supported, see ante, 362, note (c).

said writ, was sheriff of the said county of Lincoln, to be executed in due form of law. By virtue of which said writ the now defendant, afterwards, to wit, on &c. last aforesaid, and within his bailiwick as such sheriff, seized and took in execution divers goods and chattels of the now plaintiff of great value, to wit, of the value of £300, and then levied the same thereout. Yet the now defendant, not regarding his duty as such sheriff, nor the statute in such case made and provided, afterwards, to wit, on &c. last aforesaid, by reason and colour of his said office of sheriff of the said county, wrongfully, illegally, and oppressively, had, received and took, to wit, of and from the said J. H. for the serving and executing of the said execution, more and other consideration and recompence than in the said act is limited and appointed in that behalf, contrary to the form of the statute in such case made and provided, (a) whereby and by force of the said statute an action hath accrued to the now plaintiff who sues as aforesaid, to demand and have of the now defendant for our said lady the queen and himself the said sum of £40 above demanded. Yet, &c. [*Add the breach and conclusion as ante*, 358.

By COMMON
INFORMERS.

For that the defendant, after the 29th day of September, in the year of our Lord 1714, and before the commencement of this suit, to wit, on the — day of A. D. — [*day of taking the usurious interest*], at &c. [*venue*], upon a certain corrupt contract, made after the said 29th day of September, which was in the year of our Lord 1714 aforesaid, to wit, on &c., [*day from*

Common count for usury, on 12 Anne, st. 2, c. 16, stating the forbearance to have been on a loan. (b)

(a) Too general. See *ante*, 354, note (s).

(b) The venue is local. See the works of Ord, Plowden, and Comyn, on Usury; also 1 Chit. Col. Stat. 1086. For the history and progress of the usury laws, see 1 Chit. Col. Stat. 1087, n. For the construction of the statute of 12 Anne against usury, see *id.* 1091, n. "Usury is taking more than the law allows upon a loan, or, as I read it, for forbearance of a debt," per Eyre, C. J.; 1 Ves. jun. 531; 1 Chit. Col. Stat. 1091. To constitute usury, there must be an usurious contract, with intent to take more than the law authorizes; Cro. Car. 501; Com. Dig. Pleader, 2 W. 23. It is always for a jury to decide whether there was such contract and intent; see 4 M. & Sel. 192; 5 J. B. Moore, 571; 1 M. & Sel. 57; 4 T. R. 613.

The 1 Vict. c. 80, a temporary act, exempted from the operation of the usury laws bills and notes not having twelve months to run; and by the 2 & 3 Vict. c. 37, s. 1, (extended by 4 & 5 Vict. c. 54, to the 1st of Jan. 1844,) it is enacted that from and after the passing of that act, no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of £10 sterling, shall by reason of any interest taken thereon, or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or

law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other law whatsoever in force in any part of the United Kingdom to the contrary notwithstanding. But the statute contains a proviso that nothing therein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein. See *infra* as to the mode of stating the usury since these statutes.

To sustain an action for penalties for usury, it is essential to prove the taking usurious interest; for however usurious the contract may be, no penalty is incurred without the actual taking such interest, though the contract may be void; see Chit. Col. Stat. 1093.

As to the limitation of time for bringing the action, see Chit. Col. Stat. 1094.

Venue.—The venue in an action for penalties for usury is local, and must be brought in the county where the excessive interest was taken; 3 Bar. & Cress. 700; 5 D. & R. 616, S. C. In 2 B. & P. 341, a draft was given to the defendant for the interest in Middlesex, and received by him as cash, but afterwards exchanged by him for money with a third person in London, the Court of C. P. ruled, that the venue was properly laid in London, as the draft was merely a promise to pay, and the actual receipt of the money

By COMMON
INFORMERS.

whence the forbearance was to take place,] between the defendant and one E. F. took, accepted and received of and from the said E. F. a certain sum

and taking the usury was in London. Where rents were received in Middlesex, but the balance was settled in London, the *onus* was held to be well laid there; 2 T. R. 238.

Mode of stating the Usury.—In pleading an usurious contract, by way of bar to an action, the whole matter must be set forth especially, because it lay within the defendant's own privity; but before the recent statutes, in an information or declaration on the statute for making such a contract, it was held sufficient to set forth the corrupt bargain generally, because matters of this kind are supposed to be privately transacted, and such information or action may be brought by a stranger; 1 Hawk. c. 82, s. 21; Cro. Jac. 440; 3 T. R. 108; 1 Saund. 295. But since these statutes, it is doubtful whether the general form of declaring formerly used can be safely adopted. The point is now before the Court of Exchequer in the case of *Thibault v. Gibson*, as an objection in arrest of judgment; and although the declaration may be considered good *after verdict*, it is certainly advisable (if not absolutely necessary) to show on the face of the declaration that the loan was secured on *real estate*, if such were the fact, or to make it appear in some other way that the contract was not protected by the late statutes. In the case of *Turquand and others v. Mosedon*, 7 M. & W. 504, which was an action of trover by the assignees of a bankrupt, the defendant pleaded that before the bankruptcy he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought, and the plaintiff replied that it was *corruptly and against the force of the statute, &c.*, agreed between the defendant and the bankrupt that the latter should pay the defendant for the loan of the money £10 per cent. The Court held, on special demurrer, that the averment of the contract being against the form of the statute was not a sufficient allegation that it was illegal, and that the replication was bad for not alleging either that the contract was before the 7 Wm. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts. See also *King v. Braddon*, 10 A. & E. 675; *Holt v. Miers*, 5 M. & W. 168.

The declaration or information must set forth the *taking by corrupt agreement*; 11 Rep. 58; Kel. 629; Cro. Jac. 104. And if the declaration is upon two loans, one of which is alleged to be corrupt and the other not, the plaintiff shall have judgment for the part that is good, it being in the nature of two several actions; *id. ibid.*

If the agreement was for the forbearance of money till one or other of two days, at the option of the borrower, it should be so stated; 3 T. R. 531.

Where the declaration stated a specific sum to have been lent, but the evidence was of a loan, part in money and part in gold of a known definite value, which the party borrowing had agreed to take as cash, the Court held that the evidence supported the declara-

tion; 1 H. Bla. 283; 1 Marsh. 33.

It must also set forth *with whom the contract was made*; stating it was made with a certain person unknown, is insufficient; 2 Leon. 39; Noy, 143. Where A. was indebted to B., and B. to C., and C. for an usurious consideration agreed to take A. for his debtor instead of B., it was held that the contract might be stated as a loan from C. to A.; 1 East, 195. The contract may be stated for forbearance to A. alone, although B. joins in the security; *id. ibid.* A promissory note was given by A. as surety for B., and the defendant, as indorsee of the note, having taken an usurious consideration for forbearing to sue A., the transaction was held to be properly described as a forbearance to A. for money lent to A. by the defendant, and that the transaction was equivalent to a loan of money; 3 B. & P. 343; and 1 Taunt. 511.

In 1 Leon. 95, it was said, that the information had not shown whose money it was, and therefore was not good; but, *query*, if this means any thing more than that it must be set forth by whom the loan was made; the course of precedent not being to make any express averment that the money lent was the money of the defendants; 1 Chit. Col. Stat. 1096.

The time of making the contract must be stated, but the precise time is not material, unless it be one of the termini of the usury; R. & M. Ca. Ni. Pri. 153.

The time of taking the usurious interest must be stated, but the precise time is immaterial.

The time for which the forbearance is given, and which must be proved as stated, 3 T. R. 538; *Fox v. Keeling*, 1 Man. & R. 66; *Samuel v. Cooper*, 4 Nev. & Man. 523; where the declaration stated a contract to have been made on the 21st of December, 1774, for giving payment to the 23d of December, 1776, and the contract proved was on the 23d of December, 1774, for giving two years, it was held to be a variance from the contract stated, and therefore fatal; Cowp. 671. In 4 Esp. 152, it is said to have been ruled, that the day on which the money was advanced upon an usurious contract was material, though laid under a *videlicet*; but the ground of the decision *comme semble* is, that the contract is alleged to be for a forbearance from that day. Where the loan was made on the 20th of April by a check void for want of a stamp, and which was paid on the 21st, it was ruled, that the check being a mere nullity, the loan did not take place till the 21st, and that being stated on the 20th, the variance was fatal; 2 Camp. 53. Cash notes are not to be accounted as cash, unless previously agreed to be received as such, and evidence that such notes were sent on the 20th, and received on the 21st, the statement for forbearance from the 20th was held a fatal variance; 1 Campb. 445; and see 4 Taunt. 810; Ry. & Moo. C. N. P. 153.

The place where the usurious interest was taken must formerly have been stated, but the precise place was deemed immaterial; see

of money, to wit, the sum of £——, by way of corrupt bargain and loan for the defendant forbearing and giving and having forborne and given day for payment of a certain sum of money, to wit, the sum of £—— of like lawful money, theretofore, to wit, on the day and year last aforesaid, at &c. [*venue*], aforesaid, lent and advanced by the defendant to the said E. F. from the day and year last aforesaid until and upon the said — day of &c. [*usually agreed day of taking the usurious interest*], which said sum of £—— so taken, accepted and received by the defendant of and from the said E. F. in manner and for the cause aforesaid, exceeds the rate of £5 for the forbearance of £100 for a year, contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the defendant forfeited for the said offence the sum of £——, being treble the value of the said sum of £—— so lent and advanced by the said defendant to the said E. F., and so forborne as aforesaid; and thereby, and by force of the said statute, an action hath accrued to the plaintiff who sues as aforesaid, to demand and have for our said lady the queen and for himself in this behalf, of and from the defendant, the said sum of £——, being the said sum above demanded. Yet &c. [*See ante*, 358.

By COMMON INFORMERS.

And whereas also the defendant, after the 29th day of September, in the year of our Lord 1714, to wit, on &c. [*day of taking the usurious interest*], upon a certain corrupt contract, made heretofore, to wit, on &c. [*day from whence the forbearance was to take place*], between the defendant and one E. F., took, accepted and received of and from the said E. F. a certain sum of money, to wit, the sum of £——, by way of corrupt bargain and loan, for the defendant forbearing and giving and having forborne and given day of payment of a certain sum of money, to wit, the sum of £—— theretofore, to wit, on the day and year last aforesaid, due and owing from the said E. F. to the defendant, from the day and year last aforesaid, until and upon the said — day of &c. [*usually the agreed day of taking the usurious interest*] then next following. Which said sum of £—— so taken, accepted and received by the defendant of and from the said E. F. in manner and for the cause aforesaid, exceeds the rate of £5 for the forbearing of £100 for a year, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said last-mentioned offence the sum sum of £—— being treble the value of the said sum of £—— so due and owing from the said E. F. to the defendant, and so forborne as aforesaid, and thereby and by force of the said statute an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have for our said lady the queen, and for himself in this behalf, of and from the defendant, the said sum of £——, being the said sum above demanded. Yet &c. [*See ante*, 358.

Common count for usury, on 12 Anne, st. 2, c. 16, stating the forbearance to have been of a debt. (b)

For that the defendant, after the 29th day of September, which was in the year of our Lord 1714, to wit, on &c., upon a certain corrupt contract, made after the said 29th day of September, which was in the year of our

The like for usury where the sum forborne was paid at different times. (b)

1 Leon. 95. The borrower is a competent witness to prove the case; 4 Burr. 2255; 7 T. R. 60. Where the declaration stated the sum taken "exceeded the rate of £5 for the

forbearing of £35 for a year," the Court on special demurrer held it bad; *Geausant v. Levy*, K. B. Easter Term, 1830.

(b) See the notes to the last precedent.

By COMMON
INFORMERS.

Lord 1714 aforesaid, to wit, on &c. aforesaid, between the defendant and one E. F. took, accepted and received, of and from the said E. F. a certain sum of money, to wit, the sum of £1. 1s. by way of corrupt bargain and loan, for the defendant's forbearing and giving and having forborne and given day of payment of a certain sum of money, to wit, the sum of £22, theretofore, to wit, on &c., lent and advanced by the defendant to the said E. F. from the time of lending and advancing the same, until and upon &c., when a part of the said sum of £22, to wit, the sum of £15. 11s. part thereof, was paid and satisfied, and also for the forbearing and giving, and having forborne and given day of payment of the sum of £6. 9s. residue of the said sum of £22, upon and from the day and year last aforesaid, until and upon &c., when a part of the said sum of £6. 9s., to wit, the sum of £3, part thereof, was paid and satisfied, and also for the forbearing and giving, and having forborne and given day of payment of the sum of £3. 9s. residue of the said sum of £6. 9s. upon and from the day and year last aforesaid until and upon &c., which said sum of £1. 1s. so taken, accepted and received by the defendant, of and from the said E. F. in manner and for the cause aforesaid, exceeds the rate of £5 for the forbearing of £100 for a year; contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the defendant forfeited for his said offence the sum of £66 of like lawful money, being treble the value of the said sum of £22, so lent and advanced by the defendant to the said E. F. and so forborne as aforesaid, and thereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have for our said lady the queen, and for himself in this behalf, of and from the defendant, the said sum of £66, so forfeited as aforesaid, being the said sum above demanded. Yet &c. [*See ante*, 358.]

On 7 Geo. 2, c. 8, for penalties for stock-jobbing on a sale of stock. (c)

Commencement in qui tam as usual, ante, 17, *see precedent*, 7 *Wentw.* 269.] For that whereas after the 1st day of June, in the year of our Lord 1734,

(c) See the act and decisions, 1 Chit. Col. Stat. 1032. The act, sect. 1, gives a remedy to the party grieved. The act requires the form of action to be in debt. Where the plaintiff declared in assumpsit, the Court allowed it to be amended; 2 Marsh. 124; 6 Taunt. 419.

The penalty does not attach either upon the principal or broker, if the principal really has the stock at the time of the sale by his broker, though he afterwards refuse to make the transfer, and though the name of the principal is not disclosed by the broker; 8 T. R. 619.

It has been suggested that the six months limitation provided by the 1st section of the act, is confined to actions to recover back money paid for differences, and does not extend to this section for the recovery of penalties, and that the limitation of actions for penalties is two years by the general enactment in 31 Eliz. c. 5, s. 5.

Where a party possessed of stock allowed another to sell it for his own benefit, on condition that the latter should transfer the same amount of stock to his name at the next opening; it was held, this was not prohibited

by the statute, and that an action might be maintained to recover the value of the stock on the day appointed for the transfer; 8 T. R. 162. So where the defendant being indebted to the plaintiff in a sum for which he was sued, gave bond to transfer the amount in stock at a given day, with the interest in the meantime; this was held to be neither a stock-jobbing nor usurious transaction; 8 East, 304.

The act contains a clause compelling a discovery on oath, but such clause does not compel a party at law to give evidence criminating himself, and therefore in an action on a bill, a stockbroker may refuse to give evidence that the consideration of it was stock-jobbing differences, 1 C. & P. 11; but if subpoenaed so to do, he is bound to produce his books kept as directed by 7 Geo. 2, c. 8, s. 9; (1 C. & P. 11, 325); and if the stockbroker refuse to state what the consideration of the bill was, then it is to be taken that there was no consideration, and the plaintiff, in an action on the bill, will fail, if the defendant prove that he received no consideration; 1 Chit. Col. Stat. 1033; 2 C. & P. 606.

and before the making of the corrupt and unlawful agreement hereinafter next mentioned, to wit, on the — day of — A. D. 1830, it was corruptly and unlawfully contracted and agreed by and between the defendant and one E. F., that the defendant should sell to the said E. F. and the said E. F. should buy of the defendant a certain interest or share in the public stock commonly called the Three Pounds per centum Consolidated Bank Annuities, and that the said sum of £3000 should be transferred by the defendant to the said E. F. on the [28th day of January, A. D. 1830. (f)] And the plaintiff avers, that the defendant was not at the time of making such contract and agreement as last aforesaid actually possessed of or entitled unto the said interest or share in the said public stock so agreed to be sold and transferred by him as last aforesaid in his own name, or in his own right, or in the name or names of a trustee or trustees to or for his the defendant's use, or his own right; contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said offence the sum of £500, and thereby and by force of the said statute an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the defendant, as well for our said lady the queen, as for himself in this behalf, the said sum of £500 so forfeited as aforesaid, parcel of the said sum above demanded.

By COMMON
INFORMERS.

And whereas also after the 1st day of June, which was in the year of our Lord 1734, and before the making of the corrupt and unlawful agreement hereinafter next mentioned, to wit, on the — day of — A. D. 1830, it was corruptly and unlawfully contracted and agreed by and between the defendant and one E. F. that the said E. F. should sell to the defendant, and that the defendant should buy of the said E. F. a certain interest or share in a public stock, to wit, £2000 in the public stock, commonly called the Three Pounds per centum Consolidated Bank Annuities, and that the said sum of £2000 should be transferred by the said E. F. to the defendant, on [the 3d day of February, A. D. 1830.] And the plaintiff avers, that the said E. F. was not at the time of making such contract and agreement as last aforesaid actually possessed of or entitled unto the said interest or share in the said public stock so agreed to be sold and transferred by him as last aforesaid, in his own name, or in his own right, or in the name or names of a trustee or trustees, to or for his the said E. F.'s use, or in his own right, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said last-mentioned offence the sum of £500, and thereby and by force of the said statute an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the defendant, as well for our said lady the queen, as for himself the plaintiff in that behalf, the said sum of £500 so forfeited as last aforesaid, other parcel of the said sum of money above demanded. Yet &c. [*Conclude as usual, see ante, 358.*]

Second count,
for stock-job-
bing on a pur-
chase of stock.

(f) Where the contract laid in the declaration for penalties was to deliver the stock on the 27th February, and the contract proved was to deliver stock on the *settling day*, which

at the time was fixed for and understood by the parties to mean the 27th February, it was held that the proof supported the declaration; 2 B. & Ald. 335; 1 Chit. Rep. 60, S. C.

By COMMON
INFORMERS.

Commencement as ante, 284.] For that whereas the defendant after the 1st day of December, 1790, and within twelve months next before the commencement of this suit, to wit, on &c., in the Court of our lady the now queen, before the queen herself, defended a certain action or suit in a plea of debt, wherein one T. L. was plaintiff and one W. G. was defendant, in the name of one J. M. F. as attorney for the said W. G. defendant in the said plea of debt, the said Court being then a Court in which attornies had been accustomedly admitted and sworn, and which action and suit the now defendant so then defended in the said Court as an attorney, for and in expectation of gain, fee or reward, he the now defendant then not being nor having been admitted or inrolled an attorney of the said Court, or solicitor of any one of the Courts of Law or Equity mentioned in a certain act of parliament made in the second year of the reign of King George the Third, intituled "An Act for the better Regulation of Attornies and Solicitors," according to the direction of that act, nor having taken and subscribed the oath mentioned in the said act to be taken and subscribed by the defendant in that behalf, against the form of the said act, whereby the now defendant, by force of the said act, forfeited and ought to pay to the plaintiff the sum of £50 for his aforesaid offence. By means whereof and by force of the said act an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £50, parcel &c. [*Several other counts for other penalties incurred in other cases are usually inserted, and conclude with the usual breach.*] And thereupon he brings suit, &c.

On 6 Anne, c. 16, against stockbroker for acting without having been admitted by the mayor and aldermen of London; *Clarke v. Powell*, 4 B. & Ad. 846.

On 55 Geo. 3, c. 137, s. 6, for penalties against an overseer for selling goods for use of the workhouse. (h) *Commencement as ante, 284.]* For that the defendant, after the 25th March, A. D. 1816, to wit, on &c., at the parish of W., in the county of S., was an overseer of the poor of the said parish of W., in the said county, appointed in that behalf, and that the defendant did, whilst he was such overseer, during the time he retained such appointment, to wit, on the day and year last aforesaid, in his own name, provide, furnish and supply, for his own profit, certain goods and provisions, to wit, 30 cheeses, [*the precise quantity is not material,*] for the use of the workhouse of and in the said parish, for which he the defendant was appointed such overseer, he the defendant not then having obtained any certificate from any justice of the peace, permitting and suffering him the defendant so to do, according to the statute in such case made and provided, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said offence the sum of £100, and thereby and by force of the statute in such case made and provided an action hath accrued

(g) See a precedent on sect. 3 of the 2 Geo. 2, c. 23, 7 J. B. Moore, 54; 3 B. & B. 241, S. C.; and see the law, &c. Tidd's Prac. 9th edit. Index, "Attorney;" and 1 Bing. N. C. 734.

(h) See 3 B. & Ald. 145; 1 B. & C. 77;

2 J. B. Moore, 186; 8 Taunt. 239, S. C.; and see declaration and law, *Barber v. Waite*, 1 Adol. & El. 514. But *quære* whether the 6th section of the above statute is not repealed by the 4 & 5 Will. 4, c. 76, s. 77; see *Henderson v. Sherbourne*, 2 M. & W. 236.

to the plaintiff to demand and have of and from the defendant the said sum of £100, parcel of the said sum above demanded.

By COMMON
INFORMERS.

And also for that the defendant, after the said 25th March, A. D. 1816, to wit, on the said &c., was an overseer of the poor of the said parish of W., in the county aforesaid, appointed in that behalf, and that defendant, so being such overseer, did, during the time he retained such appointment, to wit, on the day and year last aforesaid, in his own name, provide, furnish and supply, for his own profit, certain other goods and provisions, to wit, 30 other cheeses, for the support and maintenance of the poor of and in the said parish, for which he the defendant was appointed such overseer as aforesaid, the defendant not then having obtained any certificate from any justice of the peace, permitting and suffering or authorising him the defendant so to do, according to the statute in such case made and provided, contrary to the form of the statute in such case made and provided, whereby and by force, &c. [*Conclude as in last count.*]

Second count

And also for that the defendant, after the said 25th March, A. D. 1816, to wit, on the said &c., being then duly constituted and appointed a member of a select vestry for the care and management of the concerns of the poor of the said parish, and a person in whose hands the providing for and ordering, and the management, control and direction of the poor of the said parish was then and there placed, under and by virtue of a certain act of parliament made and passed in the 55th year of the reign of his late Majesty King George the Third, intituled "An Act to amend the Laws for the Relief of the Poor," jointly with the churchwardens and overseers of the said parish, did, during the time which he did retain the said appointment of such member of the said select vestry as aforesaid, in his own name, provide, furnish and supply, for his own profit, certain other goods and provisions for the use of the workhouse of and in the said parish, divers, to wit, 30 other cheeses, the defendant not then having obtained any such certificate permitting and suffering or authorising him so to do, contrary to the form &c. [*Conclude as in first count.*]

Third count.

And also for that the defendant, after the said 25th March, A. D. 1816, aforesaid, to wit, on &c., being then a person in whose hands the providing for, ordering, management, control and direction of the poor of the said parish was then and there placed,* did provide, furnish and supply, for his own profit, certain other goods and provisions for the use of the workhouse of and in the said parish, &c., 30 other cheeses, the defendant not then having obtained any certificate as in and by the act in such case made and provided, whereby and by force, &c. [*Conclude as in the first count.*]

Fourth count.

*Same as in fourth count to the *, and then proceed thus:—* Did, during the time which the defendant so had on his hands and retained the office and appointment of providing for the poor of the said parish, in his own name, provide, furnish and supply, for his own profit, certain other goods and provisions, divers, to wit, 30 other cheeses, for the support and maintenance of the poor of and in the said parish, the defendant not then having any such certificate as was and is by the law in that behalf required, contrary to the form, &c. [*Conclude as in first count, and then add the common breach in debt, and conclude thus:—* And thereupon the plaintiff brings suit, &c.

Fifth count.

By COMMON
INFORMERS.

Declaration on
2 Geo. 2, c. 24,
for penalties
incurred by
bribery.⁽ⁱ⁾

Commencement, ante, 284.] For that whereas the borough of C. is an ancient borough, and for a long space of time two burgesses of the said borough have been elected and sent, and have been used and accustomed and of right ought to have been and still of right ought to be elected and sent, to serve as burgesses for the said borough in the parliament of this kingdom, and the plaintiff saith that heretofore, to wit, on the — day of —, A. D. —, a certain writ of our lady the now queen issued out of her majesty's Court of Chancery at Westminster, in the county of Middlesex, directed to the sheriff of the county of C., whereby &c. [*set out the writ.*] which said writ, afterwards and before the return thereof, to wit, on the — day of —, A. D. — aforesaid, was delivered to R. H., Esq., who then and there and from thence until and at and after the return of the said writ was sheriff for the said county of C., to be executed in due form of law, by virtue of which said writ, afterwards and before the return thereof, to wit, on the — day of —, in the year aforesaid, the said R. H., then being such sheriff as aforesaid, made his certain precept in writing under the seal of his said office of sheriff of the said county of C., directed to the mayor of the said borough of C., for the election there of two burgesses for the said borough according to the said writ, by virtue of which said precept, afterwards and before the return of the said writ, to wit, on the — day of —, in the year aforesaid, the election of two burgesses for the said borough was had and made; and the said plaintiff says, that before and at the said election J. K. was a candidate that he might be elected and returned to serve as one of the burgesses for the said borough in the aforesaid then next parliament, and the plaintiff in fact says, that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on the — day of —, in the year aforesaid, did corrupt one J. G., who then and from thenceforth until and at the time of the said election had a right to vote in the said election, to give his vote in that election for the said J. K., so being such candidate as aforesaid, by then corruptly giving to the said J. G. a large sum of money, to wit, the sum of £5, and by then corruptly promising to give the said J. G., after he should have so given his vote in the said election for the said J. K., the further sum of £5, which said several and respective sums of £5 and £5 were so then respectively given and promised by the said defendant to the said J. G.

(i) See form *Henslow v. Fawcett*, 3 A. & E. 51; 4 Nev. & Man. 585; 1 Han. & Wollas. 125. See also *Harding v. Stokes*, 1 M. & W. 354; 2 M. & W. 233, S. C.; *Webb v. Smith*, 4 Bing. N. C. 373; and see forms 7 Went. Precd. 127, 210, 340, 364; 2 Rich. Pr. K. B. 215; 2 Wils. 396.

The section of the statute on which this declaration is framed enacts, "that if any person having or claiming to have a right to vote in the election of any member or members to serve for the commons in parliament, shall ask, receive or take any money or other reward, by way of gift, loan or other device, or agree or contract for any money, gift, office, employment or other reward, to give his vote, or to refuse or to forbear to give his vote in any such election, or if any person by himself, or by any person employed by him, shall by any gift or reward, or by any promise,

agreement or security for any gift or reward, corrupt or procure any person to give, or to forbear to give, his vote in any such election, such person shall for every offence forfeit the sum of £500, to be recovered with costs by action of debt in any of the king's Courts of Record at Westminster." See the statute fully treated of, and the recent cases and statutes referred to on the subject in Selwyn's *Nisi Prius*, 10th edit. 624. The 4 & 5 Vict. c. 57, dispenses with proof of agency in the first instance upon questions of bribery before committees, but in no way interferes with the evidence necessary to support an offence under this statute. See 7 & 8 Geo. 4, c. 37, which inflicts a penalty for giving ribbons or cockades. See act, for the better discovery and prevention of bribery and treating, 5 & 6 Vict. c. 102.

as and for a reward to the said J. G. so to give his vote in the said election for the said J. K., contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said offence the sum of £500, and an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of £500: Yet the defendant hath not paid the said sum above demanded or any part thereof to the plaintiff, and the same remains wholly unpaid, and therefore the plaintiff brings his suit, &c.

By COMMON
INFORMERS.

Commencement qui tam, ante, 17.] For that the defendant heretofore and before and at the time of the neglect and refusal hereinafter mentioned, to wit, on the 5th day of September, A. D. —, was one of the overseers of the poor of the parish of —, in the borough of —, in the county of —, and it was the duty of the defendant as such overseer of the poor of the said parish, and of the other overseers of the poor of the said parish, on the day and year aforesaid, to make out an alphabetical list of the burgesses in the said parish, that is to say, of all persons who should be entitled to be enrolled in the burgess roll of the said borough for that year, according to the provisions of the statute in such case made and provided, in respect of property within the said parish, and the said defendant as such overseer ought to have signed such burgess list and ought to have delivered the same so signed to the town-clerk of the borough of — aforesaid on the day and year last aforesaid, yet the defendant, not regarding his duty in that behalf, and not respecting the statute in such case made and provided, unlawfully neglected and refused to make out and sign such burgess list as aforesaid for the said parish for the year aforesaid, on the day and year last aforesaid, and did not then, or at any time before or since, make out and sign the same, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said offence the sum of £50, and an action hath accrued to the plaintiff, who sues as well for himself as on behalf of the treasurer appointed by virtue of the said act, to demand and have of and from the defendant the said sum of £50: Yet the defendant hath not paid the said sum above demanded, or any part thereof, to the plaintiff, and the same remains wholly unpaid, and therefore the plaintiff brings his suit, &c.

Against an overseer under 5 & 6 Will. 4, c. 76, s. 48, for having neglected to make out and sign a list of persons entitled to be enrolled in the burgess roll. (k)

Commencement, ante, 284.] For that whereas heretofore, and before and at the time when the defendant acted as a commissioner as hereinafter mentioned in the city of L. and county of the same city, the defendant was a commissioner for carrying into execution the act hereinafter mentioned, and whereas also heretofore, to wit, on &c., at a meeting of the commissioners for carrying into execution an act of parliament passed in the — year of

Against a commissioner under a local act for acting in a matter in which he was personally interested. (l)

(k) See form *King v. Burrell*, 12 A. & E. 460; 4 P. & D. 207, S. C. See also *King v. Shere*, 2 G. & D. 453, which latter case decides that an overseer who omits, whether wilfully or not, to sign the burgess list, is liable to the penalty; and where the parish consists of several wards, a signature by one overseer of a list of the persons entitled to be on the burgess list for his own ward only is not a sufficient compliance with the statute to exempt him from the penalty; *ibid*.

(l) See precedent, *Charlesworth v. Rud-*

gard, 1 C. M. & R. 498; 3 Dowl. P. C. 517, S. C. The statute imposing the penalty for the recovery of which this action was brought, was in the following terms:—"That no person shall be capable of acting as a commissioner in the execution of this act during the time he shall hold or enjoy any office or place of profit under this act, or be concerned or interested (except as a creditor on the rates or assessments, or as a shareholder in any company of proprietors for the manufacture of gas) in any contract made under or by virtue

By COMMON
INFORMERS.

the reign of &c, and intituled "An Act," &c. [*set out the title,*] then and there held at &c., it was ordered by the commissioners attending the said meeting that a footpath of flag stones of two flags of four feet in width, with a four-inch kirk on the outer edge, be made in front of the buildings, yards and premises along the whole line of wharfs or roads on the east and north sides of Brayford, with mount-sorrel crossings of the same width to the gateways, lanes and openings, and that the necessary notices be given to the occupiers. And the plaintiff avers, that at the time of making the last-mentioned order, and from thence until and at the time of the defendant's acting as a commissioner as hereinafter mentioned, he the defendant was the occupier of certain premises, that is to say, certain yards and buildings on the north side of Brayford, and then and there being within the jurisdiction of the said act, and lying before and adjoining the said line in the said order mentioned, the same line being then and there a public place, also within the jurisdiction of the said act; and, as the occupier of such premises, he the defendant was, during all the time last aforesaid, one of the occupiers in the said order mentioned, subject, according to the said act, to make part of the said footpath, and also one of the occupiers mentioned in the proposal hereinafter mentioned to have been made for the alteration of the said order. And the plaintiff also avers, that afterwards, to wit, on &c., at a special meeting of the said commissioners then and there held, it was proposed that the said order, made at the said meeting, held on &c., should be altered to the following effect; namely, that the occupiers of buildings, yards, and premises, along the whole lines of wharfs or roads on the east and north sides of Brayford, be ordered to make footpaths the whole length of their respective frontages with small stones and gravel, with a four-inch kirk, and that the making of footpaths in that manner with mount-sorrel crossings should be deemed a compliance with the said order. And the plaintiff also avers, that at the last-mentioned meeting, so held as last aforesaid, it was also then and there proposed that the said original order be acted upon and put into execution. And the plaintiff further saith, that the said footpath so proposed as aforesaid was, at the time of the last-mentioned meeting, and when the defendant acted as commissioner as hereinafter mentioned, a footpath which could be made with less expense than the said footpath in the said order mentioned; and that the defendant, as such occupier as aforesaid, was, during the whole of the last-mentioned meeting, by reason of the said greater cheapness of the said footpath so proposed as aforesaid, personally interested in the question whether the said original order should be so acted upon or so altered as aforesaid. And the plaintiff further saith, that he the defendant, then and there being so personally interested as aforesaid, well knowing the premises, but not regarding the said statute, did, at the said meeting last mentioned, in the city and county aforesaid, act as a commissioner in the execution of the said

of this act, or in any case wherein he shall be personally interested in the matter in question; and if any person, not being qualified in the manner by this act directed, or not having taken and subscribed the oath as aforesaid, or, being a Quaker, not having made and subscribed the affirmation as aforesaid, or being or becoming disqualified by any of the causes in this act mentioned, shall act as a commissioner in the execution of this act,

every such person shall for every such offence forfeit and pay the sum of £100, with full costs of suit, to any person who shall sue for the same in any of his majesty's Courts of Record at Westminster by action of debt," &c., and this form will therefore only be applicable to a similar enactment, but may be some guide to the framing of a declaration on another statute.

act in the matter in which he was so interested as aforesaid, in this, that he the defendant, at the last-mentioned meeting, then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, act in execution of the said act on the occasion aforesaid, and did then and there vote for the alteration of the said original order according to the said proposal, contrary to the form of the statute in such case made and provided, whereby and by force of the statute the defendant hath forfeited the sum of £——, and an action hath accrued to the plaintiff to demand and have the same (being the sum above demanded) of and from the defendant. Yet the defendant hath not paid the said sum above demanded, or any part thereof, to the plaintiff, and the same remains wholly unpaid, and therefore the plaintiff brings his suit, &c.

ON COMMON
INFORMERS.

DECLARATIONS IN COVENANT.

ON
APPRENTICE
DEEDS.

I. ON APPRENTICE DEEDS.

By master
against the fa-
ther of an ap-
prentice, for the
apprentice ab-
senting himself.
(a)

Profert.

E. F. puts him-
self apprentice
to plaintiff.

General cove-
nant binding
the defendant.

Reference to
indenture.

Entry of ap-
prentice into
service.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., (b) by a certain indenture of apprenticeship (c) then made, (one part of which said indenture, (d) sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) one E. F. did put himself apprentice to the plaintiff to learn his art, trade and mystery of a —, and with him (after the manner of an apprentice) to serve from the date thereof until the full end and term of [seven] years from thence next following, to be fully complete and ended, during which term it was thereby covenanted and agreed, that the said apprentice his said master faithfully should serve, his secrets keep, his lawful commands everywhere gladly do, and that he should not haunt taverns or play-houses, nor absent himself from his said master's service day or night, unlawfully, but in all things as a faithful apprentice should behave himself towards his said master and all his during the said term. And for the true performance by the said E. F. of all and every the covenants and agreements therein contained on the part and behalf of the said E. F. to be performed and fulfilled, the defendant thereby bound himself unto the plaintiff, (e) as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said indenture the said E. F. afterwards, to wit, on the said &c., entered and was then received into the service of the plaintiff as such apprentice as aforesaid, and remained and continued in such service, under and by virtue of the said indenture, for a long space of time, to wit, from the day and

(a) See forms of declarations by and against apprentices, Morg. 480, 550.; Plead. Assist. 316; and other forms, indexed in 5 Wentw. 112, 132; see the law in general, Chitty's Burn, J., 26th edit. tit. "Apprentices," and "Poor-Law." A father cannot, against his infant son's consent, bind him as an apprentice; 3 B. & Ald. 584. An action of covenant cannot be supported against an infant apprentice; Cro. Car. 179; 6 T. R. 557. It should therefore be against the party who covenanted for the infant's due performance of the indenture; and the usual concluding words of the indenture amount to a covenant; Doug. 518; 8 Mod. 190; Com. Dig. tit. "Covenant;" A. 2; *infra*, note (e). It is no defence that the defendant's son, after becoming of age, avoided the indenture, though he properly served till that time; 3 B. & Ald. 59. The master cannot dismiss the apprentice or determine his service, though the apprentice misbehave himself; 1 B. & C. 460; 2 D. & R. 465, S. C. But if the apprentice quit the service, and refuse to return, or prevent himself from returning, and the master is not requested to receive him back, the mas-

ter is not liable for not receiving and taking care of him; 6 B. & C. 680; where see the pleadings. *Quære* whether a contract of apprenticeship is put an end to by a dissolution of partnership; *Lloyd v. Blackburn*, 1 Dowl. N. R. 647.

(b) A deed may be stated in pleading to have been made on a day different from its date, omitting the words "bearing date, &c."; 4 East, 477; but it is most usual to insert the date.

(c) As to the binding by indenture, see 1 Nolan's Poor Laws, 311; Co. Lit. 145 b; Burn, J., tits. "Apprentice," and "Poor Law."

(d) In declaring on deeds in general, a profert or an excuse for the want of it must be stated, or the declaration will be bad on special demurrer; 4 Anne, c. 16. If a profert be stated, and the deed cannot be produced, the plaintiff will be nonsuited on the plea of *non est factum*; 4 East, 585. As to proferts in general, see 1 Saund. 9, note 1; *ante*, 316; Index, vol. i. tit. "Profert."

(e) *Supra*, note (a). This amounts to a covenant; Dougl. 518; 8 Mod. 190.

year last aforesaid, until and upon &c. [*or* "from thence hitherto."] And although the plaintiff hath always, from the time of the making of the said indenture, hitherto well and truly performed, fulfilled and kept all things therein mentioned and contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof; (*f*) Yet the plaintiff in fact saith, that the said E. F. did not nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture; but on the contrary thereof, the said E. F. during the said term, to wit, on &c., aforesaid, did unlawfully absent himself, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture and of the said covenant of the defendant in that behalf made as aforesaid. And so the plaintiff in fact saith, (*g*) that the defendant (although often requested so to do) hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly neglected and refused, and still doth neglect and refuse; to the damage of the plaintiff of £—, (*h*) and thereupon he brings suit &c.

ON
APPRENTICE
DEEDS.

General performance by plaintiff. (*f*)
General non-observance by the apprentice.
Particular breach by apprentice absenting himself from his service.

Usual conclusion in covenant.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., by a certain indenture tripartite, then made between O. S. of &c., gentleman, of the first part, the plaintiff by the name of S. the son of the said O. S. of the second part, and the defendant by the name of &c., of the parish of P. in the said county, apothecary, of the third part, (one part of which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) the plaintiff of his own free will, and by and with the consent and approbation of his said father, testified by his being made a party thereto, and by his signing and sealing thereof, did put and bind himself an apprentice to and with the defendant to learn his art, and with him after the manner of an apprentice, to serve from the day and year aforesaid, for and during and until the full end and term of seven years from thence next ensuing and fully to be complete and ended; during which said term &c. [*then set out the whole indenture, including defendant's covenant to teach and instruct,*] as by the said indenture now brought here into Court, reference being thereunto had, will more fully appear. And the plaintiff in fact saith, that he forthwith, after the making the said indenture, to wit, upon the said &c., entered into his said service, to serve the defendant as his apprentice for the term aforesaid, according to the true intent and meaning of the

Covenant by the apprentice on his indentures against the master. (*i*)

Profert.

Reference to the indenture.
Averments.

(*f*) This general averment of performance by the plaintiff is unnecessary; 1 Saund. 236, note 6; Rep. temp. Hardw. 343, 344; 2 Mod. 309.

(*g*) This statement is unnecessary, there having been a breach of covenant alleged before, and therefore it is unnecessary to repeat it in the conclusion; 1 Saund. 236, note 7; but the pleading rules do not expressly prescribe any conciseness in this respect.

(*h*) In all declarations in covenant, a sum should be inserted sufficient to cover the real demand and interest till the time of final

judgment. The principle of 6 Car. & P. 661, extends to all cases as well of covenant as debt.

(*i*) See this form, Plead. Assist. 316. It is not framed precisely according to the modern language of pleading, but may readily be adapted; see other precedents by apprentices, 3 Wentw. 312, 324, 419, 427, 433; see a form of declaration by the father against the master, 6 Barn. & Cress. 680. As to the validity of the deed, see 16 East, 13; and Chitty's Law of Apprentices.

ON
APPRENTICE
DEEDS.
Defendant's
breach, not
teaching, &c.

Second breach,
not providing
meat, drink,
washing, lodg-
ing, &c.

said indenture, and hath always in all things well and truly observed, performed and fulfilled all things in the said indenture contained on his part and behalf to be performed and fulfilled. Nevertheless the plaintiff in fact saith, that the defendant, from the making of the said indenture, and from the time of his the said O. S.'s entering into the said service, hitherto hath not taught nor instructed the plaintiff, nor caused the plaintiff to be taught and instructed in the said art and mystery of an apothecary, as he ought to have done, according to the form and effect of his said covenant in that behalf, but hath hitherto wholly neglected and refused so to do; and the plaintiff further saith, that the defendant, from the time of the plaintiff's entering into the service of the defendant as aforesaid, hitherto hath not found, allowed nor provided, unto or for the plaintiff, meat, drink, washing, lodging or any other necessities (apparel and mending thereof excepted, as is above mentiond,) as he ought to have done according to the form and effect of his said covenant in that behalf, but hath hitherto wholly neglected, and refused so to do, contrary to the said indenture and the said covenant of the defendant in that behalf made as aforesaid, and so &c. [*Common conclusion as ante*, 371.

Indenture of
apprenticeship
to a mariner, by
apprentice,
against execu-
tors of master,
for not pro-
viding meat,
board, &c. (k)
Excuse of pro-
ferty, the deed
being in posses-
sion of defend-
ant.
The deceased's
covenants.

Reference so
indentures.
Plaintiff enters
into deceased's
service, &c.

Plaintiff's
general per-
formance.

For that whereas heretofore, to wit, on &c., by a certain indenture of apprenticeship, then made between the plaintiff and the said I. A. deceased, which said indenture was and is sealed with the seal of the said R. M. (but being in the possession of the defendant the plaintiff cannot produce the same to the said Court here), (l) the plaintiff did put himself apprentice to the said I. A. to learn his art and mystery, and with him, after the manner of an apprentice, to serve from the day of the date of the said indenture until the full end and term of three years from thence next following to be fully complete and ended, and the said I. A. thereby covenanted and agreed his said apprentice in the art of a mariner, which he used, by the best means that he could, to teach and instruct, or cause to be taught and instructed, finding unto his said apprentice sufficient meat, drink and lodging, and in lieu of all other necessities during the said term should and would pay unto him £14 for the first year, £16 for the second, and £20 for the third year, and £5 more if he served his term out faithfully; and for the true performance of all and every the covenants and agreements therein contained, both the said parties bound himself to the other by the said indenture, as by the said indenture, reference being thereunto had, will more fully and at large appear. By virtue and in pursuance of which said indenture, the plaintiff afterwards, to wit, on the day and year aforesaid, entered and was then received into the service of the said I. A. in his life-time, as such apprentice as aforesaid, and remained and continued in such service, under and by virtue of the said indenture, for a long space of time, to wit, from the day and year aforesaid, until and upon the said, &c.; and the plaintiff did always, from the the time of the making the said indenture until the day and year last aforesaid, hitherto well and truly perform, fulfil and keep all things therein contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning

(k) As to mariner's apprentice indentures,
see 1 Bott, 630 to 633; 5 Eliz. c. 5, s. 12;

Burn, J., tit. "Apprentice."
(l) Let this be according to the fact.

thereof; and although the plaintiff was always ready and willing, from the said [25th] day of [August,] in the year of our Lord [1814] aforesaid, until the expiration of the said term of three years, to continue faithfully and duly to serve the said I. A. in his life-time, and his executors since his decease, to wit, whereof the said I. A. in his life-time, and the defendant as executor as aforesaid, after his decease, always had notice. Yet neither the said I. A. in his life-time, nor the defendant, executor as aforesaid, since the death of the said I. A. although they were requested by the plaintiff so to do, afterwards, and during the said term, to wit, on the said [25th] day of [August] in the year of our Lord [1814] aforesaid, did or would, during the residue of the said term, find unto the plaintiff sufficient meat, drink, and lodging, and in lieu of all other necessities during the said term pay unto him the plaintiff £14 for the said first year, £16 for the second year, and £20 for the third year; but the said I. A. in his life-time, and the defendant, as executor as aforesaid, since the death of the said I. A. have hitherto wholly neglected and refused so to do, and by means of the premises the plaintiff hath lost and been deprived of all the profits, benefits and advantages, which he might and would have derived and acquired from the performance of the said covenant of the said I. A. And so the plaintiff in fact saith, that the said I. A. in his life-time, and the defendant, executor as aforesaid, after the death of the said I. A. have not, nor hath either of them, kept the said covenant so made by the said I. A. as aforesaid, but have broken the same, and to keep the same with the plaintiff have, and each of them hath, wholly neglected and refused, and the said R. M. executor as aforesaid, still doth neglect and refuse; To the damage of the plaintiff of £100; and thereupon he brings suit &c,

ON
APPRENTICE
DEEDS.

Breach of co-
venant by de-
ceased and de-
fendant, as his
executor, not
providing meat,
drink, &c.

General con-
clusion.

II. ON ARTICLES OF AGREEMENT.

II. ON
ARTICLES OF
AGREEMENT.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c., by certain articles of agreement then made, concluded and agreed upon, between the plaintiff of the one part and the defendant of the other part, (one part of which said articles of agreement, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) after reciting (n) that the plaintiff and defendant had used, exercised and carried on the trade or business of pawn-brokers for several years then last past, and for the better understanding each other's intentions in a more clear and better way and manner in future, it was agreed by and between the said parties, that &c. [*Here state the agreement according to the terms of the agreement, and which stipulated that either party making default should forfeit three guineas for each default. Proceed thus:*] And for the due performance and satisfaction of the said

On articles of
agreement by
copartners in
trade. (m)

Profert.

Stipulated da-
mages, three
guineas for
taking any arti-
cle out of the
joint shop with-
out entering
same, &c.

(m) See a form, 3 Went. 333. One partner may sue another for the breach of an *express* covenant, see 13 East, 8, 538; *ante*, vol. i. 45; but *semble*, that on the breach of a covenant to account, only nominal damages can be recovered, and the plaintiff must resort to equity for his share of profits, if there had been no balance struck. See other precedents

on articles of agreement, 1 Saund. 40 to 45; 3 Wentw. 298, 326, 328; Plead Assist. 321, 330, 336, 340, 343.

(n) If the statement of the recitals is not material to the assignment of the breach, say "after reciting as therein recited, it was agreed &c., and the said C. D. covenanted, that &c."

ON ARTICLES OF AGREEMENT.	
Reference to the articles.	agreement, each of the said parties did thereby, for himself, his executors and administrators, covenant and agree with the other, his executors and administrators, well and truly to observe and perform all the agreements therein mentioned, and in default of any one article, well and truly to pay such penalty, forfeiture, sum and sums of money to the other, as in and by the said agreement is mentioned and expressed to be paid by the defaulter,
Protest of general nonperformance. (o)	as by the said articles of agreement, reference being thereunto had, will (amongst other things) more fully and at large appear; and although the plaintiff hath well and truly performed and fulfilled all and singular the covenants and agreements in the said articles of agreement mentioned on his part and behalf to be done and performed; yet protesting that the defendant hath not performed or fulfilled any thing in the said articles of agreement mentioned on his part and behalf to be done and performed, the plaintiff in fact says, that after the making of the said articles, and whilst the plaintiff and defendant used, exercised and carried on the said trade or business of pawnbrokers, to wit, on &c., the defendant took from out of the said shop and premises, in the said articles of agreement mentioned, where the plaintiff and defendant so used, exercised and carried on their said business, a certain hat, to wit, of the value of five shillings, being part of the goods belonging to and in the custody of the plaintiff and defendant as copartners in the said trade or business as aforesaid, and did not set down the same upon a slate or book kept for that purpose, nor did duly account for the same, according to the form and effect of the said articles of agreement, but on the contrary thereof, the defendant made default in setting down the same as aforesaid, and did not duly account for the same as aforesaid, contrary to the force, form and effect of the said articles of agreement, whereby the defendant forfeited and became liable to pay to the plaintiff the sum of £3. 3s. for such neglect or default; and the plaintiff further says, that, after the making of the said articles, and whilst the plaintiff and defendant used, exercised and carried on the said trade or business of pawnbrokers, to wit, on &c., the defendant took from out of the said shop and premises, in the said articles of agreement mentioned, where the plaintiff and defendant so used, exercised and carried on their said business, certain plates, to wit, twelve pewter plates, to wit, of the value of six shillings, being part of the goods belonging to and in the custody of the plaintiff and defendant as copartners in the said trade or business as aforesaid, and did not set down the same upon a slate or book kept for that purpose, nor did duly account for the same, according to the form and effect of the said articles of agreement, but on the contrary thereof, the defendant made default in setting down the same as aforesaid, and did not duly account for the same as aforesaid, contrary to the force, form and effect of the said articles of agreement, whereby the defendant forfeited and became liable to pay to the plaintiff the further sum of £3. 3s. for such neglect or default. And the plaintiff further says, that after the making of the said articles, and whilst the plaintiff and defendant used, exercised and carried on the said trade or business of pawnbrokers, to wit, on the said &c., the defendant took from out of the said shop and premises, in the said articles of agreement mentioned, where the
First breach, taking an article out of shop, and not entering same, whereby defendant forfeited three guineas.	
Second breach, taking other articles, and not entering same, whereby, &c.	
Third breach, taking another article, and not entering the same, whereby, &c.	

(o) This protest of general nonperformance is not unusual, but being unnecessary should be omitted.

plaintiff and defendant so used, exercised and carried on their said business, a certain metal snuff-box, to wit, of the value of three shillings, being part of the goods belonging to and in the custody of the plaintiff and defendant as copartners in the said trade or business as aforesaid, and did not set down the same upon a slate or book kept for that purpose, nor did duly account for the same, according to the form and effect of the said articles of agreement, but on the contrary thereof, the defendant made default in setting down the same as aforesaid, and did not duly account for the same as aforesaid, contrary to the force, form and effect of the said articles of agreement, whereby the defendant forfeited and became liable to pay to the plaintiff the further sum of £3. 3s. for such neglect or default. [*State several other breaches to the amount of £75. 12s.*] Yet the defendant hath not yet paid to the plaintiff the said sum of £75. 12s. or any part thereof, according to the form and effect of the said articles of agreement, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, contrary to the said articles of agreement and the said covenant of the defendant by him in that behalf made as aforesaid. And so the plaintiff saith, that he the defendant hath not kept with him the covenants so made between them as aforesaid, but hath broken the same, and to keep the same with the plaintiff the defendant hath hitherto wholly refused and still doth refuse; To the damage of the plaintiff of £100; and thereupon he brings suit &c.

ON
ARTICLES OF
AGREEMENT.

Other breaches
and forfeitures.

Breach, non-
payment of the
forfeiture.

General breach
of covenant.

III. ON DEEDS OF SEPARATE MAINTENANCE.

For that whereas heretofore, to wit, on &c., by a certain indenture then made between the defendant of the first part, one I. J. wife of the defendant, of the second part, and the plaintiff of the third part, (one part of which said indenture, sealed with the seal of the defendant, he the plaintiff now brings here into Court,) the date whereof is the same day and year aforesaid, after reciting as in the said indenture was and is recited, it was witnessed, that it was thereby declared and agreed upon, by and between the defendant and I. J. his wife, that the said I. J. should and might, from time to time, and at all times thereafter, at her own free will and pleasure, live separate and apart from the defendant, and that the defendant should and would, during such time as the said I. J. should live separate from the defendant, pay unto the plaintiff the sum of £500 yearly and every year, and in like proportion for any lesser time than a year, for and towards the support and maintenance of the said I. J., by four equal quarterly payments, the first payment thereof to commence from the day and year aforesaid. And the defendant did thereby covenant, promise and agree to and with the plaintiff,

III. ON DEEDS
OF SEPARATE
MAINTENANCE.

By the trustee
for a married
woman against
her husband, for
not paying mo-
ney for her
separate main-
tenance. (p)

Profert.

Recital of agree-
ment to live
separate.

Defendant's
covenant to pay
£500 per
annum during
separation to
plaintiff as
trustee.

(p) As to the general liabilities of husband and wife, in case of separation, see 3 Chit. Com. Law, 45; 1 T. R. 5; 8 T. R. 545; *Nurse v. Craig*, 3 N. R. 148; 1 Hen. Bl. 334 to 351; 3 Esp. Rep. 250, 255; 1 Campb. 120. And see another precedent, 3 Wentw. 318; 1 Taunt. 417. It seems that in general deeds of separation are at law valid unless they have been so framed as to invite or improperly facilitate separation; *Waite v. Jones*, 1 Bing. N. C. 656; see the cases

collected, 1 Chitty's Gen. Prac. 58, 59. When declaration sufficient, and when adultery of wife cannot be pleaded to an action on separation deed, 8 Bing. 256. A deed of separation between plaintiff and his wife having been drawn up, but not executed, it was held that his executing such deed was a legal consideration for a promise by defendant to pay certain debts, for which the plaintiff was liable; *Jones v. Waite*, 5 Bing. N. C. 341.

**ON DEEDS OF
SEPARATE
MAINTENANCE.**

And that wife
might live sepa-
rate, &c.

Reference to
indenture.

Averment that
the wife hath
lived separate.

Plaintiff's ge-
neral perform-
ance.

Breach and
arrear of annual
payment.

his executors, administrators and assigns, that the defendant, his executors and administrators, should and would, during such time as the said I. J. should live separate and apart from the defendant, pay unto the plaintiff the sum of £500 yearly and every year, and in like proportion for any lesser time than a year, for and towards the support and maintenance of the said I. J. And that it should and might be lawful for the said I. J. at all times thereafter, at her own free will and pleasure, to live separate and apart from the defendant, as if the said I. J. was sole and unmarried, free from the power, command, restraint, and control of the defendant, at such place and in such manner as she should think proper; and in and by the said indenture it was provided, that the cohabitation of the said I. J. at any time with the defendant should not be considered as a relinquishment on the part of the plaintiff and I. J., or either of them, of their right to the performance of the covenants and agreements on the part of the defendant, his executors and administrators, therein contained, nor in any respect prejudice, annul, or make void such covenants or agreements, or either of them, but the same should, notwithstanding such cohabitation at any time, be and remain in full force and effect, any thing therein contained to the contrary in anywise notwithstanding, as in and by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. And the plaintiff in fact says, that afterwards, and after the making of the said indenture, to wit, on the — of —, A. D. —, the said I. J. in the said indenture mentioned, did choose, and was willing, and did actually live separate from the defendant, her said husband, and for a long space of time, to wit, from thence hitherto hath continued, and still doth continue, to live separate and apart from the defendant, her said husband. And although, from the time of making the said indenture hitherto, the plaintiff hath, &c. [*Plaintiff's general performance of the indenture.*] Yet the said plaintiff in fact saith, that &c. [*State the arrear, and general conclusion, as in declaration in covenant for rent, post 393.*]

**IV. ON DEED
OF INDEMNITY.**

Declaration by
administrator on deed of indemnity, for not indemnifying intestate against payment of annuity granted to third person.

IV. ON DEED OF INDEMNITY.

See 5 Bar. & Adol. 78.

**V. ON
CHARTER-
PARTIES.**

By owner
against
freighter, on a
charter-party,
to recover
freight and
demurrage and
damages for
not loading
within lay
days. (q)

V. ON CHARTER-PARTIES.

For that whereas heretofore, to wit, on &c., by a certain charter-party of affreightment then indented, made and concluded between the plaintiff, by the name and description of &c., master of the good brig or vessel called &c.,

(q) See other forms by master or owner, 3 Wentw. 341, 344, 350, 352, 355, 358, 362, 364, 372; Plead. Assist. 324. For forms at the suit of the freighter, see 3 Wentw. 357; and forms in *Assumpsit*, ante, 161; and in *Debt*, ante, 308. When the contract is under seal, the declaration must, in general, be framed upon it, and state the terms of the

deed; see 1 N. R. 104; Abbott on Shipping, 4th edit. 185; 1 M. & Sel. 573; 2 M. & Sel. 303; when the plaintiff should not sue on the charter-party, see 3 Chit. Com. Law. 430; 2 Chit. Rep. 570; 4 Campb. 131; 12 East, 179; 2 Campb. 616; 6 J. B. Moore, 415, 425. As to demurrage, see Abbott, 196; 3 Chit. Com. Law, 426; ante, 51. When not

of the burthen of — tons (r) per register, or thereabouts, then riding in the river Thames, of the one part, and the defendant, by the name and addition of &c. merchant, and freighter of the said vessel, of the other part, (one part of which said charter-party, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) it was witnessed that the plaintiff, for the considerations thereafter mentioned, did thereby covenant, promise, and agree to and with the defendant, his executors, administrators, and assigns, that the said vessel being tight, staunch, and strong, &c. [*here set out the charter-party verbatim, in the proper tense,*] as by the said charter-party, reference being thereunto had, will, amongst other things, more fully and at large appear. And the plaintiff in fact saith, that afterwards, to wit, on &c., the said vessel being then tight, staunch, and strong, and every way properly fitted and manned for the voyage in the said charter-party mentioned, the said master did then take, load and receive, on board of the said vessel, a full and complete cargo of lawful goods, which having received, and being despatched, did then, wind and weather permitting, immediately set sail and proceed to the island of Heligoland, where, being afterwards, to wit, on &c., arrived, did then make a right and true delivery of the whole of the said cargo to the agents or assigns of the said freighter, agreeably to bills of lading that were signed for the same aforesaid, which cargo being then so delivered, the said master of the said vessel did afterwards, to wit, on &c. take on board the said vessel another full and complete cargo of lawful goods, not exceeding what she could reasonably carry and stow, and being so laden and despatched as last aforesaid, the said vessel did afterwards, to wit, on &c., set sail and proceed direct from thence to London, where, being afterwards, to wit, on &c. arrived, she did then make a right and true delivery of the whole of the said homeward cargo to the defendant or his agents, agreeably to bills of lading that were signed for the same, and so ended the said voyage, according to the form and effect of the aforesaid charter-party, of which said several premises the defendant then had notice. And although the plaintiff hath always, since the making of the said charter-party, well and truly performed, fulfilled, and kept all things in the said charter-party contained on his part and behalf to be performed, fulfilled, and kept, Yet the defendant did not nor would send, or cause to be sent, alongside of the said vessel in the river Thames, such goods as he thought proper to ship, and receive the same from alongside of her at Heligoland, and sent alongside of her at Heligoland such goods as he thought fit, and receive the same from alongside of her at London, within the time limited for those purposes, and days of demurrage in the said charter-party mentioned, but wholly refused and neglected so to do, and, on the contrary, kept and detained the said vessel for a much longer space of time, to wit, the space of ten days, over and above the time limited for the purpose last aforesaid, and the days

ON CHARTER-PARTIES.

Ship being made fit for voyage, receives cargo, sails, arrives, and delivers outward cargo.

Ship takes in homeward cargo, arrives, and delivers same.

Notice to defendant.

General performance by plaintiff.

First breach, not shipping in due time, and within prescribed lay days.

recoverable, as in case of hostile occupation of the port to which the ship is bound, 10 East, 526; 3 Chit. Com. Law, 429. As to what is a condition precedent in a charter-party, and what need not be averred, see 4 East, 477; 2 Chit. Rep. 705; 3 Chit. Com. Law, 391; *Glaholm v. Hays*, 2 M. & Gr. 257. See a form of declaration against master

of a ship for not sailing in ballast direct to a named port, but improperly making an intermediate voyage for his own purposes, *Andrews v. Adams*, 1 Bing. N. C. 29.

(r) The owner may give evidence of actual burthen, and is not restricted to the precise burthen mentioned in charter-party, if there is no fraud; 2 Stark, 2, 452.

ON CHARTER-PARTIES.

Second breach,
non-payment
of freight by
bills of ex-
change.

of demurrage aforesaid, contrary to the form and effect of the said charter-party, and of the said covenant of the defendant. And the plaintiff further saith, that on delivery of the said homeward cargo at London as aforesaid, to wit, on &c., a large sum of money, to wit, as well the sum of £—— in the said charter-party mentioned, as another sum of money, to wit, the sum of £——, being £5 per centum on the amount of the freight aforesaid, in lieu of port charges, and two guineas hat money to the master, amounting in the whole to a large sum of money, to wit, the sum of £——, became and was due and payable from the defendant to the plaintiff, according to the form and effect of the said charter-party and of the said covenant of the defendant so by him made as aforesaid, Yet the defendant did not nor would (although often requested so to do) pay to the plaintiff the said sum of money last-mentioned in manner directed by the said charter-party, to wit, the sum of £——, being one half in money, or any part thereof, on the delivery of the homeward bound cargo at London as aforesaid, or before or since, nor did or would pay the other half, or any part thereof, by the defendant's accepted bill, payable in London aforesaid, at two months after the date of the said delivery of the said homeward cargo, or otherwise however, but wholly refused and neglected so to do, contrary to the form and effect of the said charter-party and of the said covenant of the defendant, and the said sum of £—— is still in arrear and unpaid. And the plaintiff further saith, that the defendant did keep the said vessel on demurrage during divers, to wit, —— days (s) over and above the said lay days in the said charter-party mentioned; yet the defendant did not nor would (although often requested) pay for the said —— days to the plaintiff the said sum of £—— per day, day by day, as the same became due and payable, according to the tenor and effect of the said charter-party, but wholly refused so to do; and the sum of £—— for the said last-mentioned —— days, at and after the rate aforesaid, became and was due and owing from the defendant to the plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said charter-party and of the said covenant of the defendant. And so the plaintiff saith. [*Common conclusion in covenant, as ante, 371.*]

Third breach,
non-payment of
demurrage.

Another form of
declaration for
not loading in
lay days, and
non-payment of
pilotage.

Reference to
charter-party.

Averments of
performance on
plaintiff's part.

For that whereas heretofore, to wit, on &c., by a certain charter-party of affreightment, then indented, made, concluded, and fully agreed upon between the plaintiff of the one part and the defendant of the other part, (one part of which said charter-party, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) it was witnessed that the plaintiff, for the considerations therein and hereinafter mentioned, had granted, &c. [*Here set out the charter-party.*] As by the said charter-party of affreightment (reference being thereunto had) will (amongst other things) more fully and at large appear. And the plaintiff in fact saith, that after the making of the said charter-party of affreightment, and before the said 20th day of June in the year aforesaid, to wit, on &c., the said brigantine being tight, staunch and strong, and well and sufficiently manned, victualled, tackled, and provided with all things necessary and proper for the said vessel for her said intended voyage, did set sail and depart from the river Thames aforesaid, and pro-

(s) As to the construction of the word "days," see 3 Chit. Commercial Law, 426, and next note.

ceed direct to the town of Riga aforesaid, and afterwards, to wit, on &c. did arrive at the said town of Riga, and was then ready to take on board and load from the factors or assigns of the defendant the said 1000 quarters of wheat in bulk, separate from the other part of the cargo, according to the form and effect of the said charter-party of affreightment in that behalf, and the said master did then give notice thereof to the correspondents of the defendant; and for the purpose of loading the same 1000 quarters of wheat at Riga aforesaid, the said brigantine did stay and lie there the aforesaid thirty-five running days, (t) commencing the next day following that on which the said master did so give notice to the correspondents of the defendant as aforesaid, and was during all that time ready to take on board and load, from the factors or assigns of the defendant, the said 1000 quarters of wheat in bulk as aforesaid, of all which premises the defendant then had notice; and although the plaintiff hath always, from the time of making the said charter-party of affreightment, hitherto well and duly performed, &c. [*General performance by plaintiff of the charter-party, as ante, 377.*] the plaintiff saith, that the defendant (although often requested so to do) did not nor would, within the said space of thirty-five running days, or at any time afterwards, load, or cause to be loaded, the said 1000 quarters of wheat on board the said brigantine at the town of Riga aforesaid, but wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said charter-party and of the said covenant of the defendant by him in that behalf made as aforesaid. And the plaintiff in fact saith, that the pilotage and port-charges in the said charter-party of affreightment mentioned amounted to a large sum of money, to wit, the sum of £——, whereof the defendant afterwards, to wit, on &c. had notice; nevertheless the defendant (although often requested so to do) hath not paid or cause to be paid to the said master or his order two-thirds of the said pilotage and port-charges, or any part thereof, but hath hitherto wholly neglected and refused so to do, and therein failed and made default, and the same and every part thereof still remains due and unpaid to the plaintiff, contrary to the form and effect of the said charter-party of affreightment and of the said covenant of the defendant by him in that behalf made as aforesaid, and so the plaintiff in fact saith &c. [*Conclude as ante, 371.*]

ON CHARTER-
PARTIES.

For that whereas heretofore, to wit, on &c. by a certain charter-party of affreightment then made, concluded, and fully agreed upon between the defendant therein described, and being the sole owner of the good ship or vessel called &c. and of the burthen of — tons or thereabouts, (of which E. F. was master,) of the one part, and the plaintiff of the other part, (one part of which said charter-party of affreightment, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) it was witnessed (amongst other things) that the defendant, for the considerations thereafter mentioned, had

By the freighter against the owner of a ship on a charter-party, stating part performance of the covenants, and breach as to residue, with special damage. (u)

(t) When the word "days" is used alone, it is said to mean working days by the custom of merchants in London; 3 Esp. Ni. Pri. Cas. 121; Abbott, 4th edit. 194; see 3 Chit. Com. Law, 426; but in the absence of any custom, Sundays are computed in the calcu-

lation; *Brown v. Johnson*, 10 M. & W. 331.

(u) See other precedents referred to, *ante*, 376, note (g). How far freighter may sue in action on the case where there has been a charter-party, see 6 J. B. Moore, 415, 425.

ON CHARTER-PARTIES.

The defendant covenants that the ship should be ready and provided, &c. and should proceed to a named port and there receive a cargo, &c.

granted and to freight letten, and by the said charter-party did grant and to freight let, unto the plaintiff, his executors, administrators and assigns, all that the said ship or vessel, and the whole use and benefit of the tonnage, stowage, and burthen thereof, with the use of her boats and appurtenances, (the master and mariners' customary privileges of the cabin, gun-decks, and steerage only excepted.) And the plaintiff had accordingly hired the same for the voyage therein and hereinafter mentioned, and therefore the defendant did thereby, for himself, his executors and administrators, covenant, promise and agree to and with the plaintiff, his executors, administrators and assigns, (amongst other things,) that the said ship should be made ready and provided in all respects for such a voyage; that the said ship's crew should consist of — men and boys, exclusive of the master; and that she should be got about to the port of &c. as soon as possible, where the master thereof should take into and on board of her all such goods, wares and merchandize, not exceeding her burthen, as the plaintiff, his factors or agents should think fit to load or tender to be put on board thereof, (contraband goods only excepted,) and should therewith, with all possible despatch, without convoy, proceed with her outwards to the port of &c. as aforesaid, to &c. and from thence to —, and should then discharge and deliver the same to such person or persons as the plaintiff, his factors or agents should direct; which done, the said charter-party should be considered to be performed; as by the said charter-party, reference being thereunto had, will, amongst other things, more fully and at large appear. And the plaintiff saith, that after the making of the said charter-party, to wit, on &c. the said ship or vessel, called &c. in the said charter-party mentioned, had been and was arrived, and that the said E. F. so being master thereof, did then take into and on board of the said ship or vessel, of and from the plaintiff, a certain cargo of goods, wares and merchandize, to be carried and conveyed therein from &c. aforesaid, to &c. aforesaid. And the plaintiff further saith, that the said E. F. so being master of the said ship or vessel as aforesaid, was then, to wit, on &c. ordered and directed by the plaintiff to proceed accordingly with the said ship or vessel and the said cargo on board thereof, from &c. aforesaid, to &c. aforesaid, and to land the said cargo, and to take another cargo on board of the said ship or vessel, that is to say, to receive wines on board thereof, to the address of the plaintiff and divers other persons; and that when the said E. F. should have completed his loading at &c. he was to proceed from thence to — in the West Indies, and there, to wit, at &c. to deliver to certain persons there, carrying on trade and commerce by and under the name, style and firm of &c. all the goods to the address of the plaintiff, and also his, the said E. F.'s bills of lading, that they might receive the freight there. And the plaintiff further saith, that the said E. F. master of the ship or vessel as aforesaid, having received the orders and directions aforesaid, afterwards, to wit, on &c. set sail and proceeded accordingly with the said ship or vessel, and the said cargo on board thereof, from the port of &c. aforesaid, to &c. aforesaid, and afterwards, to wit, on &c. arrived at &c. aforesaid, and there landed the said first-mentioned cargo, except a certain box of muslins part thereof, and that the said E. F. so being master of the said ship or vessel as aforesaid, did there take and receive on board thereof divers, to wit, — pipes of wine, being part of the cargo which he was so ordered and directed to take on board of the said ship as

aforesaid; and that the residue of the said last-mentioned cargo, consisting of divers, to wit, — pipes of wine, to the address of the plaintiff, and divers, to wit, — pipes of wine, to the address of divers other persons, were then ready and intended to be loaded in and on board of the said ship or vessel to be carried and conveyed therein, from &c. aforesaid, to &c. aforesaid, pursuant to the orders and directions aforesaid, whereof the said E. F. then had notice; but that afterwards, and before the said E. F. could receive or take residue of the said last-mentioned cargo in and on board of the said ship or vessel, for the purpose aforesaid, to wit, on &c. the said ship or vessel was, by the violence of the winds, and stormy and tempestuous weather, forced and obliged to and did depart from and out of the harbour of — aforesaid, without receiving or taking the said residue of the said last-mentioned cargo on board thereof; and although the said E. F. so being master of the said ship or vessel as aforesaid, afterwards, to wit, on &c. did return with the said ship or vessel near to — aforesaid, and could and might, and ought to have returned therewith into the said harbour of —, and to have there received and taken on board thereof the said residue of the said last-mentioned cargo, and to have proceeded with the said last-mentioned cargo from &c. aforesaid, to &c. aforesaid, pursuant to the orders and directions aforesaid; and although the plaintiff hath always from the time of the making of the said charter-party of affreightment hitherto well and truly performed, fulfilled and kept, all things therein contained on his part and behalf to be performed, fulfilled and kept, according to the tenor, effect, true intent and meaning thereof, yet the said E. F. so being master of the said ship or vessel as aforesaid, did not nor would (although often requested so to do) return with the said ship or vessel into the harbour of &c. aforesaid, and there receive and take on board the said ship or vessel the said residue of the said last-mentioned cargo, and proceed therewith from &c. aforesaid, to &c. aforesaid, pursuant to the orders and directions aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, he the said E. F. so being master of the said ship or vessel as aforesaid, afterwards, to wit, on &c. wrongfully set sail and proceeded with the said ship or vessel from &c. aforesaid, without receiving or taking, nor did nor would he receive or take on board thereof the said residue of the said last-mentioned cargo, but wholly refused and neglected so to do, contrary to the form and effect of the said charter-party of affreightment, and of the said covenant of the defendant so by him in that behalf made as aforesaid. Whereby the plaintiff not only lost and was deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to him from the said wines that were so ready and intended to be loaded on board of the said ship or vessel to the address of him the plaintiff as aforesaid, and was forced and obliged to and did freight another ship or vessel at a great and heavy expense to carry and convey the said last-mentioned wines from &c. aforesaid, to &c. aforesaid, but also thereby the plaintiff lost and was deprived of divers other great pains and profits, which might and would otherwise have arisen and accrued to him from the freight of the said wines that were so ready, and intended to be loaded on board the said ship or vessel to the address of the said other persons, and was and is, by means of the premises, other-

ON CHARTER-
PARTIES.

Averment that the vessel was obliged to leave a certain coast without completing her cargo.

That the vessel returned and might have received the residue of her cargo.

Yet the master of the vessel did not receive the rest of her cargo.

But wrongfully sailed without the same.

Whereby plaintiff lost the profits which he ought to have acquired.

ON CHARTER-PARTIES.

wise greatly injured and damnified, and so &c. [*Usual conclusion in covenant, as ante, 371.*]

Declaration against captain of a vessel as to convenience of passengers.

Declaration for breach of covenant of captain of a ship to do all acts essential for comfort and convenience of passengers, and law, Corbin v. Leader, 10 Bingh. 275.

VI. ON POLICIES OF INSURANCE.

VI. ON POLICIES OF INSURANCE AGAINST FIRE.

By executors of insurer against the secretary to British Fire-office, upon a policy on house and stock in trade on loss by fire after the death. (x)

Commencement in covenant against the secretary, stating him to be such, see ante, 27.] For that whereas heretofore, to wit, on &c. [*date of policy*], by a certain deed-poll or policy of insurance then made, and sealed with the respective seals of C. D. and E. F. directors of, and acting and duly authorized for and on the behalf of the society of the British Fire-office in London, (and which said deed-poll or policy, so sealed, the plaintiffs now bring here into Court, bearing date, to wit, the same day and year aforesaid,) after reciting that the said J. H. (now deceased) by the name and description of J. H. of &c., sugar refiner, had paid the sum of £—— to the society of the British Fire-office in London, and had agreed to pay, or cause to be paid, to the said society, at their said office, the sum of £——, on the —— day of ——, A. D. ——, and the like sum of £—— yearly, on &c. during the continuance of the said policy, assuring from loss or damage by fire, the sum of £——, on household goods and linen, wearing apparel, printed books and plate, in his dwelling-house, brick-built, situate &c. and being next to his sugar-house, but warranted not to communicate therewith, £—— on his said sugar-house, only having two pans therein, and £—— on stock in trade and utensils therein, £—— on utensils and stock in trade in the mill-house and rooms over, £—— on utensils and stock in trade in the stove at the end of the said mill-house; and the three last-mentioned adjoining and communicated brick-built buildings were warranted to have arched stoves with iron doors and no *coakels*, except what were in the stoves or inclosed in brick, and to have no metal pipes from the pan chimnies; it was declared that the said last-mentioned policy was to be void in case any Muscovado or clayed sugars should be dried in baskets in any stove or stoves on the premises aforesaid; and it was made known by the said last-mentioned deed-poll or policy, that from the date of the said policy until the —— day of ——, and so long afterwards as the said J. H. should duly pay or cause to be paid the sum of £—— yearly, at the time and place aforesaid, and the directors of the said society for the time being should agree to accept the same, the stock and fund of the said society should be subject and liable to pay or make good to the said J. H., his

(x) The 54 Geo. 3, c. 178, directs the action against this office to be against the secretary. For other forms on policies on loss by fire, see 3 Wentw. 386, 388, 403, 410, 411. On policies on ships and goods, see 3 Wentw. 378, 380; and see forms in assumption, *ante*, 132 to 158. For cases on this head, and exceptions taken in favour of the fire-offices, see 2 Hen. Bla. 577; 1 Hen. Bla. 254; 6 T. R. 710; 2 Marsh. on Insur. 601, n. a.

A general form of declaration in debt is given against the two public incorporated companies, by the 6 Geo. 1, c. 18, s. 4; 11 Geo. 1, c. 30, s. 43; 2 Marsh. 601; and see note, *ante*, 132. See precedent and cases collected in 6 J. B. Moore, 199, 201, n. As to when covenant will not lie, *id.*

Insurers are liable to compensate loss by felonious pillage of goods during fire; 7 Bing. 351.

executors and administrators, all such damage and loss which the said J. H. should suffer by fire happening to the aforesaid premises, not exceeding the sum of £— in the whole, or respectively as aforesaid; nevertheless it was thereby declared, that the said assurance was made and granted, subject to the several articles, stipulations and conditions specified in the printed proposals of the said society, dated the &c., and to two acts of parliament of the said 22d and 37th Geo. 3, charging a duty on property assured against loss by fire, which duty the said society had received to the — day of —, as by the said deed-poll or policy of assurance, reference being thereunto had, will more fully appear; and the plaintiffs in fact say, that the said printed proposals, in and by the said deed-poll or policy of assurance mentioned and alluded to, are as follow, that is to say: common insurance, article 1, buildings, the whole external walls, &c. [*Here insert such parts of the articles and conditions mentioned in the printed proposals as constitute a condition precedent verbatim.*] And the plaintiffs in fact further say, that the said J. H. in his life-time, at the time of the making of the said policy of insurance, and from thence until the death of him the said J. H. hereinafter mentioned, was interested in the said insured premises, goods, chattels, utensils, stock in trade and other effects in the said policy of insurance mentioned, and thereby intended to be insured, to a large amount, to wit, to the amount of £—, and remained and continued so interested therein from the making of the said deed-poll or policy of insurance until the death of the said J. H. hereinafter mentioned; and that the said J. H. being so interested in the said insured premises, goods, chattels, utensils, stock in trade and other effects, after the making the said policy of insurance, to wit, on &c. [*day of death or about it*] died so interested therein, having first duly made and published his last will and testament in writing, whereby he constituted and appointed the plaintiffs executors thereof; and the plaintiffs further in fact say, that after the decease of the said J. H., to wit, on the day and year last aforesaid, they the plaintiffs duly proved the said last will and testament of the said J. H., deceased, and took upon themselves the burthen and execution thereof, and thereby then became and were possessed of and interested in the premises, goods, chattels, utensils, stock in trade and effects so insured as aforesaid, as the personal representatives of the said J. H., deceased; and being so possessed thereof and interested therein, the interest in the said policy was afterwards, by a certain memorandum or indorsement, duly made on the said deed-poll or policy of insurance, on &c., duly declared to have become the property (z) of the plaintiffs, as the personal representatives of the said J. H., deceased, as by the said deed-poll or policy of insurance, with the said indorsement thereon, reference being thereunto had, will more fully appear; and the plaintiffs further say, that they the plaintiffs, after the decease of the said J. H. and after the making of the said indorsement on the said policy as aforesaid, and from thence until the loss and damage hereafter mentioned, were interested in the said insured premises, goods, chattels, utensils, stock in trade and effects in the said policy mentioned, and thereby intended to be insured

ON POLICIES OF INSURANCE.

Reference to policy.

Statement of the proposals referred to in the policy. (y)
Interest of the insurer.

The will and death of insurer.

Plaintiffs prove the will.

Indorsement on policy of plaintiffs having become interested.

(y) As to the necessity for stating these, see 3 Bing. 315.

(z) This is a stipulation in the printed proposals of all the insurance offices. But,

strictly, as a policy is a *chase in action*, it is not assignable; see 2 Marsh. 696. The plaintiff would, as executor, have the interest.

ON POLICIES OF INSURANCE.	to a large amount, to wit, to the amount of £——, and that the said household goods, linen, wearing apparel, printed books and plate, in the said dwelling-house and the said sugar-house, and pans, stock in trade and utensils therein, and the said utensils and stock in trade in the said mill-house and rooms over, and the said utensils and stock in trade in the said stove at the end of the said mill-house in the said deed-poll or policy mentioned, afterwards, to wit, on &c. [<i>day of fire or about it</i>] were burnt down and consumed and destroyed by fire, which did not happen by invasion, foreign enemy, riot, tumult, civil commotion, or any military or usurped power, whereby the plaintiffs then sustained damage and loss to a large amount, to wit, to the amount of the said sum of £——, so assured on the said premises, goods, chattels, utensils, stock in trade and effects so burnt and consumed; and the plaintiffs further say, that the said premises, buildings, goods, chattels, utensils, stock in trade and effects in the said deed-poll or policy mentioned, at the time of making the said deed-poll or policy, were not, nor at any time since have been, insured in any other office, except the said building of the said sugar-house, to the amount of £——; and the said utensils and stock in trade, to the amount of £——, in the Imperial Fire-office, by virtue of a certain policy of insurance made heretofore, to wit, on &c.; and the plaintiffs further say, that afterwards, to wit, on the day and year last aforesaid, the said C. D. and E. F. and the said society wholly waived, relinquished, released and discharged the plaintiffs from the observance and the performance of the said second condition of the said insurance; and the plaintiffs in fact further say, that the said premises, buildings, goods, chattels, utensils, stock in trade and effects in the said deed-poll or policy mentioned, were duly described, and not otherwise than they really were, or so as to cause the said insurance to be effected upon a lower premium than ought to have been; and that the plaintiffs did forthwith, after the loss and damage, to wit, on the — day of — aforesaid, give notice thereof to the said society, at the said British Fire-office in London; and also as soon after as possible, to wit, on &c., did deliver in an account stating the particulars of such loss on their oath, and were ready and willing to prove the same by the production of their books, and such other documents and vouchers as the said board of directors should reasonably require, and did afterwards, and within the space of three months next after such loss and damage, to wit, on the day and year last aforesaid, claim of and from the said society the amount of such loss and damage; and the plaintiffs further in fact say, that the premium or sums of money and duty in the said deed-poll or policy of assurance mentioned, were, from the time of making the said deed-poll and policy until the time of the loss hereinbefore mentioned, duly paid to and accepted by the said society, at the time and place and in manner and form in the said deed-poll or policy in that behalf mentioned; and that the said deed-poll or policy, at the time of the said loss, was and remained in full force; and the plaintiffs in fact further say, that the said dwelling-house in the said last-mentioned deed-poll or policy of assurance mentioned did not, at any time whilst the said deed-poll or policy remained in force, communicate with the said sugar-house and street; the said sugar-house during that time had only two pans therein; and that no Muscovado or clayed sugars were during that time dried in baskets in any	
Loss by fire.		
The premises not insured at any other office, except, &c.		
Defendants waive performance of second condition. (a)		
Averments that property insured was duly described.		
Plaintiffs gave notice of loss, and delivered an account of loss and claims.		
Premium duly paid.		
Other averments.		

(a) As to a waiver by parol, see 8 T. R. 280.

stove or stoves on the said premises ; and the plaintiffs in fact further say, that the said *three* buildings in the said deed-poll or policy last-mentioned, at the time of the making thereof, and while the same continued in force, had arched stoves with iron doors, and had no coakels, except what were, at the time of the making of the deed-poll or policy, in the said stoves, or inclosed in brick, nor any metal pipes from the pan chimnies ; and the plaintiffs further say, that although they the plaintiffs have in all things conformed themselves to and observed all and singular the said articles, stipulations, conditions, matters and things, which on their part were to be observed and performed according to the form and effect of the said deed-poll or policy and of the said proposals ; and that although the said stock and fund of the said society always, from the time of the making of the said deed-poll or policy, hitherto have been and yet are sufficient to pay to the plaintiffs the said damage and loss sustained by the said fire ; Yet the plaintiffs further say that they have not, out of the stock and fund of the said society, or in any other manner, been paid or made good their said damage and loss, or any part thereof, but the same, and every part thereof, are wholly unpaid and unsatisfied to them, contrary to the force and effect of the said deed-poll or policy and of the covenant of the said C. D. and E. F. and the said society therein, in that behalf, made as aforesaid. And so the plaintiffs say, that the said C. D. and E. F. and the said society (although often requested) have not kept with them the plaintiffs the covenant made between them and the said J. H. deceased, in that behalf as aforesaid, but that the said C. D. and E. F. and the said society have broken the same, and to keep the same with the plaintiffs have hitherto wholly refused, and still do refuse ; To the damage of the plaintiffs of £—, and thereupon they bring suit, &c.

ON POLICIES OF
INSURANCE.

Plaintiffs' general performance.

Funds of society sufficient to pay plaintiffs.

Breach, non-payment of account of loss.

ON POLICIES ON LIVES.

ON POLICIES
ON LIVES.

That whereas heretofore, to wit, on &c., by a certain instrument or policy of assurance then made (one part of which instrument or policy of assurance, sealed with the common seal of the said corporation, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) it was witnessed, that the said corporation of the Royal Exchange Assurance in London, in consideration of the sum of £48 of lawful &c. paid into their treasury by the plaintiff, the receipt whereof was thereby acknowledged, did for themselves, their successors and assigns, agree to pay to the plaintiff, her executors, administrators and assigns, the sum of £— within three months after good and sufficient proof should be made upon oath or otherwise, to the satisfaction of the said Royal Exchange Assurance, of the death of the said W. B., of the town and county of P. aforesaid, then warranted in good health, (c) and not exceeding the age of thirty-five years, in case the said

Covenant on a policy on a life against Royal Exchange Company. (b)

(b) It is best in general to declare in debt, *ante*, 308 ; see forms in assumpsit, *ante*, 153 ; as to the legality of this species of insurance, see 2 Marsh. 665, 666. The insured must have an interest in the life of the persons insured, or such insurance will be void ; 14 Geo. 3, c. 48, s. 1. What interest is sufficient ; 2 Marsh. 672 to 676 ; Hughes on Insurance, *ante*, 153. If a creditor, who has insured, be paid a debt by the executor of his debtor, the policy, which was only a contract of indemnity to the creditor, ceases to be opera-

tive ; 9 East, 72.

(c) This warranty is not falsified by proof of the insured having laboured under a particular infirmity, provided it did not tend to shorten life ; 2 Marsh. 667. See the later cases as to what is fraud and concealment, 8 B. & C. 586 ; 5 Bingh. 503 ; 9 B. & C. 693. If there be no warranty, the insurer takes all risks upon himself, unless there be fraud or concealment ; *ibid.* 670 ; Park, 437 ; Hughes on Insurance.

ON POLICIES
ON LIVES.

Reference to
policy.

W. B. should die before twelve of the clock at night on the — day of —, which should be in the year —, or whenever the death of the said W. B. should happen, provided the plaintiff, or her executors, administrators, or assigns, should continue to pay yearly and every year during the term of that assurance the like sum of £— on or before the — day of — in every year; provided always, that if the said W. B. should at any time or times before the expiration of that policy depart beyond the limits of Europe, or should die upon the seas, that policy should cease and be of no effect, unless such departure should be with the previous consent of the said Royal Exchange Assurance Company, signified in writing by indorsement thereon; provided also, that if the said W. B. should at any time during the continuance of that insurance enter into or engage in any military or naval service whatsoever, without the previous consent of the said Royal Exchange Assurance Company, signified as aforesaid, that then in every such case the said policy should from thenceforth cease and be void to all intents and purposes whatsoever; as by the said instrument or policy of assurance (reference being thereunto had) will (amongst other things) more fully and at large appear: And the plaintiff in fact saith, that at the time of making the said instrument or policy, and from thence until the time of the death of the said W. B. hereafter mentioned, she, the plaintiff, was interested in the life of the said W. B. to a large amount, to wit, the amount of all the monies by her ever insured or caused to be insured thereon; and the plaintiff further saith, that at the time of making the said instrument or policy of insurance, the said W. B. was in good health, and did not exceed the age of — years, and that afterwards, and within the space of one year next after the making of the said instrument or policy of assurance, to wit, on &c., he the said W. B. died, and that he the said W. B. in his life-time did not depart beyond the limits of Europe, or die upon the seas, nor did he the said W. B. in his life-time enter into or engage in any military or naval service whatsoever, of all which said several premises the said corporation of the Royal Exchange Assurance, afterwards, to wit, on &c., last aforesaid, had notice; and although good and sufficient proof was then made to the satisfaction of the said Royal Exchange Assurance of the death of the said W. B., and the plaintiff hath always from the time of making the said instrument or policy of assurance performed and fulfilled all things contained on her part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof, the plaintiff in fact saith, that the said corporation of the said Royal Exchange Assurance (although often requested so to do) did not nor would, within three months after such proof was so made as aforesaid of the death of the said W. B. or at any time afterwards, pay to the plaintiff the said sum of £— or any part thereof, but hath hitherto wholly refused and neglected so to do, and therein failed and made default, contrary to the form and effect of the said instrument or policy of assurance and of their said covenant by them in that behalf made as aforesaid, and so, &c. [*Usual conclusion, as ante*, 371.



VII. ON DEEDS OF SALE.

VII. ON DEEDS
OF SALE.

For that whereas heretofore, to wit, on &c., by a certain indenture then made between one T. W. of the first part, the defendant, and M. his wife, of the second part, and the said A. B. now deceased, of the third part, (which said indenture, sealed with the seal of the said T. W. defendant, and M. his wife, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid, after reciting as therein recited,) it was witnessed, that in consideration of the sum of £300 paid by the plaintiff, at the request of the defendant and M. his wife, to the said T. W. on discharge of a certain mortgage debt of £300, and of £855 paid to the defendant and M. his wife, the said T. W. by the direction and appointment of the defendant and M. his wife, did bargain, sell, assign, alien and release, and the defendant and M. his wife, did grant, bargain, sell, alien, release and confirm unto the said A. B. deceased, and his heirs and assigns, a certain messuage or tenements, closes, lands, grounds, hereditaments and premises, with the appurtenances, situate and being in the parish of &c., and in the said indenture particularly mentioned and described, to have and to hold the same unto and to the use of the said A. B., his heirs and assigns for ever; and the defendant, for himself and for the said M. his wife, and for their and each of their heirs, executors and administrators, did, in and by the said indenture, covenant, promise, grant and agree to and with the said A. B. now deceased, his heirs and assigns, (amongst other things) in manner following; (that is to say) that the defendant and M. his wife, and their heirs, and all and every other person or persons having or lawfully claiming, or who should or might at any time thereafter have or lawfully claim any estate, right, title, trust, interest, at law or in equity, of, into, or out of the said messuage or tenement, closes, lands, grounds, hereditaments and premises thereby granted and released, or any part thereof, should and would, from time to time, and at all times thereafter, upon every reasonable request, and at the proper costs and charges in the law of the said A. B., his heirs or assigns, make, do and execute, or cause and procure to be made, done and executed, all and every such further and other lawful and reasonable act and acts, thing and things, conveyances and assurances in law whatsoever, for the further, better, more perfect and absolute granting, conveying and assuring of the said messuage or tenement, closes, lands, grounds, hereditaments and premises thereinbefore mentioned, to be thereby granted and released and confirmed, with their and every of their appurtenances, unto and to the use of the said A. B. deceased, his heirs and assigns for ever, as by the said A. B. deceased, his heirs or assigns, or his or their counsel learned in the law, should be reasonably devised or advised and required, so as such further assurances should contain in them no further or other warranty or covenant than against the person or persons, and his and their heirs, who should make or do the same, and so as the party or parties who should be

Covenant by heir of purchaser from husband and wife of land of the wife, against the executor of the husband, on the covenant for further assurance, and that the vendor and wife would, levy a fine. (d)

Defendant's covenant.

(d) Though the breach of covenant for further assurance happened in the time of the testator, yet the damage having accrued to the heir, he has a preferable title to the executor to bring the action of covenant; see this

case, 1 Marsh. 107; 1 M. & Sel. 335; as he, in respect of the real estate, represents his ancestor just as the executor does with regard to the personal property; see *ante*, vol. i. chap. 1, as to when an heir may sue.

DECLARATIONS IN COVENANT.

ON DEEDS OF SALE.	so requested to make such further assurances should not be compelled or compellable, for the making or doing thereof, to go or travel from his, her, or their respective places of abode or dwelling, as by the said indenture (reference being thereunto had) will (amongst other things) more fully and at large appear; by virtue of which said grant and conveyance the said A. B. deceased, in his life-time, afterwards, to wit, on &c., entered into the said messuage or tenement, closes, lands, grounds, hereditaments and premises, with the appurtenances, and became and was seised thereof in his demesne as of fee, and being so seised thereof as aforesaid, he the said A. B. deceased, afterwards, to wit, on &c., died so seised of the said premises, with the appurtenances as aforesaid, whereupon and whereby all the estate and interest of the said A. B. deceased, of and in the said messuage, tenements, closes, lands, grounds, hereditaments, and premises, with the appurtenances, then descended and came to the plaintiff as son and heir of the said A. B. deceased, and thereby the plaintiff then became and was seised of the said tenements, with the appurtenances, in his demesne as of fee, and so remained and continued so seised thereof until the time of his being disseised and dispossessed thereof as hereinafter mentioned: and although &c.,
Reference to indenture.	[<i>state plaintiff's general performance, and defendant's general non-performance,</i>] saith that the said A. B. in the said indenture mentioned, and now deceased, in his life-time, for the better, more perfect, and absolute granting, conveying, and assuring of the said messuage or tenements, closes, lands, grounds, hereditaments, and premises, in the said indenture mentioned, did afterwards, to wit, on &c., request the defendant and M. his wife, at the proper costs and charges in the law of the said A. B. to levy a fine to pass the estate of the said M. his wife legally to the said A. B. deceased, his heirs and assigns; yet the defendant and M. his wife, before their decease, did not nor would, at the proper costs and charges in the law of the plaintiff, or otherwise, when they were so requested, or at any time before or afterwards, levy a fine for the purpose aforesaid, but wholly refused and neglected so to do, contrary to the tenor and effect, true intent and meaning of the said indenture and of the said covenant of the defendant in that behalf so made as aforesaid. By means whereof, afterwards, and after the death of the said A. B. deceased, and before the commencement of this suit, to wit, on &c., one I. J. the devisee of the said M. by reason of no such fine having been levied as aforesaid, having a lawful right and title to the said tenements and hereditaments, with the appurtenances, (and not a title derived by or from either the said A. B. deceased, or from the plaintiff,) entered into the same in and upon the possession of the plaintiff, against his will, by due process of law, and from the possession and occupation of the aforesaid tenements and lands hath from thence hitherto lawfully kept and continued, and still lawfully keeps and continues the plaintiff so expelled from his possession thereof, contrary to the said covenant of the defendant by him above made for himself and the said M. his wife, their and each of their executors, administrators and assigns, with the said A. B. deceased; and so the plaintiff in fact says, that &c. [<i>Common conclusion as ante</i> , 371.]
Breach, not levying a fine.	

See another form, 3 B. & Adol. 742.

Vendee against
vendor for

For that whereas, in the life-time of the said E. F., to wit, on &c., by a

certain indenture made between one G. H. and I. K. his wife, the defendant, and D. R. of the first part, one I. L. of the second part, and the said E. F. of the third part, one part of which said indenture, sealed, &c. [*profert*] the said G. H. and I. K. his wife, defendant, and D. R., for the consideration therein mentioned, did grant and release to the said E. F. (in his actual possession then being, by virtue of a certain bargain and sale to him thereof made by the said G. H. and I. K. his wife, defendant, and D. R. in consideration of 5s. a-piece, by indenture, bearing date the day next before the day of the date of the said indenture brought into Court, for one whole year, and by virtue of the statute made for transferring uses into possession,) and to his heirs and assigns, certain messuages, tenements, and lands, with the appurtenances, commonly called or known &c., situate &c., and all other the messuages, tenements, lands, hereditaments, and premises whatsoever of them the said G. H. and I. K. his wife, defendant, and D. R. or any or either of them, situate and being &c., together with all and singular the houses, out-houses, &c., hereditaments, and premises whatsoever, to the said messuages, lands, tenements, and hereditaments, and premises, thereby granted or released, or thereby meant, mentioned, or intended so to be, belonging or in anywise appertaining to the same, then, or at any time or times theretofore usually held, used, occupied, enjoyed or accepted, reputed or known, or taken for part, parcel, or member thereof, or as belonging thereto, to have and to hold the said premises, with their and every of their appurtenances, unto and to the use of the said E. F. his heirs and assigns for ever. And the defendant did, by the said indenture now brought into Court here, for himself, his heirs, executors, and administrators, covenant, promise and agree, to and with the said E. F. his heirs and assigns, amongst other things, in manner following, that is to say, that the said E. F. his heirs and assigns, should and might, from time to time, and at all times for ever thereafter, peaceably and quietly enter into, have, hold use, occupy, possess, and enjoy all and singular the said purchased hereditaments and premises, thereinbefore mentioned to be thereby granted and released as aforesaid, or meant or intended so to be, and every part and parcel thereof,

ON DEEDS OF
SALE.

breach of covenant for good title, stating that plaintiff was ejected by third person, and incurred great expense. (e)

Defendant's
covenant for
title.

(e) As to the construction of covenants for good title, and what a breach, see 2 Saund. 175 to 183, and notes; 11 East, 633; 15 East, 530; Dyer, 240; 2 B. & P. 13; 3 J. B. Moore, 703; 3 B. & C. 29, 459; 2 J. B. Moore, 592; 8 Taunt. 543, S. C.; 3 B. & Ald. 392. As to what is a breach of quiet enjoyment, see 4 B. & C. 261; see precedent, and as to who may sue, 3 J. B. Moore, 35; see also precedent and law, McCl. & You. 647. The plaintiff must state in his declaration in some manner that the person evicting had a lawful title before or at the time of the date of the grant to the plaintiff, and an averment that he had a lawful title without those additional words is too general. But there is no necessity to set out such title, it is sufficient to allege that "he had a lawful title at the time of the conveyance to the plaintiff," see 2 Saund. 177, 180; 1 Show. 70; 2 Lev. 37; 3 Lev. 325; Hardr. 172; 4 T. R. 617; 8 T. R. 278, &c.; Cro. Jac. 315; 1 Sid. 466; McCl. & You. 647. It is not necessary to state that plaintiff was evicted by legal process, 4 T. R. 617, 620; though some lawful eviction or disturbance must be shown if

done by a stranger, Hob. 12; Cro. Eliz. 914, &c. But where the covenant is that the grantee, lessee, &c. shall quietly enjoy, without the let or interruption of the covenantor himself, his heirs or executors, it is sufficient to allege that he or heirs or his executors entered, without showing it to be a lawful entry, or setting forth his title to enter; 2 Roll. Rep. 21; Fitz. Nat. Br. 342; Cro. Jac. 383; 1 T. R. 671. However, some particular act must be shown by which the plaintiff is interrupted, for otherwise the breach of a covenant or condition for quiet enjoyment is not well assigned; Com. Rep. 228; 8 Rep. 91 a. b.; 2 Saund. 181 b. But in an action of covenant "that the grantor has good right, full power, and lawful authority to grant," it was held that the breach might be as general as the covenant, namely, "that he had not good right, full power, and lawful authority to grant," without stating any eviction or interruption; 9 Co. Rep. 60 b; and see 2 Saund. 181 b, c. As to the mode of alleging the stranger's title, see 1 Show. 70; 2 Lev. 37; 3 Lev. 325; 4 T. R. 617, &c.; 2 B. & P. 14, n. b.

ON DEEDS OF
SALE.Reference to
indenture.Defendant's
breach of co-
venant.

with the appurtenances, and the rents, issues, and profits thereof, and of every part thereof, should and might, from time to time, and at all times thereafter, have, receive, and take, to and for his and their use and benefit, without the lawful let, suit, trouble, claim or demand, entry, eviction, ejection, molestation, hindrance, interruption, or disturbance whatsoever, of or by the said G. H. and I. K. his wife, defendant, and D. R. or any or either of their heirs or assigns, or for or by any other person or persons whatsoever; and that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise by the said G. H. and I. K. his wife, defendant, and D. R. and each of them, their and each of their heirs, executors, and administrators, well and sufficiently saved, defended, and kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, settlements, jointures, dowers, right and title of dower, thirds at common law, entries, uses, tenements, wills, legacies, statutes merchant, and of the staple, recognizances, judgments, executions, elegits, extents, rents, arrears of rent, annuities, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts upon bonds and of record, debt due to the queen's majesty, and of, from, and against all other estates, titles, troubles, charges, and incumbrances whatsoever, save and except the chief rent issuing out of or payable for the said premises to the lord or lords, fee or fees of the same, if any such should be due, as by the said indenture, reference being thereunto had, may more fully appear. And the plaintiff further says, that the said E. F. in his life-time, and the plaintiff, from the time of the death of the said E. F. [*Plaintiff's general performance.—Averment of defendant's general non-performance.*] The plaintiff in fact saith, that the plaintiff, so being the heir of the said E. F. as aforesaid, hath not been permitted, neither hath he been able, from time to time, and at all times, from the death of the said E. F. peaceably and quietly to have, hold, use, occupy, possess, and enjoy the said hereditaments and premises in the said indenture mentioned, and thereby intended to be granted and released, or any part thereof, nor hath he been permitted or been able, from time to time, and at all times since the death of the said E. F., to have, receive, and take the rents, issues, and profits of the said premises, to and for his own proper use and benefit, without lawful let, suit, trouble, entry, eviction, and ejection of any person; but on the contrary thereof, after the death of the said E. F. one M. H. widow, who, at the time of making the said indenture hereinbefore set forth, and continually from thence until and at the time of the eviction, ejection, and expulsion hereinafter mentioned, had, and who still hath, lawful right and title (*f*) to the said premises, with the appurtenances, did enter into the same, in and upon the possession of the said tenements, and ejected, expelled, and removed the plaintiff, against the will of the plaintiff, by due process of law, from the possession and occupation of all and every the premises, with the appurtenances, and every part thereof, and kept and held out, and still keeps and holds out, him the plaintiff, so thereby expelled from his possession and occupation thereof, contrary to the form and effect of the said indenture, and of the said co-

(*f*) See *ante*, note (*e*). As to what is a breach of covenant for title against the acts &c. of the vendor and those claiming under him, see *Stainiard v. Lock*, 6 A. & E. 972.

Where eviction is the breach assigned, it must not be matter of doubt whether the evictor derived title from the plaintiff himself; *Brooks v. Humphreys*, 5 Bing. N. C. 55.

tenant of the defendant, so by him made in that behalf as aforesaid; by reason of all which said premises the plaintiff hath not only entirely lost and been deprived of the said messuage, tenement, and land, with the appurtenances, in the said indenture particularly mentioned, and of divers large sums of money, amounting in the whole to a large sum of money, to wit, &c., by him the plaintiff laid out and expended in and upon the said premises, in repairing, amending, and improving the same, but hath also been obliged to pay the costs and charges sustained by the said M. H. widow in prosecuting a certain action of ejectment for the recovery thereof, which amounted to a large sum of money, to wit, &c., and hath been further compelled and obliged to sustain and undergo, and hath actually sustained and undergone the payment of divers large sums of money, amounting in the whole to £——, in and about the endeavouring to defend such action of ejectment. And so &c. [*Add usual conclusion, as ante, 371.*]

ON DEEDS OF SALE.

Whereby plaintiff deprived of the estate and of the value of improvement.

Plaintiff obliged to pay costs of action of ejectment, &c.

VIII. ON MORTGAGE DEEDS.

Declaration on a mortgage deed for non-payment of principal money and interest, and law; 10 Bing. 545. It is now usual to declare in debt on a mortgage deed; ante, 313; and from which form a declaration in covenant may be easily framed.

VIII. ON MORTGAGE DEEDS.

IX. ON LEASES.

Commencement, ante, 13.] For that whereas heretofore, to wit, on &c. [date of lease,] (h) (i) by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part, (k) [state the parties to the indenture according to the fact] (the counterpart (l) of which said indenture, sealed with the seal of the defendant, the plaintiff brings into Court, the date whereof is the day and year aforesaid,) the plaintiff (m) did demise, (n) lease, set and to farm let, [according to the words in

IX. ON LEASES.

By lessor against lessee for rent. (g) Profert.

The demise.

(g) See other forms of declaration on leases, *Lit. Est.* 130, 135, 138, 139, 141, 143, 132; 2 *Rich. C. P.* 181, 189; *Pl. Ass.* 313, 340. By executor of lessor, a termor, against lessee for rent due since death; *Baker v. Gosling*, 1 *Bing. N. C.* 19. As to the parties to the action, see *ante*, vol. i. Index, "Lease." In action by lessor the plaintiff need not state any inducement of his title to the premises, and if it be stated it would be rejected as surplusage, but such inducement is necessary and unavoidable in an action by the assignee of lessor; 4 *J. B. Moore*, 303; see also 1 *D. & R. N. P.* Rep. 1; *post*, 393.

(h) A deed may be stated in pleading to have been made on a day different from its date, omitting the words, "bearing date" &c.; 4 *East*, 477; but it is most usual to insert the date.

(i) As to the venue in covenant on leases in general, see *ante*, vol. i. Index, tit. "Declaration," "Venue." In covenant by lessor against lessee, the venue is always transitory, but it is local against the assignee of the lessee.

(k) It is not necessary or advisable to state the addition of the parties.

(l) If both parts of the deed be originals, that is, signed by all the contracting parties, say, "one part of which said indenture," &c. It is no variance if the plaintiff make profert of the said indenture, and at the trial produce the counterpart executed only by the lessee; 3 *B. & Adol.* 396. A profert, or an excuse for the want of it, must in general be stated, or the declaration will be bad on special demurrer; 4 *Anne*, c. 16. If a profert be stated and the deed cannot be produced, the plaintiff will be nonsuited, on the plea of *non est factum*; 4 *East*, 585. As to proferts in general, see 1 *Saund.* 9, n. 1; *ante*, 316; Index, vol. i. tit. "Profert."

(m) If the plaintiff will unnecessarily state any part of an entire consideration, he must state the whole; 2 *B. & Ald.* 766; 1 *Chit. Rep.* 518, S. C.

(n) The lease generally runs, "hath demised," &c. and "doth demise," &c.; the last words only are to be stated in the past tense, and every other part of the lease re-

ON LEASES.	<i>the lease</i>]	unto the defendant, his executors, administrators and assigns, a certain messuage or dwelling-house, tenements and premises, with the appurtenances, particularly mentioned and described in the said indenture, (o)
The premises.		
The habendum.	(except as in the said indenture is excepted)	to have and to hold the said messuage or dwelling-house, tenements and premises, with the appurtenances, (except as aforesaid) unto the defendant, his executors, administrators and assigns, from the — day of — then last past, to the full end and term of — years thence next ensuing and fully to be complete and ended [<i>let this be according to the words of the lease.</i>] Yielding and paying (p) therefore, yearly and every year, to the plaintiff, his heirs, [or "executors, administrators," <i>as in indenture</i>] or assigns, the clear yearly rent or sum of £— payable quarterly, at the four most usual feasts or days of the payment of rent in the year, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by even and equal portions [<i>let this be according to the words in the lease.</i>] And the defendant did thereby for himself, (p) his executors, administrators and assigns, covenant, promise and agree, to and with the plaintiff, his heirs (q) [or "executors, administrators," <i>as in indenture</i>] and assigns, that the defendant, his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the plaintiff, his heirs [or "executors, administrators," <i>as in indenture.</i>] or assigns, the said yearly rent or sum of £— at the several days and times aforesaid [<i>let this be according to the words of the covenant.</i>] (r) As by the said indenture, reference being thereunto had, will (amongst other things) more fully appear. (s) By virtue of which said demise, the defendant afterwards, to wit, on &c. entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid. (t)
The reddendum. (p)		
The covenant to pay rent. (p)		
Reference to lease.		
Lessee's entry.		

cessary to be stated is to be set forth in general in the past tense, and according to the legal effect; in a declaration "*the testatum existit*," or, "it is witnessed, &c. that A. B. demised," is sufficiently certain, though not in a plea; see *ante*, vol. i. Index, tit. "*Testatum Existit*;" 1 Saund. 274, n. 1; Lord Raym. 1539; 1 B. & C. 358.

(o) It is proper, when the description of the premises is very long, to say, "*certain tenements, hereditaments, and premises with the appurtenances particularly mentioned and described in the said indenture*," and in order to avoid variance, it is advisable not to state the abutments, or any other very particular description; 1 Saund. 233, n. 2; 2 Saund. 366, n. 1; 9 East, 188; 4 Taunt. 700. Indeed the Court will censure the statement of any superfluous matter; Cowp. 665, 727; Dougl. 667. If, however, the action is for not repairing buildings, ditches, &c. it is not unusual to state such the premises as in the indenture. A declaration stating the demise to have been of "a certain *farm and buildings*, and certain pieces and parcels of land, particularly mentioned and described in the said indenture," supports a demise "of all that farm or land, and buildings," &c. enumerating the parcels; 1 Yo. & Jerv. 2; and a declaration stating the demise to have been of lands, supports a demise of one piece of land only; 6 M. & Sel.

116. As the rent issues out of the realty, if the demise be of a house and furniture, the latter need not be noticed; 6 B. & C. 251; and see *Ward v. Smith*, 11 Price, 19, as to fixtures.

(p) If a declaration profess to set out the terms of a reservation of rent in an action of debt for the rent, it is a variance to omit an exception referring to a subsequent proviso, by which a deduction is to be made if a certain event happen, although that event have not happened; 6 B. & C. 431. As to when covenants are conditional only, in consequence of another distinct covenant, restraining the general covenant to pay, see 6 M. & Sel. 9.

(q) The words of the lease and covenant are in general to be set out *verbatim*, though indeed the legal effect of those words would suffice. When the lessor is seized in fee, the covenants are with him, and "his heirs and assigns;" but if he be only a termor, they are with him and "his executors, administrators and assigns."

(r) No unnecessary covenant or other irrelevant parts of the deed should be stated; 1 Saund. 233, n. 2; 2 Saund. 366, n. 1; Pl. Ass. 314; *supra*, n. (o).

(s) The reference to the lease is not necessary.

(t) In an action against a lessee for years,

And although the plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture; (u) Yet (x) the plaintiff saith that after the making of the said indenture, and during the said term thereby granted, to wit, on (y) &c. a large sum of money, to wit, the sum of £— (z) of the rent aforesaid, for — years and a half of the said term, ending on the day and year last aforesaid, and then last elapsed, (a) became and was due and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant (b) of the defendant, by him in that behalf so made as aforesaid. And so the plaintiff in fact saith. (c) [Conclusion as ante, 371.]

ON LEASES.

Plaintiff's general performance.

Particular breach, non-payment of rent.

Usual conclusion.

Commencement in covenant as usual, ante, 13. For that whereas heretofore, to wit, on &c. [date of lease] by a certain indenture then made between the plaintiff of the one part and the defendant on the other part, [state the parties to the indenture according to the fact] (the counterpart (e) of which indenture, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the same day and year aforesaid,) the plaintiff for the considerations therein mentioned did demise, lease, set and to farm let [as in the lease] unto the defendant, his executors, administrators and assigns, a certain messuage, tenements and premises, with the appurtenances more particularly mentioned and described in the said indenture. (f) [Then proceed to set out the covenants broken, taking care to set out

Lessor against lessee for not repairing. (d)

it is not necessary to allege an entry; 1 Saund. 203, n. 1; Com. Dig. Pleader, 2 W. 14; Dougl. 455; 7 East, 341; 11 Co. 52 b; and even against the assignee of the lessee such averment seems unnecessary; 1 Lord Raym. 367; 3 J. B. Moore, 527; 1 B. & B. 238, S. C.; see Woodfall's Law of Landl. and Ten. by Harrison; 7 East, 340, n. (a). When stated it should be alleged that the entry was after the right to occupy commenced. An entry of a tenant at will must be stated; 1 Ld. Raym. 171; and see 3 J. B. Moore, 527, as to the necessity of stating an entry.

(u) This averment of general performance by the plaintiff is unnecessary; but it may be advisable to insert it, as it might after verdict cure an omission of averment of performance of a condition precedent; 1 Saund. 235, n. 5; Rep. temp. Hardw. 343, 344; 2 Mod. 300. If there be a condition precedent, performance must be specially shown, as in the form, post, 397; see ante, vol. i. Index, tit. "Declaration."

(z) There is no occasion for a protestation or allegation in this place of the general non-performance of covenants by the defendant; the declaration may proceed at once to the material averments, and the particular breach for which the action is brought.

(y) The day on which the rent fell due. It does not seem necessary, in an action of covenant for rent, to show when it fell due, and a mistake in the statement would, it seems, be immaterial; see 4 B. & C. 157,

infra. In A. D. 1826, the Court of K. B. on special demurrer, held that a mistake in the day was not material. In debt on a demise, it is necessary to state when the rent fell due, Gilb. Debt. 407; Show. 8; Vin. Ab. Covenant, L. a. pl. 12.

(x) The plaintiff is not bound to prove the precise sum stated to be due.

(a) That there is no occasion to say, "then last elapsed;" see 4 B. & C. 157; 6 D. & R. 72, S. C. In that case, where one of five tenants in common brought covenant on a lease for rent payable on the four most usual days of payment in the year, and the breach was, that on the 24th day of June, 1824, a large sum of money, to wit, the sum of £21. 15s., one fifth part of the rent for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear; it was held good upon special demurrer.

(b) The breach may be in the negative of the covenant generally; 3 T. R. 307; or according to the legal effect; 1 Saund. 235, n. 6. As to the averments, and the statement of the breach in general, see ante, vol. i. Index, tit. "Declaration," "Breach."

(c) See ante, 371; 1 Saund. 235, n. 7.

(d) See the notes to the preceding form, and notes to form, post; see also Wright v. Goddard, 8 A. & E. 144; and see Green v. Eales, 1 G. & D. 468, for a form of declaration against lessor for not repairing outer walls.

(e) See ante, 391, n. (1).

(f) See ante, 392, n. (o).

ON LEASES.	<i>any covenant constituting a condition precedent to defendant's performance of his covenant, and afterwards averring a performance of it, and which may be as in the form, post. The following is the usual form of the covenant to repair, but the declaration must agree with the terms of the covenant in the indenture declared on.]</i> And the defendant did, in and by the said indenture, for himself and his executors, administrators and assigns, covenant, promise and agree, to and with the plaintiff, his heirs, [<i>or "executors, administrators," as in indenture</i>] and assigns, (amongst other things) in manner following, (that is to say) that the defendant, his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own cost and charges, support, uphold, maintain and keep the said messuage or tenements and buildings, gates, stiles, &c. [<i>as in the covenant</i>] in good and tenantable repair, order and condition; and the same premises and every part thereof should and would, in such good repair, order and condition, at the end, or other sooner determination of said term, peaceably and quietly quit, yield and deliver up to the plaintiff, his heirs [<i>or "executors, administrators," as in indenture</i>] or assigns, without doing, committing, or suffering to be done or committed, any waste, spoil or damage to the same, or any part thereof, (g) as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which demise the defendant then entered (h) into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence until the — day of —, A.D. —, when the said demise ended and determined. And although the plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept, all things therein contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof; Yet (i) the defendant did not nor would, during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, at his own costs and charges, support, uphold, maintain and keep all and every the said messuage or tenements, and buildings, gates, &c. [<i>as in the covenant</i>] of the said demised premises, in good tenantable repair, order and condition, [<i>as in the covenant</i>] nor did nor would leave the same premises in such good repair, order and condition, at the determination of the said term, according to the form and effect of the said indenture in that behalf: But on the contrary thereof, he the defendant, after the making of the said indenture as aforesaid, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, to wit, on the day and year first aforesaid, and from thence for a long time, to wit, from thence until the determination of the said term, suffered and permitted the said messuage, tenements, buildings, gates, &c. [<i>as in the covenant</i>] to be and continue, and the same were, for and during all that time, ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary main-
Covenant to repair, and be allowed rough timber.	
Covenant to leave in repair.	
Reference to the lease.	
Defendant's entry.	
General performance by plaintiff. (i)	
Defendant's general non-performance.	
First breach, in not repairing and leaving out of repair.	

(g) If there be any proviso or exception in the covenant as to damage by fire, &c., it must be stated, and also that the damage, &c. did not arise therefrom; see 4 Campb. 20; 2 B. & B. 395; 5 J. B. Moore, 164, S. C.

(h) As to this averment being necessary, see ante, 392, note (1).

(i) There is no occasion in this place for any general statement of the defendant's general non-performance.

taining, supporting, upholding and keeping the same, (k) and the defendant at the determination of the said term left the same premises in such bad repair, order and condition as last aforesaid, contrary to the form and effect of the said indenture and of the covenant so made by the defendant as aforesaid. By reason whereof, and of the said demised premises having been so left in such bad repair, order and condition as aforesaid, the plaintiff was hindered and prevented from demising or letting the same on such advantageous terms as he otherwise might and would have done, and the said premises were wholly useless and unproductive for a long time, to wit, hitherto. (l) [When the lease contains a covenant to repair generally, and also a covenant that it shall be lawful for the lessor to enter and give notice to repair, and a covenant by lessee to repair within three months after notice, it is not unfrequent to state such covenant, and to aver a notice to repair, and breach for not repairing within three months after such notice, as showing a more deliberate breach of covenant. But this is unnecessary.] And so the plaintiff in fact saith, &c. [Conclude as usual, ante, 371.]

ON LEASES.

The form of declaring at the suit of an assignee of the lessor will be found, post, 406; at the suit of an executor of the lessor, post, 407; at the suit of a devisee, post; at the suit of an heir, post, 413.

By assignee, executor, or heir, &c. of lessor against lessee.

Venue local, 1 Saund. 241. Commencement in covenant as usual, ante, 13.] For that whereas heretofore, to wit, on &c. [date of lease], by a certain indenture then made between the plaintiff of the one part, and one C. D. of the other part, (n) (the counterpart (o) of which indenture, sealed with the seal of the said C. D. the plaintiff now brings here into Court, the date whereof is the day and year aforesaid,) the plaintiff did demise, lease, set, and to farm let, [this is to correspond with the indenture] unto the said C. D., his executors, administrators and assigns, a certain messuage, tenements and premises, with the appurtenances, in the said indenture particularly mentioned and described, (p) (except as in the said indenture is excepted) to have and to hold the said demised premises, with the appurtenances, (except as aforesaid) unto the said C. D., his executors, administrators and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing and fully to be complete and ended [as in indenture.] Yielding and paying therefore yearly and every year to the plaintiff, his heirs [or "executors, administrators,"] or assigns, the clear

By lessor against assignee of lessee for rent. (m)

The demise.

The premises.

The habendum.

The reddendum.

(k) See ante, 394 n. (g), as to exception against fire, &c.

(l) 6 Car. & P. 782; 1 Bing. N. C. 467.

(m) See forms, Morg. 416; Lil. Ent. 134; Harley v. King, 2 Cr. M. & Ros. 18. As to the liability of assignees, see id. ibid.; ante, vol. i. Index, "Assignee." Most of the notes to the form, ante, 391, are applicable to this. An heir, (4 T. R. 75,) an executor, (1 Salk. 316, 817,) may be declared against as assignee, for a breach of covenant after he became interested. The personal liability of an executor of a lessee in respect of rent, does not exceed what the demised property yields, but where the executor is sued as assignee on a covenant to repair, he is liable as any other assignee; Freeman v. Munro, 1 Bing. N. C.

89; Heneage v. Dalison, 3 P. & D. 641, see also as to the liability of an executor for use and occupation, Buckurst v. Simpson, 1 C. M. & R. 834. An under-lessee cannot be sued by the lessor in covenant or debt on the lease; Holford v. Hatch, Dougl. 183, 445; Cowp. 766. As to what is *prima facie* evidence of defendant's being assignee, see Peake's Law of Evid. 266, 267; 2 Stark. Evid. 437.

(n) It is not necessary nor advisable to state the addition of the parties.

(o) If both parts of the deed be originals, that is, signed by all the contracting parties, say, "one part of which said indenture," &c. See ante, 391, n. (i), as to the proferat.

(p) See ante, 392, n. (o).

ON LEASES.	yearly rent or sum of £——, payable quarterly, at the four most usual feasts or days of payment of rent in the year, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by even and equal payments [as in indenture.] And the said C. D. did thereby for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the plaintiff, his heirs [or "executors, administrators," as in indenture] and assigns, that he the said C. D., his executors, administrators or assigns, should and would well and truly pay, or cause to be paid to the plaintiff, his heirs, [or "executors, administrators,"] or assigns, the said yearly rent or sum of £——, at the several days and times aforesaid, as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. (q) By virtue of which said demise, the said C. D. afterwards, to wit, on &c., entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid. (r) And the plaintiff further saith, that after the making the said indenture, and during the said term thereby granted, to wit, on &c., [day of assignment, or any day about the time,] all (s) the estate, right, title, interest and term of years, then to come and unexpired, property, profit, claim and demand whatsoever of the said C. D., of and in the said demised premises, with the appurtenances, by assignment thereof then made, (t) legally came to and vested in the defendant. And although the plaintiff hath always, from the time of making the said indenture hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, (x) the plaintiff saith, that after the making of the said indenture, and during the said term thereby granted, and after the defendant became such assignee as
The covenant to pay rent.	
Reference to lease.	
Lessee's entry.	
Assignment to defendant.	
Plaintiff's general performance. (u)	
Breach ; non-payment of rent.	

(q) The reference to the lease is not necessary.

(r) In an action against a lessee for years, it is not necessary to allege an entry; 1 Saund. 203, n. 1; Com. Dig. Pleader, 2 W. 14; Dougl. 456; and even against the assignee of the lessee, such averment seems unnecessary; see Woodfall's Law of Landlord and Tenant, by Harrison; 7 East, 340, note (a); ante, 392, note (t).

(s) In an action by the assignee of the reversion, he must set forth in the declaration the operative part of the deed, &c. by virtue of which he is entitled to the reversion; 1 Saund. 112 b, n. 1, 234, n. 3; though an assignee of a term in an action against the lessor need not show the assignment to have been by deed; 1 Saund. 234, n. 3, 276, notes 1 and 2. In an action against the assignee of the lessee, &c. the above concise statement is in all cases sufficient, though there may have been intermediate assignments; see ante, vol. i. Index, tit. "Declaration;" Covenant, 1 Saund. 112 b, n. 1; 6 Mod. 72. And it suffices in covenant though the defendant be assignee of part only of the premises; Congham v. King, Cro. Car. 221, defendant in

that case being at liberty to plead in abatement, or plead in bar as to the part only, see 5 B. & C. 482; but debt is not sustainable against an assignee of part, Curtis v. Shirley, 1 Bing. N. C. 756; and hence covenant is a safer remedy against a supposed assignee. If the plaintiff profess to set out the title of the assignee, he will, on a traverse of it, have to prove it as stated; 3 B. & P. 461. See mode of pleading an assignment of a term to commence in futuro, 1 Saund. 253; and this form will suffice even against an heir, when declared against for breach after he became heir, as he may be as assignee; 4 T. R. 76.

(t) In a declaration it is not necessary to aver that the assignment was in writing; 2 Brod. & Bing. 362.

(u) As to this averment of general performance, see ante, 371, n. (f), it is not necessary.

(x) There is no occasion for any protestation or allegation of the general non-performance of covenants by the defendant;—the declaration may proceed at once to the material averments, and the particular breach for which the action is brought; see ante, 374, note (o).

aforesaid, and while he continued such assignee, to wit, on &c., (y) a large sum of money, to wit, the sum of £—— of the rent aforesaid, for —— years (z) of the said term then elapsed, became and was and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture and of the said covenant so made as aforesaid. And so the plaintiff in fact saith, that the defendant (although often requested so to do) hath not kept the said covenant so by the said C. D. for himself and his assigns made as aforesaid, but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly neglected and refused, and still doth neglect and refuse ; To the damage of the plaintiff of £—— [*insert enough*] and thereupon he brings suit, &c.

ON LEASES.

Conclusion.

See 9 Bing. 24. Under covenant to leave at end of term a water-mill with all fixtures, fastenings and *improvements*, during the demise, fixed, fastened or set up, in or upon the premises, in good plight and condition, reasonable use and wear only excepted, the lessee is bound to leave mill-stones set up by him during the term, although the custom of the country authorize him to remove them ; *id. ib.*

Declaration by lessor against lessee for removing fixtures and improvements.

Declaration by lessee against assignee of lessee for nonpayment of rent to lessor ; 9 Bing. 60. An assignee who takes from a lessee leasehold premises by indenture indorsed on the lease, "subject to the rent reserved in the lease," is liable in covenant to the lessee for rent which the lessee has been called upon by the lessor to pay after the assignee has assigned over ; *id. ib.*

Commencement as ante, 13, and then proceed as follows:] For that whereas heretofore, to wit, on &c. [*date of lease*], by a certain indenture then made between the plaintiff of the one part, and one E. F. of the other part, the counterpart (b) of which said indenture, sealed with the seal of the said E. F. the plaintiff now brings here into Court, (the date whereof is the same day and year aforesaid,) the plaintiff, for the considerations therein mentioned, did demise, lease, set and to farm let unto the said E. F., his executors, administrators and assigns, a certain messuage, farm, tenements and premises in the said indenture more particularly mentioned. [*At all events the statement of the premises demised should be very concise, see ante, 392, note (o) ; 1 Saund. 238, note 2 ; 2 Saund. 366, note 1 ; and then state the covenants in the indenture, which perhaps may be as follows:]* And the said E. F. did, in and by the said indenture, for himself and his executors, administrators and assigns, covenant, promise and agree to and with the plaintiff, his heirs [*or "executors or administrators," as in indenture,*] and assigns, (amongst other things,) in manner following, (that is to say,) that he the said E. F. and his assigns, from and after the said messuage, &c. [*as in indenture*] should have been put in good and tenantable repair by and at the expense of the plaintiff, his heirs and assigns, should and would at all

Lessor against assignee of lessee, for not repairing, with averment of plaintiff's performance of a condition precedent. (a)

Profert.

The demise.

Covenant to repair, after lessor should have put in repair, and being allowed rough timber.

(y) *See ante, 393, n. (y).* The plaintiff is not limited in evidence to the precise time or sum stated in the declaration.

(z) *See ante, 393, n. (a).*

(a) *See the notes to the preceding form, and 9 Bingh. 60 ; 2 Crom. M. & Ros. 18.*

An assignee is liable for dilapidations during his own time, although he assign over before action commenced ; *Harley v. King*, 2 Crom. M. & Ros. 18 ; 1 Gale, 18, where see precedent.

(b) *See ante, 391, note (l).*

<u>ON LEASES.</u>	times, during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep (c) the said messuage or tenement and buildings, gates, stiles, &c. [<i>as in the covenant</i>] (d) in good and tenantable repair, order and condition, (being allowed timber in the <i>rough</i> sufficient and proper for such repair, from time to time to be provided and set out by the plaintiff, his heirs or assigns); and the same premises and every part thereof should and would leave in such good repair, order and condition, at the end or other sooner determination of said term, and should and would peaceably and quietly quit, yield and deliver up to the plaintiff, his heirs [<i>or "executors, administrators," as in indenture</i>] or assigns, without doing, committing or suffering to be done or committed, any waste, spoil or damage to the same, or any part thereof, (damage by fire, storm or tempest only excepted.) (d) And also should and would well and sufficiently uphold, cleanse, scour and repair, yearly and every year during the said demise, all the ditches, trenches and water-courses in the piece or parcel of meadow land called — meadow, and all other the ditches, trenches and water-courses in and upon every part of the said other premises thereby demised, as often as necessary, so as to keep the same cleansed, scoured, repaired and in good condition, and should and would deliver up unto the plaintiff, his heirs or assigns, the same in such good order and condition at the end of the said term as aforesaid; as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said indenture, the said E. F. afterwards, to wit, on the &c., entered into the said demised tenements, with the appurtenances, and became and was so possessed thereof for the said term so to him thereof granted as aforesaid. And the plaintiff in fact saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on &c., (e) all (f) the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim and demand whatsoever, of him the said E. F., of, in and to the said demised premises, with the appurtenances, by assignment thereof then made, legally came to and vested in the defendant. Whereupon and whereby the defendant then entered (g) into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence until the — day of — A. D. —, when the said demise ended and determined. And although the plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things therein contained on his part and behalf to be performed, fulfilled and kept according to the tenor and effect, true intent and meaning thereof; yet the plaintiff in fact saith, that although the said messuage or tenement and outbuildings, in and by the said indenture demised,
Covenant to leave in repair.	
Covenant to cleanse ditches, &c.	
Reference to the lease.	
Entry of lessee.	
Assignment to the defendant.	
Defendant's entry.	
General performance by plaintiff.	
Averment of performance by plaintiff of condition precedent. (h)	

(c) Upon a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired; 1 B. & Ald. 584.

(d) If there be an exception in the lease as to fire, it must be stated; 4 Campb. 20; 2 Brod. & Bing. 395; 5 J. B. Moore, 164, S. C.

(e) The day is not material; it is usual to insert some day about the time of the sup-

posed assignment to the defendant. See the note, *ante*, 396, as to this assignment and mode of stating it.

(f) When this must be qualified, see Cowp. 766.

(g) This does not seem necessary, *ante*, 396, note (r); 1 B. & B. 265.

(h) As to conditions precedent, see 2 Saund. 352 c; Willes, 496; *ante*, vol. i. Index, "Condition Precedent."

were, after the making thereof, to wit, on &c., put in good and tenantable repair, by and at the expense of the plaintiff; and although timber in the rough, sufficient and proper for all necessary repairs, was allowed, and from time to time provided and set out by the plaintiff; (i) yet the defendant did not nor would, after the said assignment and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, at his own costs and charges, support, uphold, maintain and keep all and every the said messuage or tenement and buildings, gates, &c. [*as in the indenture,*] of the said demised premises, in good tenantable repair, order and condition, damage by fire, storm or tempest excepted, nor did nor would leave the said premises in such good repair, order and condition, at the determination of the said term, [*as in the indenture,*] according to the form and effect of the said indenture in that behalf; but on the contrary thereof, the defendant, after the making of the said indenture, and after the said assignment to the defendant as aforesaid, and during the continuance of the demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, to wit, on &c., and from thence for a long space of time, to wit, from thence until the determination of the said term, suffered and permitted the said messuage, dwelling-house, buildings, gates, &c. [*as in the indenture,*] to be and continue, and the same were, for and during all that time, ruinous, prostrate, fallen down and in great decay, for want of needful and necessary maintaining, supporting, upholding and keeping the same, and which were not occasioned by fire, storm or tempest; and the defendant, at the determination of the said term, left the same premises so out of repair, and in such bad order and condition as last aforesaid, contrary to the form and effect of the said indenture and of the covenant so made by the said E. F. for himself and his assigns as aforesaid. And the plaintiff in fact further saith, that the defendant did not nor would yearly and every year during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, well and sufficiently uphold, cleanse, scour or repair all the ditches, trenches and water-courses in the said piece or parcel of meadow-land called — meadow, and all other the ditches, trenches and water-courses in or upon the said premises by the said indenture demised, so often as was necessary, so as to keep the same cleansed, scoured, repaired and in good condition; nor did nor would deliver up the same unto the plaintiff in such good order and condition at the end of the said demise, according to the form and effect of the said indenture in that behalf, but wholly neglected so to do; and on the contrary thereof, he the defendant, after the making of the said indenture and of the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, to wit, on &c., and from thence for a long space of time, to wit, from thence until the determination of the said demise, suffered and permitted the said ditches, trenches and water-courses in the said piece or parcel of land called — meadow, and all other the ditches, trenches and water-courses in the said premises by the said indenture demised, to be and continue, and the same

ON LEASES.

First breach, in not repairing, and for leaving out of repair.

Second breach, for not cleansing ditches, &c.

(i) This averment being traversable must correspond with the fact; if the plaintiff was merely ready to find timber, let the allegation

be accordingly, and aver notice of the plaintiff's readiness to the defendant.

ON LEASES.

Special damage, that, in consequence of the premises being so left out of repair by defendant, plaintiff could not relet the same for a long time, and in mean time lost the rent he would otherwise have obtained.

Conclusion.

were, for and during all the time last aforesaid, foul, miry, choked up and ruinous, out of repair and in bad order and condition, for want of well and sufficiently cleansing, scouring and repairing as aforesaid; and at the determination of the said term, he the defendant delivered up the same unto the plaintiff in such order and condition as last aforesaid, contrary to the form and effect of the said indenture and of the said covenant in that behalf made as aforesaid. By means of which premises and of the said breaches of covenant, and of the said premises being in such bad order and condition at the expiration of the said term, the plaintiff could not relet the said premises for a long time, to wit, from thence hitherto, and hath thereupon incurred great expense, to wit, an expense of £50, in taking care of the said premises, and hath lost and been deprived of the rents and profits which he otherwise might and would have obtained and acquired from reletting the said premises, as he might and would have done if the defendant had performed his covenants; and thereby the plaintiff hath sustained and incurred great trouble and expense, amounting in the whole to £—, in and about endeavouring to put and place the said premises in such order and condition as the defendant should have put and left the same in. (k) And so the plaintiff in fact saith that the defendant (although often requested so to do) hath not kept the said covenants so made by the said E. F. for himself and his assigns, with the plaintiff in manner and form aforesaid, but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly refused, and still refuses so to do: To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Breach, non-payment of galage rent of coal mines. (l)

After stating the lease, covenants, reference to lease, lessee's entry, and plaintiff's general performance, proceed thus:] Yet the plaintiff in fact saith that although after the making of the said indenture, to wit, on divers days and times between the — day of &c., and the — day of &c., a large quantity, to wit, — tons of coals, were, under and by virtue of the powers and authorities in the said indenture contained, by the defendant gotten, procured and brought to land, from and under the said five several closes, pieces or parcels of land in the said indenture mentioned, and although the current price per ton of coals, at — aforesaid, between the days and times last aforesaid, was then advanced and raised from the price in the said indenture above mentioned to the sum of — shillings per ton. Yet the defendant did not nor would, after the said &c., nor on any other days or times before or since, pay or cause to be paid to the plaintiff the said sum of — shillings per ton additional galage on each and every ton of the said coals so raised and procured as aforesaid, as by the said indenture the defendant had so covenanted and agreed to pay to the plaintiff, but wholly neglected and refused so to do, and on account thereof, heretofore, to wit, on &c., a large sum of money, amounting in the whole to the sum of £—,

(k) In *Woods v. Pope*, 6 Car. & P. 782; 1 Bing. N. C. 467, S. C.; it was held that a jury might give a verdict as well for the amount of dilapidations as for loss of time whilst the premises would be undergoing repair.

(l) See assignment of breach for non-pay-

ment of poor rates, whereby the lessor was obliged to pay them, 3 Wentw. 511; for not repairing after notice given, *id.* 497; for cutting down trees, *id.* 446; for stabbing up a garden hedge, *id.* 497; and for underletting, contrary to covenants in the lease, *id.* 519.

became and was, and still is, due and payable to the plaintiff, contrary to the said indenture and covenant of the defendant. And so &c. [*Conclude as ante*, 371.]

ON LEASES.

And the plaintiff in fact saith, that after the making of the said indenture, and during the continuance of the said term thereby granted, and whilst the defendant was so possessed of the said demised premises, with the appurtenances, to wit, in each and every of the respective years of our Lord — and —, the defendant did till, delve, plough up, and convert into tillage, above sixty statute acres of land, to wit, 100 acres of land belonging to the said premises, other than a summer fallow, in each and every of those years, contrary to the true intent and meaning of the said indenture, whereby, and according to the form and effect of the said indenture, the defendant forfeited and became liable to pay to the plaintiff divers penalties, to wit, the penalty of £5 an acre for every acre of the said land so tilled, delved, ploughed up, and converted into tillage, contrary to the true intent and meaning of the said indenture, that is to say, at such of the first and next rent days, which first and next happened after the said penalties so became forfeited as aforesaid; Yet the defendant (although often requested) hath not paid the said penalties or forfeitures, or any or either of them, to the plaintiff at the rent days and in manner aforesaid, or otherwise howsoever, but hath hitherto wholly refused and neglected so to do, and therein failed and made default, contrary, &c.

Breach for ploughing up above 60 statute acres of land, contrary to a covenant in indenture, whereby defendant agreed to forfeit £5 for each acre ploughed up above the 60.
(m)

And the plaintiff further saith, that the defendant (although often requested &c.) did not nor would, from time to time and at all times, after the said assignment so made to him as aforesaid, and during the said term by the said indenture granted, insure, or cause or procure to be insured and kept insured, in the name of the plaintiff, at any of the offices for insurance against fire in London or Westminster, all and singular the said messuages or tenements and premises by the said indenture demised, with the appurtenances, from and against loss or damage by fire, to the amount and in the manner specified in the said indenture in that behalf, and according to the form and effect thereof, but wholly neglected and refused so to do, and therein failed and made default; and, on the contrary thereof, the plaintiff in fact saith, that the said messuage or tenements and premises, with the appurtenances, after the said assignment so made to the defendant, and during the said term by the said indenture granted, to wit, on, &c. and from thence until the commencement of this suit, were, and continued to be, wholly uninsured from and against loss or damage by fire by the defendant, or by any other person or persons whomsoever, under and by virtue of the said covenant of the said E. F., &c. by them in that behalf made for themselves and their assigns with the plaintiff as aforesaid, contrary to the form and effect of the said indenture and of the said last-mentioned covenant in that behalf.

Breach for not insuring premises in one of the London or Westminster fire offices, against loss or damage, by defendant or any other person.(n)

(m) See 3 B. & Ald. 692; and that this reservation is stipulated damages, and not a penalty, see *id.*; 3 Younge & Jerv. 298.

(n) A covenant by lessee to insure, and keep insured, to a certain amount, "in some

sufficient insurance office within the cities of London or Westminster," is sufficiently certain; 3 Campb. 134. See 5 B. & Ald. 1, as to this covenant running with the land.

ON LEASES.

Breach, by lessee against lessor, that contrary to &c., certain quit-rent was due. (o)

That before and at the time of making the said indenture, certain arrears of rent, viz. £3 of quit-rent, for five years, for certain part of the said premises, were in arrear to the lord of the manor, &c., and certain other charges and incumbrances for suits of court and acquittances, &c. amounting altogether to £3, at the time of making the said indenture, were due and in arrear to the said lord, &c. which he the plaintiff afterwards, to wit, on &c., was compelled to pay, in order to save his goods from being distrained upon, and did pay the same to the said lord &c., who, at the time of making the said indenture and of such payment, had lawful right to and then claimed the same.

By lessee against lessors for quiet enjoyment.

Breach, that one J. B. as ground-landlord, distrained on plaintiff's goods. (p)

For that whereas, heretofore, to wit, on &c. [date of lease] by a certain indenture then made between the defendants of the one part and the plaintiff of the other part, which said indenture sealed with the seal of the defendants, the plaintiff now brings into Court here, the date whereof is the day and year aforesaid, the defendants, &c. did demise, lease, and to farm let unto the plaintiff a certain messuage and premises therein more particularly mentioned, to have and to hold the same [*here set out habendum et reddendum, as ante, 392, and according to the terms of the lease, and then set out covenant for quiet enjoyment, which may be as follows:*] and the defendants by the said indenture did covenant, promise, and agree, to and with the plaintiff, that he the plaintiff paying (q) &c., and observing, &c. [*as in covenant*] all and singular the covenants and agreements therein contained, which on his and their parts were or ought to be paid, done, observed and performed, according to the true intent and meaning of the said indenture, should and might peaceably and quietly have, hold, occupy, possess and enjoy the said messuage and premises thereby demised, with the appurtenances thereto belonging, for and during the said term of seven years, wanting three days, thereby granted, without the let, suit, trouble, denial, interruption or molestation of them the defendants, their executors, administrators or assigns, or any other person or persons lawfully claiming, or to claim, by, from or under, or in trust for them, or any or either of them, or by or through their or either of their acts, means, defaults or procurement, as by the said indenture, reference being thereunto had, will, amongst other things, more fully appear, by virtue of which said indenture the plaintiff, afterwards, to wit, on &c. entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid; and although the plaintiff hath always, from the time of the making of the said indenture hitherto observed, performed, fulfilled and kept all and singular the said covenants and agree-

Reference to lease.

Entry of lessee.

Averment of performance of covenants by plaintiff.

(o) This is a good breach, see 3 East, 491, &c.; 2 B. & P. 13; 1 Saund. 59; 4 Taunt. 329; see other assignments of breaches of covenant for quiet enjoyment, 5 Wentw. 53, 56, 60, 280. Post, next form, for suffering the ground-landlord's rent to be in arrear, whereby plaintiff was obliged to pay it, to prevent a distress; 5 Wentw. 63. If eviction be the breach, it must not be matter of doubt whether the evictor derived title from the plaintiff himself; *Brooks v. Humphreys*, 5

Bing. N. C. 55; 7 Dowl. 118. The covenant implied in the word "demise;" is restrained by an express covenant; see *Lina v. Stephenson*, 4 Bing. N. C. 678.

(p) See form, 5 Wentw. 63; 5 Bar. & Adol. 584. As to this breach, and when action lies, see 2 Saund. Rep. by Pattenon and Williams, index, "*Lease*."

(q) This is not a condition precedent to the performance of the covenant for quiet enjoyment; 5 Bar. & Adol. 584.

ments in the said indenture contained, which on his part were or ought to be paid, done, observed and performed, according to the true intent and meaning of the said indenture; Yet the defendants did not nor would suffer or permit the plaintiff, for and during the continuance of the said term of the said indenture granted, peaceably and quietly to have, hold, occupy, possess and enjoy, the said messuage and premises by the said indenture demised, with the appurtenances, without the let, suit, trouble, denial, interruption, or molestation of the defendants, their heirs, administrators, or assigns, or any other person or persons lawfully claiming, or to claim, by, from, or under, or in trust for them, or any or either of them, or by or through their or either of their acts, means, defaults or procurement, according to the form and effect of the said covenant of the defendants in the said indenture in that behalf made as aforesaid, but on the contrary thereof the plaintiff in fact saith, that after the making of the said indenture, and during the continuance of the said demise, and whilst the plaintiff was possessed of the said demised premises, to wit, on &c., [*day of distress, or about it*] a certain distress was made by and on the behalf of a certain person, to wit, one T. B., on certain goods and chattels of the plaintiff, in and upon the said messuage and premises, for a certain sum of money, to wit, the sum of £—, then due and owing from the defendants to the said T. B., for and in respect of certain rent before that time due and in arrear from the defendants to the said T. B. as the ground-landlord of the said demised messuage or premises, with the appurtenances, and by means of the premises, he the plaintiff was not only put to and suffered great trouble and inconvenience, but was forced and obliged to and did necessarily pay the said sum of £—, together with the charges of the said distress, in the whole amounting to a large sum of money, to wit, the sum of £—, and was and is by means of the premises greatly injured and damnified in the occupation, possession, and enjoyment of the said messuage and premises, contrary to the form and effect of the said indenture and of the said covenant in that behalf so made as aforesaid; and so &c. [*Conclude as usual, as ante, 371.*]

ON LEASES.

Breach by defendants.

Distress made by ground-landlord on plaintiff's goods.

Breaches of different covenants between lessor and lessee, &c. may readily be framed according to the particular circumstances of each case, and in general may be in the negative of the words of the covenant; see 3 T. R. 307, and *ante*, 393, note (c), vol. i. Chapter on Declarations. The above precedents may therefore, in this respect, suffice.

Breaches in general.

X. TITLE PLEADED.

X. TITLE
PLEADED.

As difficulties frequently occur in stating the different titles of plaintiffs in covenant, the following forms are given, and which are arranged nearly according to the plan in 2 Blackstone's Commentaries respecting real estates. In any case, when it may be necessary to enquire into or state with great precision the particular tenure or title to or in any property, personal, real, or mixed, be pleased to examine Chit. Gen. Prac. 1 vol. and Index, *per tot.*

Statements of titles.

TITLE
PLEADED.

I am greatly indebted to Sir Edward Sugden for his valuable suggestions when I originally prepared the following forms, describing different tenures, estates, and quantities of interests, conveyances, &c. I bestowed much time and consideration on the subject, and I believe that in consequence of the valuable assistance alluded to, the description of all the estates and conveyances may be relied upon with confidence.

TENURE
PLEADED BY
WAY OF IN-
DUCEMENT. (r)
Tenure in free
burgage.

TENURE.

For that whereas, before and at the time of the making of the indenture hereinafter mentioned, one E. F. was seised in his demesne as of fee of and in the tenements hereinafter mentioned to have been demised, and held the same in *free burgage* of the city of London, and being so seised, heretofore, to wit, on &c.

ESTATE AND
QUANTITY
OF INTEREST. (s)
Inducement that
lessor was seised
in fee simple of
corporeal here-
ditaments.

ESTATE AND QUANTITY OF INTEREST. (t)

For that whereas one G. H. before and at the time of the making of the indenture hereinafter mentioned, was seised (u) in his demesne (x) as of fee (y) of and in the tenements and premises, with the appurtenances, hereinafter mentioned to have been demised. And being so seised, heretofore, to wit, on &c., by a certain indenture then made between the said G. H. of the one part, and the defendant of the other part, one part, &c. [*Here set out the profert and all necessary parts of the lease, as ante, 391, 392; as to the statement of the conveyance, &c. by virtue of which the plaintiff claims, see post, 413, &c. If the seisin be stated as a consequence of a conveyance, &c. the statement is as follows:—*"Whereupon and whereby the plaintiff then became and was, and from thence hitherto hath been and still is, seised in his demesne as of fee of and in the said tenements and premises, with the appurtenances. And being so seised," &c. *Then proceed to state the usual averments of performance of covenant by plaintiff, and defendant's breach.*

Seisin in fee, &c.
in husband and
wife, in right of
the wife. (z)

For that whereas the said A. B. and C. his wife, before and at the time of the making of the indenture hereinafter mentioned, were seised in their demesne as of fee, (a) in right of the said C., of and in the tenements and premises, with the appurtenances, hereinafter mentioned to have been demised, and being so seised, &c. [*Here state the lease by husband and wife,*

(r) As to when an inducement of plaintiff's interest is necessary and traversable, see 4 J. B. Moore, 303; 1 Saund. 233, n. 2; 1 Stra. 230; 7 T. R. 538; Com. Dig. Pleader, C. 36; Gilb. on Debt, 410; Dyer, 365.

(s) 2 Saund. 234. As to the statement of copyhold and customary freeholds, see *post*, 409, 410; Borough-English, 8 Went. 201, Index; and of seisin in gavelkind, 1 Burr. 326; of a rent, 2 Rich. C. P. 350; of an advowson, &c. see *infra*, note (x).

(t) As to this division, see 2 Bla. Com. 103.

(u) As to the words "seised," or "posseised," see Com. Dig. Pleader, C. 35, 36, 37; Co. Lit. 17 a; Carth. 9; 2 Chit. Rep. 314. After verdict the averment of seisin, without showing of what estate, will be aided,

4 Bing. 646; 1 Bing. 633, S. C.

(x) 2 Bla. Com. 105, 106; Heath's Max. 145. If the estate be incorporeal, the words "in his demesne" are to be omitted; 2 Bla. Com. 106; Co. Lit. 17 a, b, n. 1; Com. Dig. Pleader, C. 35; 2 Wils. 224. They seem also improper in pleading a reversion on an estate of freehold; Co. Lit. 17 b, n. 4; Plowd. 191 a. Seisin of an advowson, &c. "as of fee and right;" 1 East, 488; Thomp. Ent. 203. Seisin by disseisin; 1 Saund. 55.

(y) As to the words, "as of fee," see Co. Lit. 17 b; 4 Bingh. 646; 1 Bing. 633, S. C. In a writ of right, also say, "and right;" 5 East, 272; 2 B. & P. 570.

(z) Dougl. 329; 1 Saund. 253, n. 4; 2 Saund. 235, n. 2, 269, 283, n. 1; Hob. 1, 2; Heath's Max. 146.

(a) As to these words, see *supra*, note (y)

and the covenants, the lessee's entry, and the plaintiff's derivative title, &c. If the seisin in fee in right of the wife be stated as a consequence of a conveyance, &c. the statement is as follows:—"Whereupon and whereby the said A. B. and C. his wife, then became and were, and from thence hitherto have been and still are, seised in their demesne as of fee, in right of the said C., (b) of and in the said tenements, with the appurtenances, and being so seised," &c. Then proceed to state the usual performance of covenants by plaintiff, and the defendant's breach.

ESTATE AND
QUANTITY
OF INTEREST.

For that whereas our sovereign lady the now queen, on &c., was and still is seised in her demesne as of fee, in right of her crown of England, of and in &c. Seisin in the queen, or in a corporation. (c)

For that whereas one E. F. before and at the time of the making of the indenture hereinafter mentioned, was seised in his demesne as of fee tail, or, if special entail, add, "that is to say, to him and the heirs lawfully issuing of the body of him the said E. F. on the body of — to be begotten," or, "of the bodies of the said E. F. and of —," &c.] of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised, and being so seised &c. [Here set forth the lease, &c. and plaintiff's derivative title, &c. If the seisin in tail be stated as a consequence of a conveyance, &c. the statement is as follows:—"Whereupon and whereby the said E. F. then became and was, and from thence hitherto hath been and still is, seised in his demesne as of fee tail of and in the said tenements, with the appurtenances." Then proceed to state the usual averments of performance of covenant by plaintiff, and the defendant's breach. Seisin in tail. (d)

For that whereas one E. F. before and at the time of making of the indenture hereinafter mentioned, was seised (f) in his demesne as of freehold, for the term of his natural life, [or, "for the term of the natural life of G. H."] of and in the tenements, with the appurtenances, hereinafter Seisin for life. (e)

(b) If this consequence be misstated, the declaration, &c. will be bad on special demurrer; Dougl. 329. See *quere*, vide Plowd. 191 a.

(c) As to the statement of seisin in the Queen, see 1 Saund. 187, n. 1; Dyer, 85 b. It must be shown *quo jure*, the queen is seised, whether in right of her crown, duchy of Lancaster, &c., 2 Bla. Com. 105, 106; 4 Mod. 355; Heath's Max. 146. As to the pleading a seisin in a Corporation sole or aggregate, see 1 Saund. 187, n. 1; 2 Saund. 310, 317, 319, n. 4; Thomp. Ent. 303, and the precedents, 1 Saund. 106; Poph. 163; Bro. Red. 480.

(d) 1 Saund. 255; 2 Rich. C. P. 350. In a declaration, when the title is stated as inducement, the commencement of the estate tail need not in general be stated, though it is otherwise in a plea; Com. Dig. Pleader, E. 19, C. 35. In pleading seisin of an estate by gift to husband and wife, and to the heirs of the body of the wife by the husband begotten, as the wife has an estate in special tail, and the husband only an estate for life, it should be alleged, "that the husband and

wife were seised together, and to the heirs of the body of the wife in her right," and not that they were seised of the freehold or fee tail; Co. Lit. 26 a, n. 1. It is not necessary to aver the continuance of the life of the tenant in tail, or of the estate tail; 1 Saund. 235 b, n. 8.

(e) See the form, 1 Saund. 231; Com. Dig. Pleader, C. 35; Co. Lit. 42 a. Under a will, see 3 M. & Sel. 382. Seisin in fee of lessor and tenant for life, the latter demising, see 1 T. R. 94; 6 Co. 14 b. In a declaration, when the title is stated merely as inducement, it is not necessary to show the commencement of the estate for life, but it is otherwise in a plea; Com. Dig. Pleader, C. 35, E. 19; 1 Saund. 187, n. 1; 8 T. R. 488. Unless the *cestui que vie* be a party to the action, or no title be derived under him, it must be averred that he was living at the time the cause of action accrued, as to which averment, see 1 Saund. 235, n. 8; 2 Bla. Com. 120. In pleading a lease for life, which passes by livery and seisin, no entry of the lessee should be stated; 11 Co. 52 b.

(f) See *ante*, 404, note (u).

ESTATE AND
QUANTITY
OF INTEREST.

mentioned to have been demised, and being so seised, &c. [*Here set forth the lease, &c. If the seisin for life be stated as a consequence of a conveyance, &c. the statement is as follows:—*"Whereupon and whereby the said E. F. then became and was, and from thence hitherto hath been and still is, seised in his demesne as of freehold, for the term of his natural life, of and in, &c." *Then proceed to state usual averments of performance of covenants by plaintiff, and the defendant's breach of covenant.*

The like by a
rector, in right
of his rec-
tory. (g)

For that whereas one E. F. before and at the time of the making of the indenture hereinafter mentioned, was and still is rector of the church of —, in the county of —, and as such rector then was, and thence hitherto hath been, and still is, seised in his demesne as of fee, in right of his said church, of and in the tenements hereinafter mentioned to have been demised, and being so seised, &c. [*If his seisin be stated as a consequence of a conveyance, the allegation will nearly resemble that in the last precedent: then set forth the lease &c., entry, plaintiff's performance of covenants, and defendant's breach.*

Tenancy by
curtesy or by
dower. (h)

For that whereas one E. F. before and at the time of the making of the indenture hereinafter mentioned, was seised of the tenements hereinafter mentioned to have been demised, in his demesne as of freehold, for the term of his life, as tenant thereof, by the law of England, and being so seised &c. [*If the seisin be stated as a derivative title, state the marriage, birth of a child, and death of the wife, as in 2 Rich. C. P. 350.*] Whereupon and whereby the said E. F. then became and was, and from thence hitherto hath been, and still is, seised in his demesne as of freehold, of and in the said tenements, with the appurtenances, for the term of his life, as tenant thereof, by the law of England. [*See the precedent, 2 Rich. C. P. 350.*

By assignee of
lessor, being a
termor, against
lessee. (i)

For that whereas one E. F., before and at the time of the making of the indenture of demise hereinafter mentioned, was lawfully possessed (k) of

(g) See the forms, Winch. Ent. 1161; Willes, 283; Poph. 163; 2 Saund. 235, n. 2. The averment of the continuance of the rector's life, when necessary, will be as in Winch. 1162.

(h) See 2 Bla. Com. 126; 3 B. & P. 652, 653. For forms, see 2 Rich. C. P. 350; 1 East, 213; 1 Saund. 250, 256; Rast. Ent. 580 b. In a declaration, when the title is stated merely as inducement, the above form will suffice, but in a plea it is generally necessary to show the commencement of the title, as in some of the precedents referred to. As to pleading tenancy by dower, see 2 Saund. 423, 305 b, n. 13; 3 East, 276; Vin. Ab. Dower, M. s. pl. 25, &c.; freebench, 5 East, 273.

(i) When the action is at the suit of the assignee of a lessor who was a termor, or by the executor of such lessor for rent due after his death, it is necessary, in order to show the plaintiff's right of action, to state the lessor's title as above, and the assignee must set forth all the mesne assignments of the term

down to himself, though we have seen it is otherwise in a declaration against the assignee of a term; 1 Saund. 112, n. 1; ante, 396, n. (s); Clift, 121, 122. But it seems unnecessary to show that the assignments were by deed or signed; 1 Saund. 234, n. 3; 276, n. 1 and 2. *Sed quare*, if this rule does not apply only to declarations by or against the assignee of the lessee, who might at common law assign by parol, see *id.*; and it is certainly usual to show the assignment was by deed. This concise mode of stating the interest is sufficient when the title is pleaded as inducement; Com. Dig. Pleader, E. 19, C. 35; Co. Lit. 17 a. As to pleading possession of a term in right of a wife, see Plowd. 191 a. *Sed vide* Dougl. 329; ante, 404.

(k) The word "possessed," and not "interested," must be adopted; 1 Show. 106; 1 Saund. 251, n. 1, 106; 2 Saund. 176, n. 5; unless when the term is in reversion; 1 Saund. 251, n. 1; 2 Saund. 176, n. 5; in which case the interest is to be described as *post*, 410.

the tenements and premises, with the appurtenances, hereinafter mentioned to have been demised to the defendant, (that is to say,) for the residue and remainder of a certain term of years, to wit, of — years, commencing from &c., (l) to come and unexpired therein, and being so possessed thereof, be the said E. F., on &c., by a certain indenture, &c. [*Here state the lease, or indenture and covenants, as ante, 391, 392; then state the entry by the lessee, as ante, 392; and after this, state the mode in which plaintiff became assignee, and for which see forms of stating derivative title, post, 413, &c., and statement of assignment, post, 416; then state the possession of the residue of the term in consequence of the assignment, &c. as follows: "Whereupon and whereby the plaintiff became and was, and from thence hitherto hath been and still is, possessed of the said tenements, with the appurtenances, for the residue and remainder of the said term therein then to come and unexpired." Then state the usual averment of performance of covenants by plaintiff, and non-performance by defendant.*]

For that whereas the said E. F. in his life-time, since deceased, before and at the time of the making of the indenture of demise hereinafter mentioned, was lawfully possessed (n) of the tenements, with the appurtenances, hereinafter mentioned to have been demised to the defendant, that is to say, for the residue and remainder of a certain term of — years, commencing from &c., to come and unexpired therein, and being so possessed thereof, the said E. F. in his life-time, on &c., by a certain indenture, &c. [*Here set forth the indenture or lease, as ante, 391; then the defendant's entry, as ante, 392; and before the averments of performance, proceed to state the lessor's will, and death, and the probate, thus:*] And the defendant being so possessed of the said demised premises, with the appurtenances, and the said E. F. being so possessed of the said reversion as aforesaid, afterwards, and during the said term by the said indenture granted, to wit, on &c., [*day of death or about it*] the said E. F. duly made and published his last will and testament in writing, bearing date a certain day and year therein named, to wit, the same day and year last aforesaid, and thereby, amongst other things, he the said E. F. then appointed the plaintiff executor thereof, and afterwards, to wit, on the day and year last aforesaid, he the said E. F. died so possessed of

By executor of lessor, being a termor, against lessee, for a breach of covenant after testator's death. (m)

(l) This is a material averment, and is traversable; 1 B. & B. 631; 4 J. B. Moore, 303; and it should seem the declaration is not sufficient without it; *id.*; Com. Dig. Pleader, C. 43; Dyer, 365 b.

Sometimes the precedents merely state, "that is to say, for the residue of a certain term of years, whereof — years and upwards were then to come and unexpired;" inserting a number of years sufficient to show that the reversion was in the lessor, and this mode seems sufficient, the lessor's title being merely inducement.

Where the plaintiff in the first and third counts alleged, that at the time of the making of the agreement he was possessed of a house for a certain term of years, to expire on the 25th of December, 1856, and in the second count alleged that he was entitled to the term under and by virtue of a certain contract;

proof that he was possessed of a term of twelve years only, and that there was no contract under which he was at that time entitled to an extension of the term, held a fatal variance, although it appeared that plaintiff had since become possessed of a lease to expire in December, 1856; 1 M. & P. 717.

(m) When the action is at the suit of the executor or administrator of a lessor who was a termor, for rent due after his death, it is necessary, in order to show the plaintiff's right of action, to state the lessor's title as above. When such action is at the suit of an administrator, a form may be readily adopted from the one above, stating the grant of administration. This concise mode of stating the interest is sufficient when the title is pleaded as inducement; Com. Dig. Pleader, E. 19, C. 35; Co. Lit. 17 a; *ante*, 406, note (h).

(n) As to these words, *ante*, 406, n. (k).

ESTATE AND
QUANTITY
OF INTEREST.

the said reversion of and in the said demised premises, with the appurtenances, without revoking or altering his said will; and after whose death, to wit, on &c., [*day of probate or about it*] the plaintiff duly proved the said last will and testament, and took upon himself the burden of the execution thereof, (o) whereby the plaintiff, as executor as aforesaid, became and was possessed of the said reversion of and in the said demised premises, with the appurtenances. And although, &c. [*Conclude, stating performance of covenants by the testator in his life-time, and by plaintiff after his death, and the defendant's breach of covenant, as in other cases.*]

By executor of
lessor, tenant
from year to
year, for breach
of covenant in a
lease for twenty-
one years,
granted by
him. (p)

For that whereas, before and at the time of making the indenture herein-after mentioned, to wit, on &c., E. F. demised the tenements, with the appurtenances, hereinafter mentioned, to the said G. H. deceased, his executors, administrators and assigns, to hold the same to the said G. H., his executors, administrators and assigns, from &c., for one year thence next ensuing and fully to be complete and ended; and so from year to year, for so long time as the said E. F. and G. H. should respectively please; by virtue of which said demise the said G. H. entered into the said tenements, with the appurtenances, so to him demised as aforesaid, and became and was possessed thereof, and being so possessed thereof, heretofore, and during the continuance of the said demise, to wit, on &c., by a certain indenture then made between the said G. H. of the one part, and the defendant of the other part, the counterpart, &c. [*Here state the lease to the defendant, which was for twenty-one years—the covenants—reference to the lease—entry of the lessee—the death of the testator during the continuance of the first demise, having made his will, and thereby appointed plaintiff executor—that he proved the will, and thereby became possessed of the interest in the first demise, as in preceding form, mutatis mutandis, and then averring the breaches of covenant during the continuance of the first demise.*]

Against the ex-
ecutor of a les-
see, for a breach
of covenant
after his death.

After stating the indenture or lease between plaintiff and the testator, and the entry of the testator, as usual, see ante, 391, 392, &c., proceed thus:] And the said E. F. [*the testator*] continued so possessed of the said demised premises for a long space of time, to wit, from thence until &c., [*day of his death or about it*] when the said E. F. died, on whose death, to wit, on the day and year last aforesaid, all the estate and interest of the said E. F. of, in, and to the said demised premises, with the appurtenances, came to and vested in the defendant as executor as aforesaid, by reason whereof the defendant, as executor as aforesaid, afterwards, to wit, on the day and year last aforesaid, entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed, and from thence hitherto hath been and still is possessed thereof, for the residue of the said term so to the said E. F. thereof granted as aforesaid. [*Then proceed to state the averments of performance by plaintiff, and the breach by the executors, as in other cases.*]

(o) See, as to the necessity of stating probate, 2 Stra. 716.

(p) This precedent was holden good on demurrer; 2 Chit. Rep. 461; see also 3

Wentw. 461. See similar form and decision, *Baker v. Gostling*, 1 Bing. N. C. 28; but they sued only on privity of contract, not of estate.

For that whereas, before and at the time of the making of the demise hereinafter mentioned, and from time whereof the memory of man is not to the contrary, the tenements hereinafter mentioned to have been demised were and still are situate within the manor of —, in the county of —, and parcel of the said manor and customary tenements thereof, demised and demisable by copy of the court rolls of the said manor by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same in fee simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor. And whereas also heretofore, to wit, on &c., —, then being lord of the said manor, at a special Court Baron of him the said —, so then being lord of the said manor as aforesaid, then holden in and for the said manor, before —, (r) the then deputy steward of the court of the said manor, by copy of the court roll of the said manor, according to the custom of the said manor, by his said deputy-steward, granted the said customary tenement, with the appurtenances, to the said E. F., to hold the same to him the said E. F., his heirs and assigns for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor. By virtue of which said grant he the said E. F. afterwards, to wit, on the same day and year aforesaid, entered (s) into the said customary tenements, with the appurtenances, and became and was seised thereof in his demesne as of fee (t) at the will of the lord, according to the custom of the said manor, and continued so thereof seised until the time of his decease, [or “surrender,” &c. according to the fact,] hereinafter mentioned. And the said E. F., being so seised of the said customary tenement, with the appurtenances, as aforesaid, heretofore, to wit, on &c., by a certain indenture then made between the said E. F. of the one part, and the defendant of the other part, one part, &c. [Here state the profert, covenants, reference to the lease, and entry of lessee, as in the precedent, rule, 391, 392, and then state the surrender, &c. according to the fact, which may be as post, &c.]

ESTATE AND
QUANTITY
OF INTEREST.

Inducement
that the pre-
mises demised
were copyhold,
and that lessor
was seised in
fee. (q)

Grant by the
lord to E. F.
and heirs.

That whereas, before and at the time of making the demise hereinafter mentioned, one E. F. was seised in his demesne as of fee, at the will of the lord of the manor of —, in the county of —, according to the custom of the said manor, of the said tenements, with the appurtenances, hereinafter mentioned to have been demised to the defendant, the same tenements with the appurtenances then and still being part and parcel of the said manor and a customary tenement thereof, demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his

The like in a
more concise
form. (u)

(q) As to the mode of describing copyhold of inheritance, or a less estate, see 1 Saund. 146, 147, 348, note 8; Heath's Max. 145; and see the form, 3 Wentw. 449. As to the necessity for the words, “at the will of the lord,” see 1 Saund. 348, note 9; Co. Lit. 58 a, n 1; and as to pleading an admission, see Vin. Ab. Copyhold, U. b.; and of copyhold in general, Com. Dig. Pleader, E. 19; 4 Co. Rep. 222 b. When the title, as in this case, in covenant, is pleaded merely as inducement, it should seem that it may be stated in a more concise mode, as in the next

precedent; see Com. Dig. Pleader, E. 19.

(r) It is necessary to state the steward's name; Cro. Eliz. 392; Vin. Ab. tit. “Copyhold,” U. b. pl. 3, 5.

(s) An entry should be averred, though it is not traversable; 1 Saund. 147, n. 2.

(t) 1 Saund. 146, 147. Or if for life, “as of freehold for the term of his life at the will of the lord of the said manor, according to the custom of the said manor;” 1 Saund. 147.

(u) See the notes to the last form. As to this form, see 4 Co. 22 b; Vin. Ab. tit. Copyhold, U. b.

ESTATE AND QUANTITY OF INTEREST. steward of the Court of the said manor for the time being, to any person or persons willing to take the same in fee-simple, or otherwise, to hold of the lord of the said manor, at the will of the lord of the said manor, according to the custom of the said manor, and being so seised be the said E. F. heretofore, to wit, on &c. by a certain indenture, &c. [*State the lease and reference, as ante, 391, 392; defendant's entry, as ante, 392; the plaintiff's derivative title, and breach of covenants.*]

Customary freehold. (x) For that whereas, before and at the time of the making of the demise hereinafter mentioned, and from time whereof the memory of man is not to the contrary, the tenements, with the appurtenances hereinafter mentioned to have been demised to the defendant, were and still are situate within and parcel of the manor of —, in the county of —, and customary tenements thereof, and during all that time descendible and which have descended from ancestor to heir, as of the hereditary right of the tenants called tenant right, held of the lord of the said manor for the time being, as of that his manor, by divers rents and certain services, according to the custom of the said manor. And that one E. F. before and at the time of the making of the demise hereinafter mentioned, was and from thenceforth until and at the time of the making of the indenture, &c. [*the conveyance under which the plaintiff claims*], hereinafter mentioned, was seised of and in the said customary hereditary tenements, with the appurtenances, as of his customary hereditary estate, in form aforesaid, descendible and descending according to the custom of the said manor, held of the lord of the said manor as of that his manor as aforesaid. And the said E. F. being so seised, thereupon heretofore, to wit, on &c. [*State the lease, &c. as usual, the lessee's entry, plaintiff's derivative title, and the breaches.*]

ESTATE AND TIME OF ENJOYMENT. (y)
Seisin in fee in reversion. (z)

ESTATE AND TIME OF ENJOYMENT.

For that whereas one E. F. before and at the time of the making of the indenture hereinafter mentioned, was seised in *his demesne* (a) as of fee of and in the reversion of a certain messuage, &c. with the appurtenances, immediately expectant upon the death of G. H. who was seised of the tenements as of freehold as tenant thereof by the law of England. And the said E. F. being so seised of the said reversion of the said tenements, with the appurtenances, he the said E. F. heretofore, to wit, on &c. by his certain indenture made between &c. [*here state the indenture containing a demise to J. K. for twenty-one years, to commence after the death of the tenant for life: then state the lessee's interest in the lease as follows:*] By virtue of

(x) As to the statement of this estate, and the nature thereof, see 3 B. & P. 378; 5 East, 51, &c.; 7 East, 305; and see form, 9 Wentw. 124, 126.

(y) As to this division, see 2 Bla. Com. 163.

(z) See the form, with notes, 1 Saund. 250, &c.; 2 B. & P. 574. Attornment of tenant need not be alleged; 2 Saund. 305 b. 13; Dougl. 283; see a form stating a reversion after an estate tail, 2 Saund. 235.

(a) The forms in Saund. 250; Co. Ent.

708 b, contain the words "in his demesne," but other forms omit them; Winch. 1103; 1 Saund. 106. When a reversion depends on an estate for years, pleading either seisin in demesne as of fee, or seisin as of fee, will be proper; but if the reversion depend on an estate of freehold, the words "in his demesne" should be omitted; Plowd. 191 a; Co. Lit. 17 b, note 1; see also Com. Dig. Pleader, C. 35; Doc. Plac. 287; 1 M. & P. 633; *ante*, 404, note (x); as to pleading a reversion in general, see 1 Saund. 234, note 3, 4.

which said demise the said J. K. then became and was possessed of the interest of the said term expectant upon the death of the said G. H. And the said J. K. being so possessed of the interest in the said term, and the said E. F. being so seised of the reversion thereof expectant upon the death of the said G. H., he the said E. F. afterwards, to wit, on &c. [*here state bargain and sale, &c. by E. F. to the plaintiff, and assignment by J. K. the lessee to C. D. the defendant, of the interest in the term, to commence on the death of G. H. : then state the death of G. H., the entry of C. D. as tenant, and the seisin of the reversion by A. B. the plaintiff, and the rent in arrear, &c. as usual, see ante, 396, 397.*]

ESTATE AND
TIME OF
ENJOYMENT.

Interest in a
term to com-
mence in futuro.
(b)

State the seisin of the lord, and that at a Court Baron, &c. he granted the said tenements, with the appurtenances, to one G. H. for the term of his life, and the remainder thereof after the decease of the said G. H. to one E. F. and his heirs for ever. By virtue of which said grant he the said G. H. entered into the said tenements, with the appurtenances, and was seised thereof in his demesne as of freehold for the term of his life, at the will of the lord, according to the custom of the said manor, the remainder thereof belonging to the said E. F. and his heirs. And the said G. H. being so seised thereof, and the remainder thereof belonging to the said E. F. and his heirs as aforesaid, he the said E. F. &c.

Remainder in
fee in a copy-
hold. (c)

ESTATE AND NUMBER OF OWNERS.

As to the number of owners, see 2 Bla. Com. 103, 175 to 195. An estate is either in severalty, joint-tenancy, co-parcenary, or in common.

ESTATE AND
NUMBER OF
OWNERS. (d)

In all the foregoing precedents the estate having been described as in severalty, it will be merely necessary here to give the form of pleading (e) in the case of an estate in fee in the husband and wife in right of the wife, when the wife survives, and which is as follows :] And the said E. F. and G. his wife, being so seised of the said reversion as aforesaid, he the said E. F. afterwards, to wit, on &c. died, and the said G. then survived him, whereupon and whereby she the said G. then became, and was, and still is, sole seised of the said reversion, with the appurtenances, in her demesne as of fee. (f)

An estate in se-
veralty.

For that whereas, before and at the time of the making of the indenture hereinafter-mentioned, E. F. and G. H. were seised as joint-tenants in their demesne as of fee, (g) of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised to the defendant, and being so seised thereof heretofore, to wit, on &c. by a certain indenture then made between the said E. F. and G. H. of the one part, and the defendant of the

Estate in joint-
tenancy and the
death of one,
and sole seisin of
the survivor.

(b) As to the *interesse termini*, see 1 Saund. 251, note 1; *ante*, 406, note (k); 2 Saund. 176, note 5; 1 Saund. 106; Clift's Ent. 222.
(c) As to this form, see 1 Saund. 146, 147, and notes; see the mode of pleading a remainder in fee of a freehold estate, 2 Saund. 235.

(d) 2 Bla. Com. 103.

(e) See the next form as to sole seisin by survivorship, in case of a joint tenancy.

(f) See this form, 1 Saund. 253; and as to the allegation of sole seisin in general, 2 Saund. 10, note, 14.

(g) As to these words, see *ante*, 404, n. (y).

ESTATE AND
NUMBER OF
OWNERS.

other part, the counterpart, &c. [*here set out the lease as usual, the reference to it, and the lessee's entry, as ante, 391, 392, and then state the death and survivorship as follows:*] And the defendant, being so possessed of the said demised premises, with the appurtenances, for the said term so to him thereof granted as aforesaid, and the reversion thereof after the expiration of the said term belonging to the said E. F. and G. H., afterwards, and in the life-time of the said G. H. and during the said term by the said indenture granted, to wit, on &c. the said E. F. died so seised of the said reversion of and in the said demised premises, with the appurtenances, as aforesaid, and the said G. H. then survived him, whereupon and whereby the said G. H. then became and was sole (*h*) seised of the said reversion of and in the said demised premises, with the appurtenances, in his demesne as of fee, and being so seised, &c.

Estate in co-
parcenary.

For that whereas, before and at the time of the making of the indenture hereinafter mentioned, E. F. and G. H. were seised in their demesne as of fee (*i*) of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised to the defendants, as daughters and co-heir (*k*) of one J. K. deceased. And being so seised, heretofore, to wit, on &c. by a certain indenture then made, &c. [*If the estate in co-parcenary be stated derivatively from the father, it is described as follows:*] For that whereas, before and at the time of the making of the demise hereinafter mentioned, one J. K. was seised in his demesne as of fee of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised. And being so seised, he the said J. K. heretofore, to wit, on &c. by a certain indenture then made, &c. [*here set forth the demise to the defendant, the covenants, the reference to the lease, and the lessee's entry, and then state the death of the lessor, and the descent to the co-parceners, as follows:*] And the defendant being so possessed of the said tenements, with the appurtenances, and the reversion thereof after the expiration of the said term belonging to the said J. K. and his heirs, he the said J. K. afterwards, to wit, on &c. died so seised of the said reversion as aforesaid; whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, descended and came to the defendants as daughters and co-heir of the said J. K. (*l*) whereupon and whereby the defendants then became, and were, and still are, seised of the said reversion of and in the said tenements, with the appurtenances, as of fee.

Tenancy in
common. (*m*)

For that whereas, before and at the time of the making of the indenture of demise hereinafter mentioned, one E. F. was seised in his demesne as of fee of and in one undivided moiety, the whole into two equal moieties to be divided, of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised to the defendant; and one G. H. was also then

(*h*) See the last note, and 2 Saund. 10, note 14.

(*i*) As to these words, see *ante*, 404, n. (*y*).

(*k*) In 1 Saund. 255, and Winch. 1163, the parceners are described as co-heirs; but according to Co. Lit. 163, 164, and 2 Bla. Com. 187, all parceners make but one heir;

see also Rob. Gav. 114; 10 Bing. 529.

(*l*) See 7 Dowl. & Ry. 517.

(*m*) See the form, Winch. 1163; how to describe the demand, *de una medietate* of the rent, Carth. 289. As to joinder or severance in an action, 5 T. R. 246.

seised in his demesne as of fee of and in the other undivided moiety of and in the said tenements, with the appurtenances; and thereupon heretofore, to wit, on &c. [*here state the lease by both tenants in common.*]

ESTATE AND
NUMBER OF
OWNERS.

THE TITLE, AND HOW ACQUIRED.

THE TITLE,
AND HOW
ACQUIRED.

State the seisin of the lessor and the lease, as ante, 404, and the lessee's entry, and then proceed as follows:] And the defendant being so possessed as aforesaid, and the said E. F. being so seised of the said reversion as aforesaid, he the said E. F. afterwards, to wit, on &c., died so seised of the said reversion of and in the said demised tenements, with the appurtenances as aforesaid, whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, then descended and came to the plaintiff as son and heir of the said E. F., deceased, and thereby he the plaintiff then became, and was, and still is, seised of the said reversion of and in the said tenements, with the appurtenances, in his demesne as of fee. [*Then proceed to state the averments of performance of covenants by plaintiff, and defendant's breach, as in other cases.*]

Title to the en-
tirety by de-
scent in fee. (n)

And the said E. F. being such rector as aforesaid, and so seised as aforesaid, he the said E. F. afterwards, and during the continuance of the said term, to wit, on &c. died, and thereupon afterwards, and during the continuance of the said term, to wit, on &c., the plaintiff was in due form of law presented to the said rectory and lawfully instituted and inducted into the same. Whereupon the plaintiff then became, and was, and still is, rector of the said rectory, and the lawful successor of the said E. F. therein; and the plaintiff, as such rector as aforesaid, then became, and from thence hitherto hath been, and still is, seised in his demesne as of freehold, in right of his said rectory, of and in the said premises in the said indenture mentioned.

By succession
of a rector on
death. (o)

(n) It must, in covenant by an heir on the lease of his ancestor, be shown that the lessor was seised in fee, Gilb. Debt, 408 to 410; as to pleading title by descent in general, see 2 Bla. Com. 200 to 240; Com. Dig. Pleader, 2 E. 1, 2; Vin. Abr. Heir; see the form, Co. Ent. 708 b; 2 Saund. 418. As to pleading a descent in tail, 1 Saund. 255. The like as co-heirs, *id. ibid.*; and *ante*, 412. It may be pleaded that B. is heir to A., without saying either that A. is dead or had no son; 2 Saund. 305 a, note 13; 2 Lutw. 1172. It must be shown *how* the plaintiff is heir, whether as son or daughter, grandson, *cousin*, &c. 2 Saund. 45 a; 5 East, 272; 1 Salk. 365; and that he was heir to the person last seised, Co. Lit. 11 b; Vin. Abr. Heir, L. pl. 14, 15; 1 Stra. 230. In 3 B. & P. 453, it was decided, that in a count on a writ of right, it is not sufficient to state that the lands descended to four women, "as nieces and co-heirs of J. S." without showing how they were nieces. And in pleading title as heir to an uncle, he must show how he is heir, and make the father a medium, viz. that the inheritance descended to him *ut consanguineo et heredi*, viz. son of

such an one, who is brother and heir to the uncle; 12 Mod. 619. And so in case of a descent from the grandfather, viz. as son and heir to the father, who was son and heir to the grandfather; 12 Mod. 619. But between two brothers a descent is *immediate*, and title may therefore be made by one brother, or his representatives, *to or through* another brother, without mentioning their common father; and the son of one brother may claim as cousin and heir to the son of the other brother, without naming the grandfather, thus, "as son of Francis, who was the brother of John, who was the father of Matthew;" 2 Bla. Com. 226; Vin. Abr. Heir, L. 1, pl. 18, &c.; 5 East, 272. As to stating descent to the king, 4 Mod. 355; as to pleading a title by descent in a *copyhold* estate, see 4 Co. 22 b; Vin. Abr. Copyhold, U. b. When descent traversable, Dyer, 365 b.

(o) As to the statement of a freehold in right of a rectory, *ante*, 406. This concise mode is adopted in actions on the case for dilapidations. See also Mall. tit. "*Quare Impedit*," F. 1, &c.; 3 B. & P. 444.

**THE TITLE,
AND HOW
ACQUIRED.**
By marriage. (p) And the said C. being so seised of and in the said reversion in the said demised tenements, with the appurtenances as aforesaid, she the said C. afterwards, to wit, on &c., took to her husband the plaintiff; by virtue whereof the plaintiffs then became and were seised of the said tenements, with the appurtenances, in their demesne as of fee in right of the said C.

By feoffment.
(q) And the said E. F. being so seised as aforesaid, he the said E. F. afterwards, to wit, on &c., enfeoffed the plaintiff of the said tenements, with the appurtenances, to have and to hold the same to the plaintiff and his heirs and assigns to the use of the plaintiff his heirs and assigns for ever; by virtue of which said feoffment the plaintiff then became and was seised of and in the said tenements, with the appurtenances, in his demesne as of fee; and being so thereof seised, &c.

By lease. (r) For that whereas heretofore, to wit, on &c., by a certain indenture then made between E. F. of the one part and the plaintiff of the other part, (which said indenture, sealed with the seal of the said E. F. the plaintiff now brings here into Court, the date whereof is the day and year aforesaid,) the said E. F. did demise, lease, set and to farm let(s) unto the plaintiff, his executors, administrators and assigns, a certain messuage or dwelling-house, &c.; situate &c. (except as in the said indenture is excepted,) to have and to hold the said messuage or dwelling-house, &c., with the appurtenances, (except as aforesaid,) unto the plaintiff, his executors, administrators and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing and fully to be completed and ended [*here set out any parts of the lease that may be applicable to the case, and see the form and notes, ante, 391, 392,*] as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said demise the plaintiff afterwards, to wit, on &c., entered (t) into and upon all and singular the said demised premises, with

(p) See the form, 1 Saund. 253. Pleading a seisin in fee tail in husband and wife by marriage, 1 Saund. 255; 2 Rich. C. P. 350, 351. Seisin in fee in right of the wife, *ante*, 404. Tenancy by curtesy by husband's surviving, *ante*, 406. Sole seisin in wife by her surviving, *ante*, 411.

(q) See the forms, 2 Saund. 9, 20; 4 Mod. 355, and the law as to feoffments, 2 Bla. Com. 310 to 316. When feoffment traversable, Dyer, 365 b. A feoffment is not pleaded by deed, 2 Saund. 9, n. 13; and therefore no profit thereof need be made; and the statute of frauds, 29 Car. 2, c. 3, which requires that livery should be accompanied by some instrument in writing, has not altered the form of pleading, 3 T. R. 156; 1 Saund. 9 a, note 1; livery of seisin on the feoffment needs not be stated in pleading, Co. Lit. 303 b; 2 Saund. 305 a, n. 13; 1 Saund. 228 b. As to the distinctions between a gift of real property and a feoffment, see 2 Bla. Com. 316, 317. As to the mode of pleading a *grant*, *id.* 317; 2 Saund. 96, 297, 327, 328, n. 12.

(r) 2 Bla. Com. 317 to 323. Lease for lives, 3 Wils. 129. Demise by the king by indenture inrolled, &c. 1 Saund. 187. When a tenant for life and the remainder-man in fee join in making a lease, it should not be pleaded as a joint lease by both in its inception, for, living the tenant for life, it is only *his lease*, and the *confirmation* of the remainder-man; Cas. & Op. vol. ii. 184, edit. a. d. 1791; 6 Co. 14 b, 15 a; 2 Bla. Com. 325. If the lessee, or any other, plead a demise by husband and wife, it is not necessary to plead it to have been by deed, 2 Co. 61 b; Say. 111; Dyer, 91 b; Cro. Eliz. 438, 482; or that any rent was reserved, Cro. Eliz. 112. And as to pleading a lease by husband and wife in general, see 2 Saund. 180 b.

(s) These are the words usually adopted, see 1 Saund. 187. See *ante*, 391, 392, as to how to set out the lease.

(t) It is not necessary to state the entry, 1 Saund. 203, n. 1. As to the *interesse termini*, *ante*, 406, 411; possession of a term, 2 Saund. 21; *ante*, 406.

the appurtenances, and became and was possessed thereof for the said term, so to him thereof granted as aforesaid; and being so possessed, &c.

THE TITLE,
AND HOW
ACQUIRED.

By virtue of which said demise he the said E. F. afterwards, to wit, on &c. aforesaid, entered into and upon all and singular the said demised tenements, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid. And the said E. F. being so possessed thereof, he the said E. F. afterwards, to wit, on &c., by his certain deed-poll indorsed on the said indenture, and duly signed by him and sealed with his seal, and which the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid, he the said E. F., for the consideration therein mentioned, did bargain, sell, assign, transfer and set over unto the plaintiff, his executors, administrators and assigns, [*here set out the operative words of the deed of assignment,*] as by the said deed-poll, reference being thereunto had, will more fully appear. By virtue of which said deed-poll the plaintiff afterwards, to wit, on &c. last aforesaid, became and was, and from thence hitherto hath been, and still is possessed of the said tenements, with the appurtenances, for the residue of the said term so thereof granted as aforesaid. And although &c. [*Aver plaintiff's general performance of the covenants since the assignment to him of lessee's interest, and the defendant's breach of covenant, as in other cases.*]

Assignment of
a term to the
plaintiff. (u)

And the said E. F. being so possessed of the said demised tenements, with the appurtenances, as aforesaid, he the said E. F. after the making of the said indenture, and during the continuance of the said term thereby granted, to wit, on &c., did surrender to the said G. H. the said term of years of him the said E. F. then to come and unexpired of and in the said demised tenements, with the appurtenances, and all his estate, right, title, and interest of and in the same; which said surrender he the said G. H. then accepted.

Surrender of a
leasehold inter-
est. (v)

And the said E. F. being so seised, afterwards, to wit, on &c., by his certain writing then made by the said E. F. and sealed with his seal, the date whereof is the day and year last aforesaid, he the said E. F. for and in consideration of the natural love and affection which he the said E. F. bore for the plaintiff, then being his [cousin], did covenant for himself and his heirs

Covenant to
stand seised to
uses. (x)

(u) 2 Bla. Com. 326; see *ante*, 406. In an action by the assignee of the reversion, or by the assignee of the tenant, he must state the operative part of the deed of assignment, &c. and all mesne assignments, by virtue of which he is entitled to sue; 1 Saund. 112 b, n. 1, 234, n. 3. But it seems the assignee of a term need not in a declaration show the assignment to have been by deed or in writing, under the statute 29 Car. 2. c. 3, s. 3, though it may be otherwise in a plea; 3 Lev. 155; Com. Dig. Plead. 2, v. 2. And where the title is doubtful, or the assignments have been lost, 2 Bla. Rep. 1228, it is advisable not to refer to the deeds of assignment, 1 Saund. 234, n. 3, 276, n. 1, 2. *Sed query* whether the rule as to its not being necessary to state the assignment to have been by deed does not

apply only to the assignee of a lessee, who might at common law assign by parol; see 1 Saund. 234. A more concise form may be adopted *against* an assignee, *ante*, 396.

(v) See the form, 1 Saund. 235; 2 Saund. 22; 2 Bla. Com. 326. As to what operates as a surrender, and the mode of pleading it, see 1 Saund. 235 c, n. 9; 6 East, 86; Com. Dig. "Surrender," N. Though since the statute against frauds, a surrender not merely by operation of law must be in writing, yet in a declaration it is not requisite to allege that it was in writing, though it may be necessary in a plea; 1 Saund. 276 a, notes 1 and 2; 5 Taunt. 257; and see 6 Bing. 529.

(x) As to this conveyance, see 2 Bla. Com. 338; and as to pleading it, 2 Saund. 97 b, c, 370; Lutw. 1207; Carth. 307; 3 Lev. 370.

THE TITLE,
AND HOW
ACQUIRED.

to and with the plaintiff and his heirs, that he the said E. F. and his heirs, then and from thenceforth for ever, did, would, and should stand and be seised of the said [or "of the said reversion of and in the said"] demised tenements, with the appurtenances, to the use of the plaintiff, his heirs, and assigns, for ever, whereupon and whereby, according to the form and effect of the said deed and of the said covenant of the said E. F. and by force of the statute for transferring uses into possession, (y) he the plaintiff then became and was seised of and in the said demised tenements, with the appurtenances, [or "of the said reversion,"] in his demesne as of fee. And being so seised, &c.

Bargain and
sale enrolled.(z)

And the said E. F. being so seised, afterwards, to wit, on &c., by a certain indenture of bargain and sale then made between the said E. F. of the one part and one G. H. of the other part, which said indenture sealed with the seal of the said E. F. the said G. H. now brings here into Court, (a) the date whereof is the day and year aforesaid, and which said indenture of bargain and sale was afterwards, and within six months next after the date thereof, to wit, on &c., in due manner enrolled in the High Court of Chancery of our lady the now queen at Westminster, in the county of Middlesex, according to the form of the statute in such case made and provided, (b) he the said E. F., for and in consideration of a certain sum of money, to wit, the sum of £—, (c) therefore then paid by the said G. H. to the said E. F. did bargain and sell (d) to the said G. H. amongst other things the said demised premises, with the appurtenances, to have and to hold the same to the said G. H., his heirs and assigns, to the only proper use and behoof of him the said G. H., his heirs and assigns, for ever, as by the said last-mentioned indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. By virtue of which said bargain and sale and enrolment, and by force of the statute for transferring uses into possession, (e) he the said G. H. then became and was seised of the reversion of the said demised premises, with the appurtenances, as of fee, and the said G. H. being so seised, &c.

(y) See *infra*, note (e).

(z) The nature of this conveyance is described in 2 Bla. Com. 338, and 1 Saund. 251, n. 2; see the forms, 1 Saund. 251, 252, 256; 2 Saund. 275, 297 c; *id.* 11. The bargain and sale in *Outram v. Morewood*, 3 East, 346, was pleaded as in this precedent.

(a) It has been supposed not to be necessary to make a profert of deeds operating under the Statute of Uses, 8 T. R. 573; 1 Saund. 9, n. 1; but the safer course is to make a profert, and which seems necessary where the party pleading has a right to the possession of the deeds. See also *Jenkin v. Pearce and others*, 6 M. & W. 722; 8 Dowl. 758, S. C.

(b) By 27 Hen. 8, c. 16, bargains and sales shall not enure to pass a freehold, unless the same be made by indenture sealed, and enrolled within six months after the date thereof, in one of the Courts at Westminster, or with the Custos Rotulorum of the county; 2 Bla. Com. 338; 1 Saund. 251, n. 2. It is neces-

sary to show in what Court the deed is enrolled, 1 Saund. 251, n. 3; Com. Dig. "Bargain and Sale," B. 12. This regulation does not extend to London, &c. Com. Dig. "Bargain and Sale," B. 5.

(c) In pleading a conveyance under the Statute of Uses, it is necessary in all cases (except in the instance of a covenant to stand seised, *ante*, 415,) to state that a valuable consideration was paid, Com. Dig. "Bargain and Sale," B. 12; 1 Mod. 263; 2 Saund. 12, note 20; *ante*, vol. i. tit. "Declarations;" *semble*, the omission would be fatal on special demurrer, 2 Hen. Bla. 259.

(d) The operative words are so pleaded in 2 Saund. 275, which is more correct than the form in 1 Saund. 251; see also 2 Saund. 97 c.

(e) The 27 Hen. 8, c. 10, is always called in pleading "the statute for transferring uses into possession," 1 Saund. 251, n. 2; 2 Saund. 97 c.

And the said E. F. being so seised, [*or*, "so seised of the said reversion,"] as aforesaid, afterwards, to wit, on &c., by a certain indenture of bargain and sale then made between the said E. F. of the one part, and the plaintiff of the other part, which said indenture, sealed with the seal of the said E. F., the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid, (*g*) he the said E. F., for and in consideration of a certain sum of money, to wit, the sum of 5*s*. then therefore paid by the plaintiff to the said E. F. (*h*) did bargain and sell the said [*or*, "the said reversion of and in the said"] demised tenements, with the appurtenances, to the plaintiff, to have and to hold the same to the plaintiff, his executors, administrators, and assigns, from the day next before the day of the date of the said last-mentioned indenture, for the term of one whole year from thence next ensuing and fully to be complete and ended; as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. (*i*) By virtue of which said last-mentioned indenture, and by force of the statute made for transferring uses into possession, (*k*) the plaintiff then became and was possessed of the said tenements, with the appurtenances, for the said term so to him thereof granted as aforesaid [*or if the conveyance was of a reversion expectant on the expiration of a lease for years, insert, after the word "possession," as follows, "the said reversion of and in the said demised tenements, with the appurtenances, became and was vested (l) in the said A. B. for the said term so to him thereof granted as aforesaid," the reversion [or if expectant on a lease, "the further reversion,"] thereof, with the appurtenances, belonging to the said E. F., his heirs and assigns. And the plaintiff, being so interested as aforesaid, and the defendant, being so possessed of the said demised premises for the residue of the said term so to him thereof granted as aforesaid, afterwards, to wit, on &c., (n) by a certain indenture of release then made between the said E. F. of the one part, and the plaintiff of the other part, and which said last-mentioned indenture, sealed with the seal of the said E. F. the plaintiff now brings here into Court, the date whereof is the day and year last aforesaid, (o) he the said E. F., for and in consideration of a certain sum of money, to wit, the sum of £——, then paid to him by the plaintiff, did grant, bargain, sell, alien, release, and confirm (*p*) unto the plaintiff and his heirs the said demised premises, with the appurtenances, to have and to hold, &c. [*Set out the habendum as in the deed.*] By virtue of which said last-mentioned indenture, and by force of the statute made for transferring uses into pos-*

THE TITLE,
AND HOW
ACQUIRED.

Lease and re-
lease. (*f*)

Release. (*m*)

(*f*) 2 Bla. Com. 339; see forms, 2 Saund. 10, 275; Lutw. 567; 3 Wils. 134; Lil. Ent. 136. As to the mode of pleading the lease for a year, see 2 Saund. 10, n. 15; lease by husband and wife, 2 Saund. 180 b.

(*g*) In pleading a conveyance by lease and release, profert must be made of the release; *Jenkins v. Peace*, 6 M. & W. 722.

(*h*) *Seem*le if omitted, bad on special demurrer, 2 H. Bla. 259.

(*i*) This is not necessary.

(*k*) This allegation in the old way of pleading was omitted, but it is now always inserted; 2 Saund. 10, n. 1, 15; *supra*, note (*e*).

(*l*) See the opinion of Mr. Booth, in *Cases and Opinions*, vol. ii. 143 to 149, tit. "Reversion," edit. 1791, as to the effect of a con-

veyance by lease and release of a reversion expectant on a term, and the mode of pleading such conveyance, and see Co. Lit. 270 a, note 3; 4 Cruise, 199; from which it appears to be incorrect to plead that the lessor was possessed of the reversion.

(*m*) See forms, 2 Saund. 11, 276, 277; Lutw. 568.

(*n*) As to the date of lease and release, 2 M. & Sel. 434.

(*o*) As to the profert, see *Jenkin v. Peace*, 6 M. & W. 722.

(*p*) As to the proper words to be here inserted, 2 Saund. 97. a, b, c, and the forms, *ibid.* 11, 276, 277. *Quere* as to using all these words, see 1 Cbit. Rep. 67.

**THE TITLE,
AND HOW
ACQUIRED.**

session, (q) afterwards and during the continuance of the said term by the said first-mentioned indenture granted, to wit, on &c., aforesaid, he the plaintiff became, and was, and from thence hitherto hath been, and still is, seised in his demesne as of fee, [or, "of and in the said reversion"] of and in the said demised tenements, with the appurtenances.

By release,
under 4 Vict. c.
21.

And the said E. F., being so seised [or "so seised of the said reversion as aforesaid,"] afterwards, to wit, on &c., [date of release] by a certain indenture then made in pursuance and by virtue of an act of parliament made and passed in the fourth year of the reign of her present majesty, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," and made between &c. [make profert and set out the operative part of the deed, habendum and uses, and conclude as follows:] by virtue of which said last-mentioned indenture, afterwards, and during the continuance of the said term by the said first-mentioned indenture granted, to wit, on &c. aforesaid, [as in the last precedent.

By private act
of parliament.
(r)

For that whereas heretofore, to wit, on &c., by a certain act of parliament made in the — year of the reign of her present majesty, [or, "his late majesty King —"] intituled, &c. after reciting, that &c. it was, amongst other things, enacted, &c. [Here set forth the material clauses relating to the matters in dispute.] As by the record of the said act of parliament, remaining amongst the rolls of parliament of our lady the now queen, at Westminster, in the county of Middlesex, may more fully and at large appear.

By lease, &c.
from the king,
with profert of
exemplification
of the enrolment
of the letters
patent. (s)

State the seisin of the king, as ante, 405, and then proceed as follows:] And being so seised thereof, the said late king afterwards, to wit, on &c. in the — year of his reign, by his certain indenture sealed with his great seal of England, made between the said late king and one E. F., and in due manner enrolled of record in the Court of Chancery of the said late king, at Westminster, demised, granted, and to farm let, &c.. [Here set out the demise, &c.] as by the said indenture, (an exemplification of the enrolment thereof, sealed under the said late king's great seal of England, the date whereof is at Westminster, the — day of —, in the — year of the reign &c., the plaintiff, according to the form of the statute (t) in such case made and provided, brings here into Court) more fully appears. By virtue, &c. State lessee's entry, &c.

By fine levied
by husband and
wife of the
inheritance of
the wife. (u)

And the said E. F. and G. his wife, being so seised, (v) afterwards and

(q) Ante, 416, n. (e); and 417, n. (k).

(r) 2 Bla. Com. 344, 345; as to pleading a private act of parliament, see Bac. Abr. tit. statute, L.; Bul. Ni. Pri. 224, see a precedent, 1 Saund. 193. The defendant is not entitled to oyer; Dougl. 476, 477; 1 Saund. 9, n. 1, b.

(s) As to pleading leases or other grants from the king, which are always matter of record, see 2 Bla. Com. 346; 1 Saund. 189; Com. Dig. tit. "Patent."

(t) 3 & 4 Edw. 6, c. 4, explained by 13 Eliz. c. 6. As to the necessity for a profert of the exemplification, 1 Saund. 189, n. 2;

10 Coke's Rep. 94 b. But the defendant is not entitled to oyer, though pleaded with profert; 1 T. R. 149; 1 Saund. 9, n. 1, b.

(u) As to the fine and the effect of it, 2 Bla. Com. 348, 357; 1 Saund. 319, n. 1. See the form of a fine, 2 Bla. Com. App. No. 4; see the precedents, 2 Saund. 175, 269, 270; 1 Saund. 258; Co. Ent. 700; Clift. 819, pl. 5; 1 Leon. 255; 2 Rich. C. P. 531, vol. xvii. MS. 633. This form was adopted in 3 East, 346. Fines and recoveries are now abolished; see 3 & 4 W. 4, c. 74.

(v) It is not in general necessary to allege a seisin in fee; 2 Saund. 175, n. 1; 1 Leon.

during the continuance of the said demise, to wit, in [Hilary] Term, (x) in the — year of the reign of his late majesty King —, a certain fine was duly had and levied in his said majesty's Court of the Bench at Westminster, in the county of Middlesex, before —, (y) then his majesty's justices of the bench aforesaid, and other faithful subjects of the said late king then there present, between the plaintiff by the name of —, complainant, and the said E. F. and G. his wife, by the names of &c., deforciant, amongst other things of the said demised tenements, with the appurtenances, by the name and description of &c.; whereupon a certain plea of covenant (z) was summoned between them in the same Court, to wit, that the said E. F. and G. acknowledged the said tenements with the appurtenances to be the right of the plaintiff, as those which the plaintiff had of the gift of the said E. F. and G., and the same remitted and quitted claim from the said E. F. and G. and the heirs of her the said G. (a) to the plaintiff and his heirs for ever. (b) And further, the said E. F. and G. granted for themselves and the heirs of the said G. that they would warrant to the plaintiff and his heirs the tenements aforesaid, with the appurtenances, against all men for ever; as by the record of the said fine, remaining in the Court of the Bench of our lady the now queen, more fully appears; (c) which said fine so had and levied as aforesaid was had and levied to the use and behoof of the plaintiff and his heirs and assigns for ever. By virtue (d) of which said fine the plaintiff then became and was seised of the said tenements, with the appurtenances, in his demeane as of fee.

THE TITLE,
AND HOW
ACQUIRED.

See the precedent, 1 Saund. 259; as to the pleading a fine with proclamations as a bar to the issue in tail, and in general when such proclamations are necessary, and how they are to be pleaded, see 1 Saund. 259, n. 8; 2 Saund. 175, n. 3, 4; see the form, 2 Bla. Com. App. No. 4. Fines and recoveries are now abolished; see 3 & 4 W. 4, c. 74.

The like with
proclamations.

And the defendant further says, that before the said several times when &c., in the said first count mentioned, and at the several times hereinafter mentioned, one E. F. as heir at law of G. H. deceased, was seised in his demeane as of fee of and in the manor of &c., with the appurtenances, in

Deed to lead the
uses of recovery,
and recovery
accordingly. (e)

255. See a statement of seisin in fee in right of the wife, 2 Saund. 269.

(z) The term must be shown, and in what Court the fine was levied; 2 Saund. 175, n. 2.

(y) It appears advisable to state the names of all the judges; 2 Saund. 175, n. 2.

(x) 2 Rich. C. P. 352; 2 Saund. 270.

(a) In 2 Saund. 270, it is stated, "the heirs of the husband," but this is inaccurate, when the estate is the inheritance of the wife; 2 Saund. 175, n. 3; 2 Rich. C. P. 352.

(b) If a less estate, see 2 Saund. 175.

(c) A reference to the record of the fine, or of proclamations, is unnecessary; 2 Saund. 175, n. 4.

(d) As to this statement, 2 Rich. C. P. 352; 2 Saund. 270, 176. And as to the statement of a deed to lead the uses of the fee, see the following precedent of a recovery, and the statement of the deed to declare the uses of the fine, 2 Saund. 270.

(e) The recovery is pleaded in this form more concisely than is usual. See the next form. The above form in a plea was advised by Mr. Serjeant Williams, in preference to the more prolix statement. He pleaded it thus in a special verdict, and the Court expressed their approbation of it, but *quære* its goodness. See also 8 East, 560; Lutw. 1539; Doc. Plac. 309 a; Jacob's Law Dict. tit. "Recovery." See the record of a recovery, 10 Wentw. 251, and the exemplification of it, *ibid.* 252. The recovery is in this case merely inducement to show that C. D. was tenant for life. See the form of a recovery with single vouchers and writ of seisin thereon, 2 Saund. 89, &c.; and one with double voucher, 2 Bla. Com. App. No. 5, which will assist in framing the statement of a recovery. See the nature of a recovery defined, &c. Willes, 451; 2 Saund. 42, n. 7; 2 Bla. Com. 357. See the forms, Winch. Ent. 1139; 2 Lutw. 1541; Clift, 814, pl. 3.

THE TITLE,
AND HOW
ACQUIRED.

The recovery.

the county aforesaid. And being so seised thereof, he the said E. F. heretofore, to wit, on &c. by his certain indenture of bargain and sale, bearing date the day and year last aforesaid, and made between the defendant, (the now defendant,) of the first part, the said E. F. of the second part, J. K. of the third part, N. O. of the fourth part, and P. Q. of the fifth part; which said indenture bearing date the day and year aforesaid was then sealed with the seal of the said E. F. and was, within six months then next following, to wit, on, &c. in due manner enrolled in the High Court of Chancery of our said lord the late king, (according to the form of the statute in such case made and provided,) in consideration of the sum of 5*s.* to him the said E. F. in hand then paid by the said N. O., he the said E. F., at the request and by the direction and appointment of the said J. K., testified as therein mentioned, did bargain and sell, and the said E. F. did grant, bargain, sell and confirm unto the said N. O. (amongst other things) the said manor of &c., with the appurtenances, in the county aforesaid, to have and to hold the same to the said N. O. and his heirs and assigns, to the use and behoof of the said N. O. and his heirs and assigns for ever, to the intent and purpose that the said N. O. might become perfect tenant of the freehold of the said manor with the appurtenances. And it was thereby agreed that the said P. Q. should, before the end of that present Easter term, or of some other subsequent term, sue forth a writ of entry against the said N. O., in order to have a recovery suffered of the manor of &c., *sur disseisin en le post.* And that the said recovery when suffered should be and enure to the use of the said C. D. the now defendant, and his assigns, for and during the term of his natural life, and the remainder thereof to the use of the said J. K., his heirs and assigns for ever. And the defendant further says, that afterwards, to wit, in — term, in the — year of the reign of our lord the late king, a writ of entry *sur disseisin en le post* was sued out, and a common recovery in due form of law suffered of the said manor with the appurtenances, in pursuance of the said indenture, wherein the said P. Q. was demandant, against the said N. O. tenant, and the said N. O. vouched to warranty the defendant, (the now defendant,) who appeared and vouched to warranty the said J. K., who appeared and vouched to warranty —, the common vouchee, and a writ of seisin was thereupon awarded to the said P. Q., and the sheriff of the same county returned the same writ executed: as by the record and proceedings thereof remaining in the Court of our lady the now queen of the Bench here, to wit, at Westminster, more fully appears. And the defendant further saith, that the said J. K. and all those whose estate he now hath, and at the several times when &c., had of and in the said manor, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and have used, and been accustomed to have, and of right ought to have had, and the defendant who is so seised of the said manor, with the appurtenances, for the term of his life as aforesaid, still of right ought to have &c. [*Here the subject-matter of the prescription was stated.*]

The like more
fully pleaded.
(f)

After stating that R. H. and M. by fine became seised, proceed as follows:]

(f) This form is precisely as pleaded in *Outram v. Morewood*, 3 East, 346. See the notes, *ante*, 418, 419; and 1 Hen. Bl. 395.

And the said R. H. and M. being so seised, N. Z. and J. M. afterwards, to wit, in the same term of St. Michael, in the — year of the reign aforesaid, in the said Court of the Bench, before — and his companions, justices of the bench aforesaid, impleaded the said R. H. and M. in a plea of land of the aforesaid manor and tenements (amongst other things) by the writ of the said lady the queen, of entry upon *disseisin en le post*, in the same Court then returnable and duly returned, and the said R. H. and M. and N. Z. and J. M., parties to the said writ in the said Court in due manner appearing, and the said R. H. and M. so being seised of the said manor and tenements, with the appurtenances, in their demesne as of fee as aforesaid, the said N. Z. and J. M. then declaring upon the said writ, in their proper persons demanded against the said R. H. and M. the manor and tenements aforesaid, with the appurtenances, (amongst other things,) by the names and descriptions aforesaid, as their right and inheritance, and into which the said R. H. and M. had not entry, unless after the disseisin, of which R. H. thereof unjustly and without judgment had made to the said N. Z. and J. M. within thirty years then last past; and whereupon they said that they were seised of the manor and tenements aforesaid with the appurtenances, in their demesne as of fee and right, in time of peace in the time of the said then queen, by taking the profits thereof, to the value of &c., and into which, &c., and thereupon they brought suit, &c. And the said R. H. and M., in their proper persons, came and defended their right, when &c., and thereupon vouched to warranty J. Z., gentleman, son and heir apparent to the said J. Z., Esquire, which said J. Z. the son, present then in Court by H. M. W., Esquire, his guardian, which said H. M. W. was admitted by the said Court of the said queen to appear for the said J. Z. the son, being then under age, as the guardian of the said J. Z. the son, the manor and tenements aforesaid, with the appurtenances to them warranted, &c. and thereupon the said N. Z. and J. M. demanded, against the said J. Z. tenant, by his own warranty, the manor and tenements aforesaid, with the appurtenances, in form aforesaid &c. And whereupon they said that they were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee, in time of peace in the time of the said queen, by taking the profits thereof, &c. and into which, &c. and thereupon they brought suit, &c. And the aforesaid J. Z. tenant, by his own warranty, defended his right, when &c. and thereupon further vouched to warranty R. H., who was present there in Court in his proper person, and freely, the manor and tenements aforesaid, with the appurtenances, to him warranted, &c. And thereupon the said N. Z. and J. M. demanded against the said R. H. tenant, by his own warranty, the manor and tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon they said that they themselves were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee and right in the time of peace, in the time of the said then queen, by taking the profits thereof, to the value, &c. and thereupon they brought suit, &c. And the said R. H., tenant by his own warranty, defended his right, when, &c. and said that the aforesaid R. H. did not disseise the aforesaid N. Z. and J. M. of the manor and tenements aforesaid, with the appurtenances, as the aforesaid N. Z. and J. M., by their writ and count aforesaid above supposed, and of this he put himself upon the country; and the aforesaid N. Z. and J. M. thereupon prayed leave to

THE TITLE,
AND HOW
ACQUIRED.

R. H. and M.
vouch J. Z. the
son.

J. Z. to son
vouches R. H.

R. H. defends.

THE TITLE, AND HOW ACQUIRED.	
Judgment.	imparl, and they had it; and afterwards the aforesaid N. Z. and J. M. came again there into Court in that same term, in their proper persons; and the aforesaid R. H., though solemnly called, came not again, but departed, in contempt of the Court, and made default. Therefore it was then considered that the aforesaid N. Z. and J. M. should recover their seisin against the aforesaid R. H. and M., of the manor and tenements aforesaid, with the appurtenances, and that the aforesaid R. H. and M. should have of the land of the said J. Z. the son, to the value &c. and that the said J. Z. the son, should further have of the land of the said R. H. to the value, &c. and the said R. H. in mercy, &c. And thereupon the said N. Z. and J. M. prayed a writ
Writ.	of the lady the queen, to be directed to the sheriff of the county aforesaid, to cause them to have full seisin of the manor and tenements aforesaid, with the appurtenances, and it was granted to them, returnable thereon, &c. At
Return.	which day came there in Court the aforesaid N. Z. and J. M. in their proper persons, and the sheriff, to wit, —, Esquire, then returned, that he, by virtue of the writ aforesaid to him directed, on &c. then last past, did cause the said N. Z. and J. M. to have full seisin of the manor and tenements aforesaid, with the appurtenances, as by that writ he was commanded, &c.: as by the record and process thereof in the Court of our lady the now queen
Uses of recovery.	of the Bench, at Westminster, now remaining, appears: which said recovery as to the coals and ironstone being within or under any part of the said lands and tenements in &c. (except the coals and ironstone being within or under any of the messuages, buildings, orchards and gardens which were then standing and being upon any of the said lands and tenements,) with free liberty of ingress and egress into the said premises in places convenient for the getting and digging for the same coals and ironstone, and for the stacking the same in places near where the same should be gotten, until they might be conveniently sold and carried away off and from the said premises, was had and suffered to the use of the said J. Z. the father, for and during the term of four-score years, if he so long did live, the remainder thereof to the use of the said J. Z. the son, and to the heirs male of his body lawfully begotten and to be begotten, and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh and eighth sons of the body of the said J. Z. the father, begotten or to be begotten severally and successively, one after another according to seniority, and to the several and respective heirs male of the body of such sons respectively, and for default of such issue, to the use of the said J. Z. the son, and to his heirs for ever. By virtue of which said recovery, and by force of the statute made
Right of J. Z. the father, and seisin of the reversion in J. Z. the son, &c. by virtue of recovery.	for transferring uses into possession, the said J. Z. the father became possessed, amongst other things, of the said coals, with the liberties and appurtenances thereto belonging, for the term of four-score years, if the said J. Z. the father should so long live; and the said J. Z. the son became seised thereof in his demesne as of fee tail, the further remainder and reversion thereof belonging as before limited; and the said J. Z. the father, being so possessed, he the said J. Z. the father, afterwards, to wit, on &c. in &c. was created a knight by the said queen, which honour of knighthood the said J. Z. the father then accepted. And the said Sir J. Z. afterwards, to wit, on &c. died without any issue of his body, save the said J. Z. the son, and the said J. Z. the son being so seised as aforesaid, afterwards, to wit on &c. [<i>Lease and release by the son.</i>]

As to the statement of the premises being copyhold, and of the admission in fee, &c. of a lessor, &c. and of his seisin, see ante, 409,] And the said E. F. being so seised of the said customary tenement, with the appurtenances as aforesaid, he the said E. F. by — his attorney, in that behalf *(h)* duly authorized, at that same Court, did afterwards, to wit, on the day and year last aforesaid, according to the custom of the said manor, in open Court there, *surrender* to the hand of the said — so then being lord of the said manor, by the hands and acceptance of the said deputy steward, by the rod, the said customary tenement, with the appurtenances,^a to the use *(i)* of such person and persons, for such estate or estates therein, as he the said E. F. then already had, or thereafter should, in or by his last will and testament in writing, give, devise, direct, limit or appoint the same aforesaid. *(k)* And the plaintiff further saith, that the said E. F. being so seised as aforesaid, afterwards, and during the said term, to wit, on &c. he the said E. F. duly made and published his last will and testament in writing, signed by him the said E. F. and subscribed in the presence of the said E. F. by three credible witnesses, *(l)* and thereby devised the said reversion unto &c. [*State the terms of the devise.*] And the said E. F. afterwards, and during the said term, to wit, on &c. died so seised of the said reversion as aforesaid, without revoking his said will; and the plaintiff further saith, that after the death of the said E. F. and during the continuance of the said term, to wit, at a general Court Baron of — then lord of the said manor, holden in and for the said manor, on &c. before *(m)* — his steward of the Court of the said manor, the homage of the said last-mentioned Court then presented, the said E. F. died seised to him and his heirs of the reversion of and in the said customary tenement, with the appurtenances. And also then presented the said last will and testament of the said E. F. And thereupon the plaintiff came into the said Court in his proper person, and prayed to be admitted to the said reversion of the said customary tenement, with the appurtenances, whereupon the lord of the said manor, at the said Court so holden as last aforesaid, by his said steward, granted the said reversion of and in the said customary tenement, with the appurtenances, to the plaintiff, to hold to him the plaintiff and his assigns for and during the term of his natural life, by copy of the court roll, at the will of the lord, according to the custom of the said manor. And the plaintiff was then, according to the custom of the said manor, admitted *(n)* tenant of the said reversion of and in the said last-mentioned tenements, with the appurtenances, in manner and form

THE TITLE,
AND HOW
ACQUIRED.

Surrender of a copyhold to the use of a will, with death of testator; presentment of his death, and will and admission of devisee. *(g)*

(g) 4 Co. Rep. 22 b. A surrender is now unnecessary; see 1 Viet. c. 26, s. 3.

(h) If the surrender were out of Court, here insert "by his deed duly authorized did surrender out of Court into the hand of — Esquire, then the lord of the said manor for the time being, by the rod, according to the custom of the said manor, by the hands and acceptance of — the steward of the Court of the said manor for the time being, certain customary tenements of the said manor, whereof the said demised premises were then parcel, with their and every of their appurtenances, to the use and behoof, &c." *ut supra.*

(i) The uses are to be stated according to the effect of the surrender.

(k) As to the necessity at common law for a surrender to the use of a will to render the latter operative, see 1 Chitty's Gen. Prac. Index, tit. "Copyhold;" and see 53 Geo. 3, c. 192, Chitty's Col. Stat. tit. "Copyhold;" and *Doe v. Bird*, 5 Bar. & Adol. 695; see note *(a)*, *post*, 424.

(l) This does not appear to be necessary, a will of copyhold not being within the statute of frauds; Bac. Ab. tit. "Wills," D. 2, p. 316; see note *(a)*, *post*, 424.

(m) The name of the steward must be stated, *ante*, 409, n. *(r)*.

(n) As to the statement of the admission, 1 Saund. 146, 7; Vin. Ab. tit. "Copyhold," U. b.; and *ante*, 409, notes *(t)* and *(u)*.

THE TITLE,
AND HOW
ACQUIRED.

aforesaid. And thereupon the plaintiff then became and was seised (n) of the said reversion of and in the said last-mentioned tenements, with the appurtenances, for the term of his natural life, at the will of the lord, according to the custom of the said manor. And the plaintiff being so seised, &c.

Devise of copy-
hold premises
since 1 Vict.
c. 26. (o)

And the said E. F. being so seised of the said customary tenement, with the appurtenances, as aforesaid, afterwards, and during the said term, and after the 1st day of January, A. D. 1838, to wit, on &c., [date of the will] duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and which said will was then signed at the foot [or "end"] thereof by the said E. F. in the presence of two witnesses present at the same time, and was then attested and subscribed by such witnesses in the presence of the said E. F., according to the form of the statute in such case made and provided, and thereby &c. [set out the devise, death of the testator, entry of the will on the court rolls, (o) presentment, and admittance of the devisee, and conclude as in last precedent.

Surrender to the
use of a pur-
chaser. (p)

Same as the last form but one to the asterisk, and then proceed as follows:] And the reversion and reversions, remainder and remainders thereof, and all the estate, right, title, interest, claim and demand whatsoever, either at law or in equity, of him the said E. F. of, in, and to the same, and every part thereof, to the use and behoof of him the said E. F. his heirs and assigns. Whereupon at that same Court (q) came the plaintiff, and humbly prayed to be admitted tenant of the said customary tenement so surrendered by the said E. F. as aforesaid, to whom the said last-mentioned lord of the said manor by the said last-mentioned deputy-steward then granted seisin thereof by the rod, to have and to hold the said customary tenement, with the appurtenances, to the plaintiff, his heirs and assigns, for ever, to be holden of the said last-mentioned lord by copy of court-roll, at the will of the lord, according to the custom of the said manor, and the plaintiff was then admitted (r) tenant of the said customary tenement, with the appurtenances, as aforesaid, and thereby then became, and was, and still is, seised in his demesne as of fee of the said reversion of and in the said customary tenement, with the appurtenances, at the will of the lord, according to the custom of the said manor. And being so seised, &c.

(n) As to the statement of an entry when necessary, *ante*, 409, n. (s); 1 Saund. 147, n. 2.

(o) No surrender to the use of the will is necessary since 1st January, 1838, (1 Vict. c. 26, s. 3.) but every will must be in writing, and signed by the testator in the presence of two witnesses at one time; see sect. 9, *post*, 427; sect. 5 of the same statute requires the lord of the manor or reputed manor of which the real estate is holden, or his steward, or the deputy of such steward, to cause the will by which the disposition is made, or so much thereof as shall contain such disposition, to be entered on the court rolls of the manor or reputed manor; and if such entry has been made it may be alleged after stating the death of the testator, and before the admittance of the devisee, as follows: "And the plaintiff

avers, that afterwards, to wit, on &c., A. B. [the lord of the manor, steward, or deputy-steward, according to the fact] caused the said will of the said E. F., by which such disposition was made as aforesaid, [or 'so much of the said will of the said E. F. as contained the disposition of the said real estate,'] to be entered on the court rolls of the said manor [or 'reputed manor,'] according to the statute in that behalf made and provided."

(p) See a form, 1 Saund. 146, 147; 3 Wentw. 449; 4 Co. 22 b. The uses are to be stated according to the effect of the surrender.

(q) Where the surrender has been presented state it accordingly.

(r) See the form, 1 Saund. 146; Vin. Ab. tit. "Copyhold," U. b.; *supra*, n. (n).

After stating surrender out of Court in favour of purchaser, as in last form, proceed as follows:—] And afterwards and during the said term, to wit, on &c., at a general Court Baron of the said —, then lord of the said manor, holden on &c., last aforesaid, before the said —, his steward of the Court of the said manor, the homage of that Court presented the said surrender, and at that Court in his proper person came the said — and prayed to be admitted tenant to the said surrendered premises, according to the form and effect of the said surrender, to whom the said —, then lord of the said manor, by his said steward, granted seisin thereof by the rod, to hold the same unto the said —, his heirs and assigns for ever, of the lord of the said manor, by the rod, according to the custom of the said manor. And the said — was then, according to the custom of the said manor, admitted tenant of the said surrendered premises, with the appurtenances, in form aforesaid, and thereby then became and was seised according to the custom of the said manor, among other things, of the said reversion of the said demised premises, with the appurtenances, expectant on the determination of the said term.

THE TITLE,
AND HOW
ACQUIRED.

Statement of
presentment of
surrender at a
subsequent
Court to the
surrender.

And the plaintiff further saith, that the said S. B. being so seised, afterwards and during the said term, to wit, on &c., by a certain indenture of bargain and sale then made between Sir G. C. (then lord of the manor aforesaid, and seised in his demesne as of fee thereof,) of the one part, and the said S. B. and the plaintiff of the other part (one part of which said indenture, sealed with the seal of the said Sir G. C. the plaintiff brings into Court here, the date whereof is the day and year last aforesaid,) he the said Sir G. C. in consideration of a certain sum of money, to wit, the sum of 5*s.* a piece, then therefore paid by the said S. B. and the plaintiff to the said Sir G. C. did bargain and sell the said demised premises (amongst other things) unto the said S. B. and plaintiff, their executors, administrators and assigns, to have and to hold the same unto the said S. B. and plaintiff, their executors, administrators and assigns, from the day next before the date of the said last-mentioned indenture, for the term of one whole year from thence next ensuing and fully to be complete and ended. And the plaintiff further saith, that afterwards, during the said term demised to the said —, and while the said bargain and sale was still in full force and effect, to wit, on &c. by a certain indenture of release then made between the said Sir G. C. (then lord of the said manor, and seised thereof as aforesaid,) of the one part, and the said S. B. and the plaintiff of the other part (one part of which last-mentioned indenture, sealed with the seal of the said Sir G. C., the plaintiff brings into Court here, the date whereof is the day and year last aforesaid,) he the said Sir G. C. in consideration of thirty-two pounds paid to him by the said S. B., and of five shillings paid to him by the plaintiff, did grant, bargain, sell, alien, release, enfranchise and confirm unto the said S. B. and the plaintiff, and to their heirs, the said last-mentioned premises (amongst other things) to have and to hold the same unto the said S. B. and the plaintiff, their heirs and assigns, to the only proper use and behoof of the said S. B. and the plaintiff, their heirs and assigns for ever, freely, clearly and absolutely enfranchised, acquitted and discharged by the said last-mentioned indenture, from thenceforth for ever thereafter of and from all customary or copyhold rent, fines, heriots, suit of Court, and all other usual or customary

Enfranchise-
ment of copy-
hold by lease
and release.

**THE TITLE,
AND HOW
ACQUIRED.**

or copyhold payments, duties, services or customs whatsoever, which according to the custom of the said manor, the said premises thereby released, or any part thereof, had been or otherwise would be subject or liable to, or which otherwise ought to be paid or performed for or in respect of the same premises, or any part thereof, as copyhold holden of or as parcel of the said manor, as by the said indentures of bargain and sale and release (reference being thereto had) will fully appear. By virtue of which indentures of bargain and sale and release, the said S. B. and the plaintiff became and were seised in their demesne as of fee of and in the said reversion of the said premises demised to the said J. expectant on the determination of the said term to him granted, freely, clearly and absolutely enfranchised, acquitted and discharged as last aforesaid.

Title by devise in fee-simple before 1st January, 1838. (s)

And the said E. F. being so seised as aforesaid, he the said E. F. afterwards, to wit, on &c., duly made and published his last will and testament in writing (s) bearing date &c., and signed by him the said E. F. and attested and subscribed in the presence of the said E. F. by three credible witnesses, according to the form of the statute in such case made and provided, (u) and thereby (amongst other things) gave and devised the said demised premises, with the appurtenances, unto the plaintiff, to hold unto and to the use of the plaintiff and his heirs and assigns for ever. And the said E. F. afterwards, to wit, on &c., died so seised of the reversion of and in the said demised premises, with the appurtenances as aforesaid, without altering his said will as to his said devise of the said demised premises with the appurtenances. Whereupon and whereby (v) the plaintiff then became and was seised of the said reversion in his demesne as of fee. And being so seised, &c.

Title to a chattel real by will made before 1st January, 1838. (s)

And the defendant being so possessed of the said demised premises, with the appurtenances, and the said E. F. being so possessed of the said reversion as aforesaid, afterwards, and during the said term by the said indenture granted, to wit, on &c., the said E. F. duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, and thereby (amongst other things) gave and bequeathed the said reversion of and in the said demised premises, with the appurtenances, unto the plaintiff and his assigns, and by his said will, he the said E. F. then appointed G. H. executor thereof. And afterwards, to wit, on &c., he the said E. F. died so possessed of the said reversion of and in the said demised premises, with the appurtenances, without revoking or altering the said will with respect to the said bequest. After whose death, to wit, on &c., the

(s) See the forms, 2 Saund. 236, 236; 1 Saund. 253; Lil. Ent. 133; 7 East, 128; 3 Wils. 130. See a devise for the residue of a term pleaded, Morg. 465, 461. See the form stating a title by devise of a copyhold and surrender to the use of the will, ante, 423.

(t) The will must be shown to have been made in writing, in pursuance of the statutes 32 Hen. 8, c. 1, and 34 Hen. 8, c. 5, 1 Saund. 276 a, n. 2.

(u) 29 Car. 2, c. 3, s. 5, but neither this nor the statute of Wills need be referred to; Dyer, 86 b. It is not necessary in pleading

a will to state that the solemnities required by this statute against frauds have been observed; see the case of *Davis v. Reeves*, Vern. & Scriv. 497; reported 1 Bridgm. Equity Digest, 2d edit. 611, pl. 630.

(v) No assent of the executor is to be stated in the case of a devise of a *freehold* interest; Co. Lit. 111 a; 1 Saund. 278, n. 5; 3 East, 120; 7 East, 324.

(x) This form is framed precisely as in the case of *Maokay v. Maokray*, 2 Chit. Rep. 461. See also 1 Saund. 278; 2 Id. 21.

said G. H. duly proved the said last will and testament, and took upon himself the burthen of the execution thereof, (y) and then assented (z) to the said bequest of the said reversion to the plaintiff, whereupon and whereby the plaintiff then became and was possessed (a) of the said reversion of and in the said demised premises, with the appurtenances. And being so possessed, &c.

THE TITLE,
AND HOW
ACQUIRED.

And the said E. F. being so seised as aforesaid, he the said E. F. heretofore and after the 1st day of January, A. D. 1838, to wit, on &c., [*date of the will*] duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and which said will was then signed at the foot [*or "end"*] thereof by the said E. F. in the presence of two witnesses present at the same time, and was then attested and subscribed by such witnesses in the presence of the said E. F., according to the form of the statute in such case made and provided. And thereby, &c. [*set out the devise and death, as in the last form but one, if it be in fee simple, or as in the last form, if it be of a chattel real.*]

Title by devise
since 1st Ja-
nuary, 1838.(b)

(y) It is necessary to state the proof of the will; 2 Stra. 716. See the precedent, 1 Saund. 106, 107. See form where one of the devisees disclaimed by deed the estate devised, 3 Bar. & Adol. 31.

(z) In the case of a bequest of a chattel real, the legatee must, in pleading, aver the assent of the executor, which is necessary to vest the *legal* interest in him; see 1 Saund. 278, n. 5; see *supra*, n. (v).

(a) *Ante*, 414; and 2 Saund. 21.

(b) The 1 Vict. c. 26, s. 9, enacts that

"no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

DECLARATIONS IN DETINUE.

IN DETINUE.

In the Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas."]

Declaration in
detinue on a
bailment to be
re-delivered on
request. (a)

On the — day of —, A. D. —.

— (b), (to wit). A. B., by —, his attorney, complains of C. D., who has been summoned to answer the plaintiff in an action of detinue for certain goods and chattels [or "deeds and writings," according to the fact,] of the plaintiff, of great value, to wit, of the value of £—, which he unjustly detains from him. For that whereas the plaintiff heretofore, to wit, on &c., delivered to the defendant certain goods and chattels, to wit, &c. (c) of the plaintiff, of great value, (d) to wit, of the value of £—, to be re-delivered by the defendant to the plaintiff when the defendant should be thereunto afterwards requested. (e) Yet the defendant, although he was afterwards, to wit, on the day and year aforesaid, requested by the plaintiff so to do, (f) hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the plaintiff, but hath hitherto and still doth neglect and refuse so to do, and unjustly detains the same from the plaintiff.

Conclusion. To the damage of the plaintiff of £—, (g) and thereupon he brings suit, &c.

Declaration in
detinue on a
supposed find-
ing. (h)

For that whereas the plaintiff heretofore, to wit, on &c., was lawfully possessed as of his own property of certain goods and chattels, to wit, &c. [here enumerate them] of great value, to wit, of £—; and being so pos-

(a) Com. Dig. Pleader, 2 X. 2; mode of declaring, 1 New Rep. 140; see the forms in detinue, Morg. 581; 4 T. R. 229; 7 Went. 647; 3 Woodd. 106; 1 New Rep. 140; Willes, 119, and in trover, post. When this action lies in general, and its properties, see ante, vol. i. Index, "Detinue;" 1 Tyr. 445; 1 Crom. & Jerv. 565.

(b) The venue is transitory; Com. Dig. Action, N. 6, unless against justices of the peace, &c. The pleading rules, Hil. T. 4 W. 4, direct that description of venue shall not be repeated in the body of a declaration.

(c) As to the certainty necessary in the description of the chattels, 2 Saund. 47 b; Co. Lit. 286 b; Bac. Ab. tit. Detinue, B.; Com. Dig. tit. Pleader, 2 X. 2. The date of a deed, &c. need not be stated; 1 Wils. 116; see Willes' Rep. 126; 12 Mod. 9; 2 Vent. 78.

(d) The declaration may mention the value of every particular, or of all in gross, Com. Dig. tit. Pleader, 2 X. 2; 2 Bla. Rep. 853; and the latter is most usual. Formerly a distinction was taken as to price and value in the description of animate and inanimate chattels, Cro. Jac. 130; but this is no longer attended to, Bac. Ab. tit. Trover, F.; F. N. B. 88, M.;

and value appears in all cases to be the preferable description.

(e) The terms and limited object of bailment should be truly stated; see the forms, 3 Woodd. 106; 1 New Rep. 140; Willes' Rep. 119; but in *Gladstone v. Hewitt*, 1 Tyr. 445, and 1 Cromp. & Jer. 565, S. C., it was held, that although the declaration be on a bailment to re-deliver on request, and the defendant plead that it was a bailment to secure the repayment of a loan, plaintiff may reply a tender and wrongful detention without being guilty of a departure.

(f) The forms in 1 New Rep. 140; 3 Woodd. 106; Willes, 119; do not state a special request; but from Willes, 118, 5 T. R. 409, it should be averred, when a request to re-deliver is essential before action; and see the form in 7 Wentw. 635, 636, 637.

(g) The damages here to be stated should be sufficient to cover the utmost value of the goods and damages that a jury might give for the detention.

(h) Com. Dig. Pleader, 2 X. 2; see the forms, 1 New Rep. 140; Willes' Rep. 118; 4 T. R. 229, and the notes to the preceding count.

seized, the plaintiff afterwards, to wit, on &c., aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on &c. aforesaid, came to the possession of the defendant by finding; (i) Yet the defendant, well knowing the said goods and chattels to be the property of the plaintiff, and of right to belong and appertain to him, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the plaintiff, although he was afterwards, to wit, on &c., requested by the plaintiff so to do, but hath hitherto wholly refused so to do, and hath unjustly detained, and still doth unjustly detain the same from the plaintiff. To the damage of the plaintiff of £—, (k) and thereupon he brings suit, &c.

IN DETINUE.

— (to wit). A. B., by Y. Z. his attorney, complains of C. D., who has been summoned to answer the plaintiff in an action of debt and of detinue. For that whereas [*here insert the counts in debt, and the conclusion, as ante, 286, 291, omitting the words "to the damage, &c.," and then insert the counts in detinue as in the last form to the end, and conclude "To the damage," &c.*]

Debt and detinue in the same declaration. (l)

(i) This is not traversable; 1 New Rep. 140; *case*, vol. i. Index, "Detinue;" Doct. Plac. tit. Detinue.

(k) As the judgment in this action is conditional to recover the specific chattel, or in case it be not forthcoming, damages for detaining the same, Cro. Jac. 628; Com. Dig. Pleader, 2 X. 12, a sum should be here inserted to cover the real value and utmost damages that a jury might give.

(l) That debt and detinue may be joined, see 2 Saund. 117 b; Bro. Joinder in Action,

97; and for the forms, see Brownl. Red. 186; Rast. 150. When a defendant has in his possession personal property formerly of the plaintiff, and if it be doubtful whether a contract by the defendant for the purchase thereof can be proved, it is advisable to insert a count in *debt* for goods sold, and another count in *detinue* for the chattel, in order that the plaintiff may recover on one ground or the other; and many other cases may occur in which this joinder of action may be advisable.

PUBLIC
NUISANCES.

Consequent injury to plaintiff's carriage overturned, and to plaintiff.

or signal at or near such dirt or rubbish to denote or show that the same were so there as aforesaid. By means and in consequence of which premises, afterwards, to wit, in the night-time of the said day, a certain carriage of the plaintiff, of great value, to wit, of the value of £—, with the plaintiff therein, then going and passing in and through the said street, was driven upon and against the said dirt and rubbish, and was thereby then overturned. By means whereof the plaintiff then became and was greatly hurt, bruised, cut and wounded, and sick, sore, &c. [*Same damage as ante, 430, and if the plaintiff's carriage were injured, state such damage, and the expense of repair.*]

The like, omitting the statement of the defendant's possession of the house.

For that whereas, before and at the time of the committing of the grievance by the defendant as hereinafter mentioned, there was, and from thence hitherto hath been, and still is, a certain common and public highway, in the county aforesaid, for all the liege subjects of our lady the queen, to go, pass and repass, at all times of the year, at their free will and pleasure; Yet the defendant, well knowing the premises, heretofore, to wit, on the — day of —, A. D. —, wrongfully and unjustly caused to be put and placed, and to be kept and continued, divers large quantities of materials, dirt and rubbish, in the said last-mentioned common and public highway, whereby a certain carriage with the plaintiff therein, then lawfully passing in and along the said last-mentioned highway, was then with great force and violence overturned. By means, &c. [*Same damage as in the last precedent, and conclude as ante, 430.*]

For keeping a hole (which led to defendant's cellar) so badly covered, that plaintiff fell and broke his leg. (g)

For that whereas the defendant, before and at the time of the injury and damage occurring as hereinafter mentioned, to wit, on &c., was the possessor and occupier of a certain messuage, vault, cellar and premises, with the appurtenances, situate in the county of M. and near to a certain common and public footway there, and in which vault and cellar there then was a certain hole or apperture, opening into the said public footway; (h) Yet the defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage, vault, cellar and premises, with the appurtenances, and whilst there was such hole as aforesaid, to wit, on the day and year aforesaid, wrongfully and unjustly, and contrary to his duty in that behalf, permitted the said hole to be and continue, and the same was then so badly,

(g) The occupier of a house is bound to rail or fence in the area, and if an accident happen, it is no defence that the premises had been in the same situation for many years before the defendant came into possession of them; 3 Campb. 398; Harrison's Index, tit. *Case, Action for*, VII. 3. Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state, and an accident happened, the landlord was held liable; 4 Taunt. 649; 2 H. Bla. 349. So where the defendant had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the defendant was held liable; 6 Esp. 6; 5 B. & C. 559; 8 D. & R. 563, S. C. And an occupier of a house who has a cellar

opening upon the public street, is bound, when he uses it, to take reasonable care that the flap thereof be so placed and secured that, under ordinary circumstances, it shall not fall in, or occasion injury; but if the occupier have so placed and secured it, and a wrongdoer throw it over, the former will not then be liable in damages for any injury occasioned thereby; 4 C. & P. 262.

(h) If the proper description of hole be doubtful, state it generally as a hole, "which the defendant by reason of his said possession and occupation, before and at the time of the injury and damage hereinafter mentioned, of right ought to have so sufficiently guarded and secured as to prevent damage or injury to any person lawfully passing in or along the said highway."

insufficiently and defectively covered, that by means of the premises, and for want of a proper and sufficient covering to the said hole, the plaintiff, who was then lawfully passing in and along the said footway, then slipped and fell into the said hole, and thereby the left leg of the plaintiff was then fractured and broken, and greatly damaged, and the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, from thence hitherto, during all which time the plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted, and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend a large sum, to wit, the sum of £—— [*state enough*] in and about the endeavouring to be healed and cured of the said wounds, lameness, sickness and disorder so occasioned as aforesaid.

For that whereas, before and at the time of the committing of the grievance hereinafter next mentioned, to wit, on &c. [*day of obstruction, or about it,*] there of right was, and from thence hitherto hath been, and still of right ought to be, a certain common and public bridleway and driftway [*according to the fact—if the way was for all purposes, say "highway,"*] in, through, over and along a certain close, situate and being in the county of N., for all the liege subjects of our lady the queen to go, return, pass and repass, on foot and with cattle, at all times of the year, at their free will and pleasure [*if the right be at only particular seasons of the year, or for particular purposes only, state it accordingly.*] And whereas, before and at the time of the committing of the grievances hereinafter and before mentioned, the plaintiff was lawfully possessed of divers, to wit, three asses, laden with coals, goods and chattels of the plaintiff, and, just before and at the time of the committing of the said grievances, by his servants in that behalf was driving and conducting his said asses, so laden as aforesaid, in, through, over and along the said common and public [bridleway and driftway.] Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to prevent him from driving and conducting his said asses, so laden as aforesaid, in, through, over and along the said common and public [bridleway and driftway] on &c. and on divers other days afterwards, wrongfully and injuriously shut and fastened, and caused to be shut and fastened, a certain gate across the said common [bridleway and driftway] and kept and continued the said gate so shut and fastened across the said common and public [bridleway and driftway] for a long space of time, to wit, for the space of — hours then next ensuing, and thereby, during all the time aforesaid, obstructed the said common and public [bridleway and driftway] and thereby prevented the plaintiff from driving and conducting his said asses, so laden as aforesaid, in, through, over and along the said common and public [bridleway and driftway], by reason whereof the plaintiff was obliged to drive and conduct his said asses, so laden as

For obstructing a public highway, whereby plaintiff sustained particular damage. (i)

(i) An action will not in general lie by an individual for the obstruction of a public highway, see Comb. 180; 6 Mod. 255; 3 Mod. 289; Cro. Eliz. 664; unless the obstruction occasion him any special or actual

damage, when he may bring an action against the party causing the obstruction; see 2 Bing. 156, 263; 4 M. & Sel. 101; and see Harrison's Index, tit. "Way;" Selw. N. P. 10th edit. 1115.

PUBLIC
NUISANCES.

aforesaid, back again, and by a very circuitous road, and for a much greater distance than he otherwise would and of right ought to have done.

FOR MALICIOUS
ARRESTS.

For a malicious arrest under a *capias*, where the former suit terminated by plaintiff's taxing costs upon a rule for the payment of money into Court. (*k*)

Commencement as ante, 13.] For that whereas (*l*) the defendant, heretofore, to wit, on &c. (*m*) not then having any reasonable or probable cause of action whatsoever against the now plaintiff, to the amount of the sum of money for which the now defendant maliciously caused the now plaintiff to be arrested, as hereinafter mentioned, (*n*) but wrongfully and unjustly contriving and intending to imprison, harass, oppress, and injure

FOR MALICIOUS ARRESTS.

(*k*) *Quære* whether this general form is now proper; and see form, *post*, 438, where the judge's order for the arrest was rescinded. As to the action in general, see *ante*, vol. i. Index, *Malicious Prosecutions*; Co. Lit. 161 a, n. 4; 2 Wils. 305; Bac. Abr. Action on the Case, H.; Com. Dig. Action on the Case for a Conspiracy, A. &c.; 3 Bl. Com. by Chitty, 126, &c. n.; 3 Chitty's Gen. Prac. by Lush; Harrison's Index, tit. Case, Action of, I.; *Combe v. Capron*, 1 Mood. & Rob. 398; *Heywood v. Collings*, 1 P. & D. 202; 9 A. & E. 268, S. C.; Selw. N. P. 10th ed. The gist of the action for a malicious arrest is the unfounded arrest or imprisonment, 2 Wils. 305; *falsehood* in the demand, malice, and the want of probable cause, 1 T. R. 544; 2 T. R. 231. The suit must also have been determined in the present plaintiff's favour by some legal means, before an action is maintainable, 1 Esp. Rep. 80; see 3 Bing. 297; *post*, 436, n. (*y*); unless the judge's order for the arrest has been rescinded, in which case perhaps an action may be at once sustained. No action can be supported merely for a malicious suit, without an arrest or imprisonment; 1 Salk. 14; 1 B. & P. 205; Com. Rep. 190; Selw. N. P.; 1 Gow, C. N. P. 20; 1 Campb. 203, n.; 6 Mod. 73; 3 Black. Com. by Chitty, 126, notes. But placing a party under restraint of a sheriff's officer, who holds a writ of *capias*, is an arrest, without proceeding to actual contact; *Granger v. Hill*, 4 Bing. N. C. 212. A party is subject to this action where there is an admitted set-off, and he arrests without regarding it; 3 B. & C. 139; 4 D. & R. 653, S. C.; 4 Burr. 1996; 5 B. & A. 513; 1 D. & R. 67, S. C.; and as to arresting for penalty of a bond, see 1 Saund. 58 c. It seems the party is liable, though the acts were done by his attorney, and without his (the defendant's) knowledge; 3 M. & P. 12. The reasonableness or probability of the cause is a mixed question of law and fact for the judge and jury to decide; *Panton v. Williams*, 1 G. & D. 504. As to want of probable cause, see *Broad v. Horn*, 5 Bing. N. C. 722. Proof of express malice is not evidence of want of probable cause; 1 T. R. 545. Though want of probable cause is evidence of malice, it is always desirable, if possible, to prove express malice, but in some cases malice may be implied, as where plaintiff brought an action, and delayed it afterwards for some time, and then discontinued and paid costs, it was considered malice might be inferred; 4 B. & C. 21; 6 D. & R. 12,

S. C.; though in another previous case it was considered by Lord Ellenborough that a mere discontinuance was not of itself evidence of malice; 1 Stark. 50. Suffering a non-pros is not of itself evidence of malice; 4 Taunt. 7; nor is taking money (after being paid in by defendant) out of Court, and not proceeding; 3 Esp. Rep. 34. Arresting on a bill, upon which the defendant was discharged for want of notice of dishonour, is not a sufficient want of probable cause; 1 Stark. C. N. P. 50. Arresting a person by mistake will rebut evidence of malice against him; see M. & M. C. N. P. 180; 3 Camp. 180; 3 East, 314; but it would be no legal bar to trespass for false imprisonment. A plaintiff is bound to accept the debt and costs on a *ca. sa.*, and if he proceed afterwards, he will be liable to an action for a malicious prosecution; 4 B. & C. 26; 6 D. & R. 129, S. C.; see also 1 B. & P. 388; 14 East, 468.

Whenever the imprisonment is under regular process, trespass cannot be supported, and case is the only remedy; 3 T. R. 185; Hob. 266; 1 T. R. 544; 2 T. R. 225; 3 Chit. Rep. 304.

When the arrest was on process out of an inferior Court, the declaration will be similar to the above, except in the statement of the process. Case may be supported, though the Court had no jurisdiction; 2 Wils. 302, 376; Com. Rep. 190.

(*l*) It was formerly usual to commence the declaration by a recital that "by the law of the realm no person ought to be arrested, &c. for a debt under a particular sum; but as no arrest on *mesne* process can now be made, except under a judge's order, such recital would be improper.

(*m*) The date of the writ.

(*n*) When the arrest has been for too much, the above precedent is the proper form; 1 Campb. 295. In 1 Salk. 15, it is said the plaintiff should show how much was due, but that cannot be necessary. It should seem that in an action for a malicious arrest, where there was a set-off, the declaration should aver a *scienter* of the set-off; or at least should state that the defendant had not cause of action to an amount for which *he* could arrest. In 2 Wils. 302, in an action for maliciously holding plaintiff to bail in an inferior Court, which had not jurisdiction, it was held necessary to aver in the declaration a *scienter* in the defendant of the want of this jurisdiction.

the now plaintiff, and to cause and procure him to be arrested and imprisoned, and to compel him to find bail for his appearance, or to deposit his money as a security, according to the statute in that case made and provided, falsely and maliciously (o) caused and procured to be sued and prosecuted out of the Court of our said lady the queen, before the queen herself, (p) a certain writ of our said lady the queen, called a *capias*, (q) [*here state the issuing of the writ of capias, which may be stated as in an action on a bail bond, as ante, 321; see form, post, 438.*] And the now defendant, contriving and intending as aforesaid, afterwards, to wit, on the day and year first aforesaid, falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the now plaintiff, to the amount for which the now defendant caused the now plaintiff to be arrested as hereinafter mentioned, caused and procured the said writ to be, and the same then was marked and indorsed for bail for £——. (r) And the said writ being so indorsed for bail as aforesaid, the now defendant afterwards, and before the said return thereof, to wit, on &c. [*the precise time is not material, but it is usual to insert the day of arrest, or some day just before it,*] contriving and intending as aforesaid, and without having any reasonable or probable cause of action whatsoever against the now plaintiff, to the amount for which he caused him to be arrested as hereinafter mentioned, falsely and maliciously (s) caused the now plaintiff to be arrested (t) by his body, under and by virtue of the said writ, and to be thereupon imprisoned, and kept and detained in prison for a long time, to wit, for the space of —— hours then next following, and until (u) the now plaintiff, in order to procure his release and discharge from the said imprisonment, was forced and obliged to and did then

MALICIOUS
ARRESTS.

Defendant causes writ to be indorsed for bail.

Writ delivered to sheriff.

The arrest.

(o) As to the allegation of defendant's malicious intent, see 2 Wils. 306, and 1 Wils. 233. The words "*falsely*," or "*wrongfully*," have been holden to be sufficiently expressive of a malicious intent; 1 Saund. 242 a, n. 2; 1 East, 563; Com. Dig. Action on the Case for a Conspiracy, C. 3; legal definition of malice, Gilb. Cases Law & Evid. 193; Stark. on Evid. tit. Malice; 4 B. & C. 255; 6 D. & R. 302, S. C.; but see *Saxon v. Castle*, 6 A. & E. 652. The malice may be implied from want of probable cause; 1 T. R. 545. As to proof of malice in a criminal prosecution, see 9 East, 361; and what evidence suffices, see 1 Stark. 48; 1 Marsh. 222. Party not liable if he acts under what he conceives sound advice; 1 Stark. 502; 2 B. & C. 693; 4 D. & R. 107, S. C. *Quere* whether it would not be more correct to state that the defendant caused and procured a judge's order to be made as well as a writ to be sued out; see *form, post, 438.*

(p) See *ante*, 321, as to the allegation of the Court being held at the time of issuing the writ.

(q) As to the statement of a *capias* see *ante*, 321. The writ should be correctly stated; 1 H. Bla. 49; 1 T. R. 238.

(r) This should accord with the fact. Formerly a variance was considered fatal; 6 Price, 540.

(s) *Supra*, n. (o).

(t) To constitute an arrest, there must be either a corporal touch, or a capacity in the officer to arrest, and submission by the party;

Bul. N. P. 62; 2 New Rep. 211; R. & M. C. N. P. 321; M. & M. 244. Where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A. and asked him to fix a time to call and give bail, and A. accordingly fixed a time, and attended and gave bail; it was held that this was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action; 6 B. & C. 528; 9 D. & R. 558, S. C. In *George v. Radford*, 5th December, 1828, at Guildhall, where the officer swore that he arrested the defendant by showing him the warrant, telling him at whose suit, and that it was in the sheriff's office, and waited till the defendant paid him £2 as a *douceur*, whereupon the defendant referred him to his attorney to put in bail, &c., Lord Tenterden, C. J., thought strongly it was no arrest, but said he would reserve the point rather than nonsuit; see 1 C. & P. 153; R. & M. C. N. P. 26; 2 C. & P. 605; but see *Granger v. Hill*, 4 Bing. N. C. 212. It seems the sheriff's return of *cepi corpus* is *prima facie* evidence of the arrest; 11 East, 297; 2 Phil. Evid. 166; *sed vide* Peake, 174. If there was no actual arrest, and the defendant, to avoid it, was obliged to execute a bail-bond or to deposit money, then, instead of the above statement of the arrest, state the facts accordingly.

(u) This allegation need not be proved to the full extent laid; 1 Stark. 48.

MALICIOUS
ARRESTS.

The bail-bond.

The termination
of the former
suit. (y)

procure certain persons, to wit, E. F. and G. H. to become bail (x) for the now plaintiff, causing special bail to be put in for him to the said action in her majesty's said court, as required by the said writ, and upon that occasion he the plaintiff and the said E. F. and G. H. were forced and obliged to and did then enter into a certain bond or obligation for the purpose aforesaid. Whereas in truth and in fact the now defendant, at the time of obtaining the judge's order for the said writ, and suing forth the said writ and of the said arrest and imprisonment, had not any reasonable or probable cause of action against the now plaintiff to the amount of the said sum of money for which the now defendant so maliciously caused the now plaintiff to be arrested and held to bail as aforesaid, or whereby or for which he the now plaintiff, by the law of this realm, or by the practice of the said Court of our said lady the queen, before the queen herself, could or ought to have been arrested or holden to bail as aforesaid.* And the now plaintiff further saith that such proceedings were thereupon had in the said suit, that afterwards, to wit, on &c. (x) a certain rule and order (a) was duly made by the said Court, according to the course and practice of the same Court, whereby it was ordered by the said Court that [*let this agree with the order*] the now plaintiff should have leave to bring into Court in the said suit £—, (b)

(x) If the plaintiff did not find bail, or if there be any doubt as to the proof of the bail-bond, this allegation, and that of the costs of procuring bail, had better be omitted. If the allegation be inserted, take care that it accords with the language of the bond.

(y) This action must not be brought before the first suit has been *legally determined*; and it must be averred that the former suit terminated in the present plaintiff's favour, and a *legal* conclusion of the suit must be shown; and if the suit be not proved to have been determined in the particular manner alleged, it was, before the new rules of pleading, ground of nonsuit; Year Book, 2 R. 3, 9, pl. 22; Dyer, 284; Yelv. 117; Gilb. Cases Law & Evid. 163; Com. Rep. 190; 1 Salk. 15; Dougl. 215; Willes, 250, n. a.; 1 Esp. Rep. 79; 10 Mod. 209; Bac. Abr. Action on the Case, H.; Com. Dig. Action, Case, Conspiracy, C. 5; 2 T. R. 225, 232; 1 Saund. 228 b. in notes, and 228, 229; and see *Combe v. Capron*, 1 Mood. & Rob. 398; but the omission is sided by verdict by the common law; 1 Saund. 228 b. in notes, and 228, 229. See the reason, 1 Saund. 228 b.; 2 T. R. 228. This allegation, unless specially traversed, is now admitted; *Watkins v. Lee*, 5 M. & W. 270. 404, 405, the declaration merely alleges, "*that the plaint was duly ended and determined.*" In *Wetherden v. Embden*, partially reported in 1 Campb. 295, the manner in which the suit ended was shown and objected to on motion in arrest of judgment, but the Court held that, as it was averred that the suit was ended, the statement of the manner how was unnecessary, and the plaintiff had judgment, and it should seem a count averring generally a discontinuance is sufficient; 5 Price, 540. Several of the precedents in the old entries referred to

8 Wentw. Index, xix. do not show the termination of the first suit. The plaintiff in the above action obtained a verdict, notwithstanding the case in 1 Esp. Rep. 79; 3 Esp. Rep. 34; and no objection was taken to this mode of determining the suit. See Tidd's Prac. Forms, and T. Chitty's Forms, Index, Judgment for Defendant, as to the manner of describing the different modes by which the suit terminated in favour of the present plaintiff. An averment that the suit is ended, is evidenced by proof of the rule to discontinue upon paying of costs, and that the costs were taxed and paid; 1 Stark. 48; 4 Campb. 213, S. C. The acceptance of the debt and costs in satisfaction of the action under a judge's order, or a rule of reference, is a sufficient determination of a suit, but the averment must be appropriate; *Combe v. Capron*, 1 Mood. & Rob. 398. In the Common Pleas it seems that the plaintiff must prove the discontinuance by an entry of it on the roll; *semble*, 1 M. & P. 195. How far an agreement to determine a suit, afterwards made a rule of Court, is sufficient, see 2 D. & R. 343. In an action for a false arrest upon a plaint in the Sheriff's Court in London, evidence was given that the usual course of that Court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute book of "withdrawn," and it was held that proof of such entry in the minute book was sufficient to prove the determination of the suit; 14 East, 216. The mere proof that no declaration was filed within a year after the return of the writ is sufficient to establish that the former action is at an end; 3 Bar. & Adol. 397.

(x) The date of the rule.

(a) See another form, 3 Bing. 297; 11 Moore, 69, S. C.; and see next note.

(b) This statement must be according to the facts of the particular case, and may be easily altered to make it applicable to a deter-

and that thereupon (unless the now defendant should accept thereof, together with his costs and charges to be taxed by the master of the said Court, in full discharge of the said suit), the said sum of £—— should be struck out of the declaration in the said suit, and paid out of the said Court to the now defendant, or his attorney, and that upon the trial of the issue the now defendant should not be permitted to give evidence for the said sum of —. And the now plaintiff further saith that afterwards, to wit, on &c., (c) the now plaintiff did bring into Court in the said suit the said sum of £—— in the said rule or order mentioned, and that the costs of the now defendant in the said suit were duly taxed by the master of the said Court, at the instance and request of the now defendant, at £——, which said last-mentioned sum of £——, together with the said sum of £——, were afterwards, to wit, on &c., last aforesaid, duly paid to the now defendant, and the now defendant did accept the same, together with the said sum of £——, in full discharge of the said suit; and the said action was and is by means of the premises, and according to the course and practice of the said Court, wholly discharged, ended and determined. (d) By means of which said several premises the now plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted, but was also forced and obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of — [state enough] in and about the procuring the said suit, obtaining of his release from the said arrest and imprisonment, and in and about other the premises, (f) and hath been and is by means of the premises otherwise greatly injured and damnified.

MALICIOUS
ARRESTS.

Damages. (e)

Same as the last precedent, to the asterisk in page 436, and proceed as follows:] And the plaintiff in fact saith, that such proceedings were thereupon had in the said suit, that afterwards, to wit, in — term then next following, the now defendant did not prosecute his said suit against the now plaintiff with effect, but voluntarily permitted the same to be discontinued for want of prosecution thereof, and thereupon it was then considered in and by the said Court, that the now defendant should take nothing by his said writ, as by the record and proceedings thereof still remaining in the said Court of our said lady the queen, before the queen herself, at Westminster.

The like, where
the first suit was
discontinued. (g)

mination of the former suit by payment of money into court according to the modern practice. If the mode of determining the prior action be stated, and the statement conclude "whereupon and whereby" the said suit was ended and determined, and there be a plea traversing that allegation, then it must be proved as alleged; *Combs v. Capron*, 1 Mood. & Rob. 398; *Watkins v. Lee*, 5 M. & W. 270.

(c) The day of taxation.

(d) *Ante*, 436, n. (y).

(e) If the plaintiff have sustained any particular damage, besides those inconveniences which are here enumerated, and which are incidental to the imprisonment, it must be

stated, or the plaintiff will not be permitted to give evidence of it on the trial; *Peake's C. N. P.* 46, 62.

(f) Cannot recover extra costs; *Ry. & Moo. C. N. P.* 419; 1 Campb. 151, 152; 4 Taunt. 7; 9 East, 361; *sed vide* 1 Stark. 306.

(g) See the notes to the last form, and 5 Price's Rep. 540; and *Pierce v. Street*, 3 Barn. & Adol. 397; see 8 Wentw. 329; and the form of a judgment of discontinuance, *Tidd's Prac. Forms*, 310. As to the plaintiff's discontinuing being *prima facie* evidence of malice, see 4 Barn. & Cress. 21; 6 D. & R. 12, S. C.; *sed vide* 1 Stark. 48, *ante*, 434, n. (k).

**MALICIOUS
ARRESTS.**

ster aforesaid, more fully appears; (*h*) whereupon and whereby the said suit then became and was and is wholly ended and determined. By means, &c. [*Conclude as in the last precedent.*]

The like, where the first suit was non-prossed. (*i*)

Same as the form, ante, 434 to 436, to the end of the asterisk, and then proceed as follows:] And the now plaintiff further saith, that the now defendant did not prosecute his suit against the now plaintiff, but therein wholly failed and made default. And thereupon afterwards, to wit, on &c. it was considered by the same Court that the now defendant should take nothing by his writ, but that he and his pledges to prosecute (*k*) should be in mercy, and that the now plaintiff should go thereof without day &c. as by the record and proceedings thereof, still remaining in the said Court, more fully and at large appears; (*l*) and the said action was and is thereby wholly ended and determined. By means, &c. [*Conclude as ante 437.*]

The like, where there was a verdict for the defendant in the former suit. (*m*)

Same as the form, ante, 434 to 436, to the asterisk, and then proceed as follows:] And the now plaintiff further saith, that such proceedings were had in the said suit, that afterwards, to wit, on &c., it was considered in and by the said Court that the now defendant should take nothing by his writ, but that he and his pledges to prosecute should be in mercy, &c. as by the record &c. (*n*) Whereupon and whereby the said suit became and was and is wholly ended and determined. By means, &c. *Conclude as ante, 437.*

For causing the plaintiff to be arrested by virtue of a *capias* issued under a judge's order which has been rescinded. (*o*)

For that whereas the defendant heretofore, to wit, on the — day of —, A. D. —, not then having any reasonable or probable cause for believing that the plaintiff was about to quit England, but wrongfully, maliciously and unjustly contriving and intending to imprison, harass, oppress and injure the now plaintiff, and to cause and procure him to be arrested and imprisoned, and to compel him to find bail or to deposit his money as a security, according to the statute in that case made and provided, wrongfully, maliciously, and unjustly procured from —, one of the judges of one of her majesty's superior Courts of law at Westminster, to wit, one of the judges of her majesty's Court of Queen's Bench at Westminster, a certain special order, directing the now plaintiff to be held to bail for the sum of £—, by falsely and maliciously representing to the said — that the now plaintiff was about to quit England unless forthwith apprehended; and thereupon afterwards, to wit, on the — day of —, A. D. —, the defendant wrongfully and maliciously caused and procured to be sued and prosecuted out of

(*h*) As to the allegation referring to the record of the discontinuance, see *ante*, 437. Under that reference the record must be produced, 5 Price, 540, and therefore when the proceedings and judgment of discontinuance have not been, as they may be, entered of record, it should be omitted. It would in all cases in Queen's Bench suffice to omit the averment. The production of the rule to discontinue, &c. would be sufficient, *ante*, 436, n. (*y*); 1 Stark. 48; 4 Campb. 214. But it seems otherwise in Common Pleas; 1 M. & P. 191.

(*i*) See the notes to the form, *ante*, 434, &c.; Lil. Ent. 35; see the form of the entry of the judgment of *non pros*, Tidd's Prac. Forms, 310. That a plaintiff entering judg-

ment of *non pros* is not *prima facie* evidence of malice, see 4 Taunt. 7; and see 3 Bar. & Adol. 397.

(*k*) Though the words "and his pledges," &c. be not in the record, the variance in inserting them would not be fatal; 13 East, 547; see 2 B. & C. 6; 3 D. & R. 228, S. C.

(*l*) As to this allegation, see *supra*, n. (*h*).

(*m*) See Tidd's Prac. Forms, 313.

(*n*) *Supra*, note (*h*).

(*o*) This form was used in the case of *The Duke of Normandy v. Barrett*, Home Circuit, Spring Assizes, 1842; but as it has never been decided to be good, it must not be altogether relied upon. And see the notes to the form, *ante*, 434, 435, 436.

the said Court of our lady the queen a certain writ of our said lady the queen called a *copias*, directed to the sheriff of —, and bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, by which said writ, our said lady the queen commanded the said sheriff of —, that he should omit not by reason of any liberty in his bailiwick, but that he should enter the same and take the now plaintiff if he should be found in his bailiwick, and him safely keep, until he the said now plaintiff should have given him the said sheriff bail, or made deposit with him according to law in an action of debt, or until the said now plaintiff should by other lawful means be discharged from his the said sheriff's custody, which said writ afterwards, and before the delivery thereof to the sheriff of the said county of — to be executed, as is hereinafter mentioned, to wit, on the day and year last aforesaid, was by the said now defendant marked and indorsed for bail for £—, and the said writ being so indorsed for bail as aforesaid, the now defendant afterwards and before the said return thereof, to wit, on the — day of —, A. D. —, contriving and intending as aforesaid, and without having any reasonable or probable cause for believing that the now plaintiff was about to quit England, falsely and maliciously caused the now plaintiff to be arrested by his body under and by virtue of the said writ, and to be thereupon imprisoned and kept and detained in prison for a long time, to wit, for the space of — days then next following, and until the now plaintiff was forced and obliged to apply and did apply to the said — to be discharged out of the custody of the said sheriff of — as to the said action, on the ground that the now plaintiff was not about to quit England at the time of obtaining the said order as aforesaid, and as falsely and maliciously represented by the defendant as aforesaid. And the now plaintiff further saith, that such proceedings were had and taken upon the said application that afterwards, to wit, on &c., by a certain order then duly made by the said —, the said — did order that upon the now plaintiff entering an appearance in the said action he should be discharged out of the custody of the said sheriff of — as to the said action, on the ground that the now plaintiff was not about to quit England, as falsely and maliciously represented by the said defendant as aforesaid, and thereupon the now plaintiff was discharged accordingly. By means of which said several premises the now plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs and business during that time to be performed and transacted, but was also forced and obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the obtaining of his release from the said arrest and imprisonment and in and about other the premises, and hath been and is by means of the premises otherwise greatly injured and damnified. To the plaintiff's damage of £—, and thereupon he brings suit, &c.

For that whereas heretofore, and before the grievance hereinafter mentioned, to wit, on &c. in the Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas,"] at Westminster, in the county of Middlesex, the said W. D. by the consideration and judgment of the said Court, recovered against the plaintiff £54: 19s. which were adjudged to the said W. D. in

Case by plaintiff against defendant and his attorney, for not releasing plaintiff out of prison after satisfaction

**MALICIOUS
ARRESTS.**
of debt and
costs, &c. (p)
The issuing a
*capias ad satis-
faciendum*
against the now
plaintiff.

Indorsed to
levy £32.

Plaintiff taken
in execution.

Plaintiff tenders
£34 : 13s. in
full.

Defendant's re-
fusal to release
plaintiff.

and by the said Court for his damages by him sustained, as well on occasion of the not performing certain promises before then made by the plaintiff to the said W. D. as for his costs and charges by the said W. D. about his suit in that behalf expended, whereof the now plaintiff was convicted. And the said W. D. the then plaintiff in the said action, by the said L. C. his attorney in that behalf, afterwards, to wit, on &c., for the obtaining satisfaction of a certain residue of the said damages so recovered as aforesaid by the said W. D. (part of the said damages having been before duly satisfied) sued and prosecuted out of the Court of our said lady the queen, at Westminster aforesaid, a certain writ called a writ of *capias ad satisfaciendum*, directed to the sheriff of the county of —, whereby our said lady the queen commanded the said sheriff that he should take the plaintiff if he should be found in his bailiwick, and him safely keep, so that he might have his body before the [barons of her majesty's Exchequer] at Westminster, immediately after the execution of the said writ, to satisfy the said W. D. [£34 : 19s.] residue of the said [£54 : 19s.] which the said W. D. had so recovered as aforesaid, and that he should have then there that writ; and the said writ was afterwards duly indorsed by the defendants with an indorsement, directing the said sheriff to levy a certain sum of money thereon, to wit, the sum of [£32.] besides sheriff's poundage and lawful expenses, and was afterwards, to wit, on &c. last aforesaid, delivered by the now defendants to the said sheriff, so indorsed as aforesaid, to be executed in due form of law; and the said sheriff afterwards, to wit, on &c. last aforesaid, in obedience to and by virtue of the said writ, took and arrested the plaintiff by his body, and detained and had him in his custody under the said writ for the residue of the said debt and costs. And the now plaintiff, so being in custody as aforesaid, afterwards, to wit, on the [ninth] day of [January,] A. D. [1824,] tendered and offered to pay to the said W. D. by the hands of the said L. C. as his attorney as aforesaid, a large sum of money, to wit the sum of [£34 : 13s.] in full satisfaction and discharge of the said damages, costs and charges so adjudged to the said W. D. as aforesaid, being the said sum so indorsed on the said writ as aforesaid, together with sheriff's poundage and lawful expenses as aforesaid, and being the whole amount which was lawfully due or demandable of and from the now plaintiff to or by the now defendant under the said writ, and then demanded of the now defendant, L. C. as such attorney as aforesaid, to receive the said sum in full discharge and satisfaction of the said damages, costs and charges, and sheriff's poundage, to instruct and inform the said sheriff that the same was satisfied, and to give the said sheriff authority to discharge the plaintiff from his custody under the said writ. Yet the defendants wilfully and maliciously devising and intending to oppress, harass, and injure the now plaintiff, and to cause and procure the plaintiff to be longer imprisoned and detained by the said sheriff under the said writ, without any reasonable cause whatsoever, then wilfully and maliciously refused to accept or receive the said sum of money, so tendered as aforesaid, in discharge of the said damages, costs and charges, sheriff's poundage and lawful expenses as aforesaid, and did not nor would instruct or inform the said sheriff that the said W. D. was satisfied of his said damages, costs

(p) That this action lies, see 4 Barn. & Cress. 26; 6 D. & R. 129, S. C.; the above being the declaration used in that case.

and charges and sheriff's poundage as aforesaid, nor give authority to the said sheriff to release the said plaintiff out of his custody under the said writ as aforesaid, whereby and by reason of the said conduct in that behalf, the now plaintiff was detained in custody under the said writ by the said sheriff for a long space of time after the said tender so made as aforesaid, to wit, for the space of ten months then next following, and was thereby put to great trouble, inconvenience and expense, and was thereby greatly injured and ruined in his credit, reputation and circumstances. To the plaintiff's damage of £—; and thereupon he brings suit, &c.

MALICIOUS
ARRESTS.

FOR MALICIOUS CRIMINAL PROSECUTIONS.

For that whereas the plaintiff now is a good, true, honest, just and faithful subject of this kingdom, (r) and as such hath always behaved and conducted himself, and hath not ever been guilty, or until the time of the committing of the several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of [felony], or of any other such crime, by means whereof the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly obtained and acquired the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm. Yet the defendant well knowing the premises, but contriving and maliciously (s) intending to injure the plaintiff in his aforesaid good name, fame and credit, and to bring him

FOR
MALICIOUS
CRIMINAL
PROSECUTIONS.

For maliciously charging the plaintiff of felony before a justice of the peace, and causing him to be imprisoned, on a warrant, until he was discharged by the justice. (q)
Defendant goes before a justice.

(q) See the various forms in 8 Wentw. Index, xv. to xxi.; Morg. 410, 413, 415; 2 Rich. C. P. 158; Plead. Ass. 180; and the approved one in 1 D. & R. 97; 2 Chit. Rep. 304; and see a full form of declaration for charging plaintiff with felony before a magistrate, and obtaining a search warrant, and searching plaintiff's house, *Hensworth v. Fockes*, 1 Nev. & Man. 321; 4 B. & Adol. 449, S.C.; and see a declaration for maliciously charging plaintiff with having uttered menaces against defendant's life, 10 Bingh. 301; as to this action in general, see *ante*, vol. i. Index, tit. "Mal. Pros.;" Selw. N. P. 10th edit. tit. "Mal. Pros.;" Bac. Abr. Action on the Case, H.; Com. Dig. Action on the case for a Conspiracy; 1 Saund. 228 to 230, in notes; Harrison, Index, Case, action of, II.; 3 Bla. Com. by Chitty, 126, from which it appears, that to support an action for a criminal prosecution, four circumstances must concur:—1st, *Falsehood* in the original charge, and which must have terminated in favour of the plaintiff. 2dly, *The want of probable cause* for instituting such proceedings; 3 Dow. Rep. 160. 3dly, *Malice* in the prosecutor, which must be proved; 9 East, 361; 5 Taunt. 187; 1 Marsh. 12. 4thly, *Damage* to the accused party, which may be either to his person by imprisonment—to his reputation by scandal—or to his property by expense; Gilb. Cases, Law and Evid. 185, 202; 12 Mod. 208; 1 T. R. 493 to 551. These four circumstances must be correctly stated in the declaration. The falsehood of the charge must have been substantiated by a verdict, or the decision of the Court in which it is instituted, or by the proceedings having been otherwise legally

determined, before the party aggrieved can commence his action for the injury sustained; 2 T. R. 225; 1 Saund. 228; Bul. N. P. 11; 1 Esp. 79. The husband alone may sue for the malicious prosecution of his wife, where the expenses have been paid by him; 2 Stra. 977; Ca. temp. Hardw. 54. No action is sustainable against the defendant, if the magistrate mistook the law, &c.; 3 Esp. Rep. 166; 1 Stark. 67; see the law very fully considered in 3 Bla. Com. by Chitty, 126, notes. To a declaration for maliciously and without probable cause procuring plaintiff to be indicted at the Central Criminal Court for felony, it is no answer that the defendant was bound over by recognizance to prosecute, if the jury believe that the defendant caused himself to be bound by making the charge maliciously and without probable cause before the magistrate who took the recognizance; *Dubois v. Keats*, 11 A. & E. 320.

(r) This inducement is usually inserted, but it is not traversable, Styl. 118, and if omitted, the declaration would be sufficient. The inducement is similar to that in an action for a libel, or for words, *post*, 454, &c. &c. In general, a criminal prosecution is injurious to the character of the plaintiff, see *supra*, n. (s); Gilb. Cases, L. & E. 185; 12 Mod. 208, in which case this inducement of the plaintiff's good character is proper, but if the proceeding were not prejudicial to the plaintiff's character, the inducement should be omitted, and the declaration commence with the statement, that the defendant contriving, &c. to cause the plaintiff to be imprisoned, &c.; *id. ibid.*

(s) As to the allegation of malice, see *ante*, 434, note (k); and 4 Burr. 1974.

**MALICIOUS
PROSECUTIONS.**

And maliciously
charges plaintiff
of a felony.

And causes the
justice to issue
his warrant
against plaintiff
for the said
felony.

Defendant
causes plaintiff
to be apprehended
and brought before
such justice on
such charge.

into public scandal, infamy and disgrace, and to cause the plaintiff to be imprisoned for a long space of time, and thereby to impoverish, oppress, and wholly ruin him, heretofore,* to wit, on &c., [date of warrant, or about it,] went and appeared before one E. F. Esq. (t) then being one of the justices of our lady the now queen, assigned to keep the peace of our said lady the queen in and for the county of —, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the said county, (u) and then before the said E. F. so being such justice as aforesaid, falsely and maliciously, (x) and without any reasonable or probable cause (y) whatsoever, charged the plaintiff with having [feloniously (z) stolen a certain gold watch of the defendant,] and upon such charge the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said E. F., so being such justice as aforesaid, to make and grant his certain warrant, under his hand and seal, for the apprehending (a) and taking of the plaintiff, and for bringing the plaintiff before him the said E. F. or some other of her majesty's justices of the peace in and for the said county of —, to be dealt with according to law for the said supposed offence. And the defendant, under and by virtue of the said warrant, afterwards, to wit, on the day and year aforesaid, wrong-

(t) It was formerly considered that a variance in the description of the justice's proper addition would be fatal; 2 B. & Ald. 756.

(u) In Com. Dig. Action on the Case for a Conspiracy, C. 4, it is said, that it must be alleged in the declaration that the former proceeding against the plaintiff was instituted before a justice, or Court of competent jurisdiction to try the offence; and see Rol. Ab. Action sur Case, p. 50; but as it is now settled, that an action may be supported for a malicious prosecution of a defective indictment (see 4 T. R. 247; 1 Salk. 15, notes; 2 Stra. 691; 5 B. & Ald. 634; 1 D. & R. 97, S. C.) and that case may be supported for a malicious arrest in a Court having no jurisdiction, 2 Wils. 302; it seems not material to allege that the justices, &c. had competent authority.

(x) As to malice, see ante, 434, note (k).

(y) This allegation is material, though *quære* whether the word "falsely," without "maliciously," would not suffice; ante, 434, n. (k), and 435, n. (o); 1 Wils. 232; 1 T. R. 544, 545; 4 Burr. 1974; Gilb. Cases, L. & E. 187, 189; 6 A. & E. 652; see 3 Hawk. P. C. 7th ed. 161, as to what is a probable cause. It is a mixed proposition of law and fact, whether there was probable cause, and whether the circumstances alleged to show it probable cause, are true, and existed as matter of fact; read particularly 10 Bing. 301. But whether or not, supposing the alleged circumstances to be true, they amount to a probable cause, is a question of law for the judge to decide; *Panton v. Williams*, 1 G. & D. 504. *Prima facie* evidence of want of probable cause suffices; 6 Bing. 183.

The defendant may rebut the plaintiff's evidence of want of probable cause, by showing the existence of the probable cause. Where the defendant presented two bills for perjury against the plaintiff, but did not ap-

pear himself before the grand jury, and the bills were ignored, and he presented a third, and, on his own testimony, the bill was found; this prosecution he kept suspended for three years, till plaintiff, taking the record down to trial, and defendant declining to appear as a witness, although in Court, and called on, plaintiff was acquitted; it was held sufficient *prima facie* evidence of want of probable cause; *Willans v. Taylor*, 6 Bing. 183; see 6 B. & C. 225; 9 D. & R. 380, S. C.

(z) The statement of this charge is to be taken from the magistrate's warrant, or from the examination of the defendant on oath, when a sight of them can be obtained. As to the right of the party to copies of the depositions, see 2 Burn, J. 26th edit. 103. The charge must be accurately described, and if it did not impute the guilt of felony, though the magistrate erroneously thought it did, the action is not sustainable; 3 Esp. Rep. 165, 166; 1 Stark. 67; but if the charge and warrant be substantially described, it will suffice; 5 Taunt. 187. In *Davis v. Noakes*, Guildhall, London, K. B. 1816; 6 M. & Sel. 29; 1 Stark. 377, (but see 13 East, 554) the declaration in case, for maliciously charging the plaintiff before a magistrate, stated that the defendant charged plaintiff before a magistrate with having feloniously stolen, &c. and the information and warrant produced were, that the defendant suspected and believed that the plaintiff had stolen, &c. and it being objected that this was a variance, Lord Ellenborough over-ruled the objection, because the charge must always be from suspicion, and plaintiff had a verdict. See also 1 Stark. 67, as to admission of parol evidence, where the depositions are lost, &c.; 2 B. & C. 494; 3 D. & R. 669, S. C.; 2 Burn, J. 26th edit. 53.

(a) This is to be taken from the warrant.

fully and unjustly, and without any reasonable (b) cause whatsoever, caused and procured the said plaintiff to be arrested by his body, and to be imprisoned, (c) and kept and detained in prison, for a long space of time, to wit, for the space of — hours then next following, and until he the defendant afterwards, to wit, on &c., falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be carried and conveyed in custody before the said E. F. so being such justice as aforesaid, [if the plaintiff was committed for further examination, then insert this averment between brackets] [and to be committed by the said justice for a further examination, to a certain gaol or prison of our said lady the queen, called —, and there, to wit, in the said gaol or prison, the defendant then falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of — then next following, and until he the defendant, afterwards, to wit, on &c., falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be carried and conveyed in custody before one G. H. then and there being a certain other justice of our said lady the queen, assigned to keep the peace of our said lady the queen, and to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county of —], to be examined before the said justice, touching and concerning the said supposed crime. Which said [last-mentioned] justice having heard and considered all that the defendant could say or allege against the plaintiff touching and concerning the said supposed offence, then, to wit, on the day and year last aforesaid, adjudged and determined that the plaintiff was not guilty of the said supposed offence, and then caused the plaintiff to be discharged out of custody, fully acquitted and discharged (d) of the said supposed offence; and the defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint

MALICIOUS
PROSECUTIONS.

And causes
plaintiff to be
committed for
further exami-
nation.

And afterwards
to be carried
before another
justice.

Who discharges
plaintiff as not
guilty of alleged
offence.

(b) *Supra*. n. (y).

(c) The imprisonment being one of the damages, in respect of which the action is sustainable, should be stated, if the fact; see *ante*, 437, 441. Though, indeed, it would suffice to sustain the action that plaintiff was injured in his reputation, or had been put to expense.

(d) The declaration must show that the former prosecution was at an end, though the omission will be aided by verdict; see the cases, *ante*, 436, note (y); and 1 *Str.* 114; *Com. Dig.* Action on the Case for Conspiracy, C. 5; *Bac. Ab.* Action on Case, H. In 2 *T. R.* 231, Buller, J. observed, that the words "released and discharged from the said imprisonment are not sufficient, they not being equal to the word *acquitted*, which has a definite meaning, namely, by a jury on the trial, and that it must be shown upon the face of the declaration that the original prosecution was at an end." But it must not be inferred from this observation, that no action can be supported by a person who was taken before a magistrate upon a charge of felony of which the magistrate discharges him, and for which no indictment is afterwards preferred;

if it were otherwise, as the party accused has no mode of forcing the prosecutor to prefer a bill, he would be without redress; and see 3 *Esp. Rep.* 165. In a precedent settled by an eminent Pleader, the following allegation was inserted instead of what is above between the brackets, as follows: "and thereupon the said defendant not having any ground or evidence to support the said false and malicious charge, then and there, to wit, on &c., aforesaid, neglected to bring the same on to a hearing or trial, and he the said plaintiff being innocent of the said supposed offence, was then and there duly discharged out of the said custody, fully acquitted and discharged of the said supposed offence." Case may be supported against a person for maliciously obtaining a search warrant, though no goods were found, and though consequently no prosecution could be instituted; see *Boote v. Cooper and another*, 1 *T. R.* 635; 3 *Esp. Rep.* 144, 147; *Rol. Ab.* Action *sur* Case, F.; and in *Bac. Ab.* Action on the Case, H. it is said, that an action lies whether the prosecutor proceed so far as actually to exhibit an indictment or not.

MALICIOUS PROSECUTIONS.

and prosecution is wholly ended and determined. [*Since the pleading rules of Hil. T. 4 W. 4, a second count is not admissible. Add damages as in next count.*]

The like more general. (e)

For that whereas the defendant, contriving and maliciously and wickedly intending, &c. [*same as above*] heretofore, to wit, on &c., falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff with having committed a certain offence punishable by law, to wit, felony; (f) and upon such last-mentioned charge, he the defendant, then, to wit, on the same day and year last aforesaid, falsely and maliciously caused and procured the plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of — then next following, and at the expiration of which time, he the plaintiff was duly discharged and fully acquitted of the said last-mentioned offence. (g) By means of which said several premises, (h) he the plaintiff hath been and is greatly injured in his said credit and reputation, and brought into public scandal, infamy and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and divers of those neighbours and subjects, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the plaintiff hath been and is guilty of [felony]; and also the plaintiff hath, by means of the premises, suffered great anxiety and pain of body and mind, and hath been forced and obliged to lay out and expend, and hath laid out and expended, divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—— (i) in and about the procuring his discharge from the said imprisonment, and defending of himself in the premises, and the manifestation of his innocence in that behalf, and hath been greatly hindered and prevented, by reason of the premises, from following and transacting his lawful and necessary affairs and business for a long time, to wit, for the space of —, and also, by reason and means of the said premises, the plaintiff hath been and is otherwise greatly injured in his credit and circumstances.

Damage applicable to both counts.

For maliciously exhibiting articles of the peace

For that whereas the plaintiff now is, and from the time of his nativity hitherto hath been, a good, quiet, honest and peaceable subject of this realm,

(e) This count, in respect of its generality, was frequently adopted as a second count when more than one count were admitted, but now it would be hazardous to insert it; see Rol. Ab. tit. Action sur Case, Q. pl. 6. It may be questionable, however, whether it would be sufficient upon demurrer. See 5 B. & Ald. 634; 1 D. & R. 266, S. C., though it was holden sufficient after verdict; *id.*; Cro. Eliz. 724; see 2 B. & Cres. 283; 3 D. & R. 519, S. C.; 6 M. & Sel. 29; see form, *post*, 450, and 1 D. & R. 97; 2 Chit. Rep. 304.

(f) That this is sufficient, see 2 B. & C. 283; 3 D. & R. 519, S. C.; 6 M. & Sel. 29.

(g) The accusation of felony before the magistrate, or in any other course of legal proceeding, cannot be treated as *libellous*, 1 Saund. 132, n. 1; but if the defendant at

any other time accused the plaintiff of the felony, a count may be here added for the slanderous words; 1 Saund. 133.

(h) We have already seen that the damage may be imprisonment, scandal, or expense; *ante*, 441, note (q); these, and any other particular damage, should be circumstantially stated, or such as are not necessarily incidental to the premises will not be admissible in evidence; *ante*, 437, note (e). The plaintiff cannot recover damages for any imprisonment after the gaol delivery, for it was his own fault to remain in prison after that time; Bro. Damages, pl. 115; Sayer, Damages, 87.

(i) As to what costs, see 1 Campb. 151, 152; *ante*, 437, note (f). Plaintiff is not entitled to costs as between attorney and client; *ante*, 233, note.

and never hath been guilty, or suspected to have been guilty, of any breach of the peace, or of any other crime whatsoever, yet the defendant, well knowing the premises, but contriving and maliciously intending wrongfully and unjustly to hurt, injure, and prejudice the plaintiff in this respect, and to cause him to undergo the pains and penalties by the laws and statutes of this realm provided against persons guilty of a breach of the peace of our lady the queen, and to cause him to be put to great trouble and expense in procuring bail for his personal appearance at the general quarter sessions of the peace, to be held for the said county of Middlesex at the sessions-house on Clerkenwell Green, in the said county, or if he could not procure such bail, to cause him to be imprisoned, and to be kept and detained in prison, until the general quarter sessions of the peace of our said lady the queen, holden in and for the said county of Middlesex at the sessions-house for the said county, on &c. before W. M. Esq. and other justices assigned to keep the peace in and for the said county, and also to hear and determine divers felonies and misdemeanors committed in the said county, falsely and maliciously, and without any reasonable or probable cause whatsoever, in his own proper person, came before the said justices, and then and there being duly sworn before the said justices on the Holy Evangelists, exhibited to the said justices certain false, feigned and malicious articles of the peace against the plaintiff, by the name and description of &c. under colour and pretence of fear of bodily harm to be done unto the defendant by the plaintiff; by which said articles the defendant charged the plaintiff, that on &c. [*Set out the articles or the substance of them to the end.*] And the plaintiff saith, that upon such charge and exhibiting of such articles, the defendant then, for the said supposed breaches of the peace, falsely and maliciously, and without any reasonable or probable cause, caused and procured D. W. and I. G. Esquires, two of the said justices, to issue out their warrant under their hands, in open session aforesaid, directed to all constables, headboroughs, &c. [*according to the direction*] and strictly charged and commanded that they or some or one of them, should, on sight thereof, take and bring the plaintiff, by the name and description of &c. [*as in warrant*] before them, and others her majesty's justices, assigned to keep the peace in the county aforesaid, and also to hear and determine felonies and misdemeanors committed in the said county, at the then sessions of the peace, holden at the sessions-house in and for the said county, (if the Court should then be sitting,) to answer to the said articles of the peace so exhibited and filed against him by the defendant as aforesaid for fear of bodily harm; and if the Court should not be sitting at the time of such taking, then, that they or some one of them should forthwith afterwards bring the plaintiff before them or some other of her majesty's justices of the peace for the same county, to find sufficient sureties personally to appear at the then sessions to answer the same articles, and all such other matters as on her majesty's behalf should be there objected; and if he could not be taken during the sessions, then that they should bring him before them, or some other of her majesty's justices of the peace for the said county, as speedily after as might be, to find such sureties personally to answer as aforesaid, and further to be dealt with according to the law. And the defendant after-

MALICIOUS PROSECUTIONS.

at the quarter sessions against plaintiff, in consequence of which he was arrested on a warrant of the justices, and obliged to find sureties, and enter into a recognizance to appear at a future time; that he did appear, but was not proceeded against and discharged. (k)

(k) See the notes to the form, *ante*, 441, 442.

**MALICIOUS
PROSECUTIONS.**

wards, to wit, on &c. falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be taken into custody by virtue of the said warrant, and then to be brought before one J. P. Esq. then and still being one of the justices assigned to keep the peace in and for the said county, and to hear and determine divers felonies and trespasses in the said county committed, and to be by the said justices then obliged to find sureties, and with such sureties then to enter into a recognizance to our said lady the queen, before the said justice, for his the plaintiff's personal appearance at the then next general quarter sessions of the peace to be held for the said county, at the sessions-house on Clerkenwell Green as aforesaid, there to answer the said articles of the peace so exhibited and filed against him by the defendant as aforesaid for fear of bodily harm. By reason whereof the plaintiff afterwards, to wit, at the next general quarter sessions of the peace of our said lady the queen, holden by adjournment in and for the said county of Middlesex, on &c. at the sessions-house on Clerkenwell Green aforesaid, before W. M. Esq. and other justices assigned, &c. did personally appear pursuant to the said recognizance, and the defendant did not appear at the said last-mentioned sessions, nor was any bill of indictment preferred, either at the said last-mentioned sessions, or at any future or subsequent session, nor hath any other prosecution been commenced against the plaintiff for the said supposed breaches of the peace in the said articles mentioned, whereupon the plaintiff was then discharged by the said Court of Session from the said recognizance and also from the said articles; by reason of which said premises the plaintiff was forced and obliged to undergo, and did necessarily undergo, great fatigue of body and anxiety of mind, and did incur great expense, amounting, to wit, to the sum of £—, in and about then defending of himself in the premises, and in and about the procuring sureties to enter into the said recognizance, and in and about the appearing at the general quarter sessions of the peace, and the manifestation of his innocence in the premises.

For maliciously
procuring a
search warrant,
and causing
plaintiff's house
to be searched
for stolen
goods. (1)

For that whereas the defendant, contriving and maliciously intending to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to vex, harass and injure the plaintiff, heretofore, to wit, on &c. went and appeared before one H. M. Esq. then and there being one of the justices of our lady the now queen, assigned to keep the peace of our said lady the queen in and for the county of M. and also to hear and determine divers felonies, trespasses and other misdemeanors, committed in the said county, and then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, made a complaint before the said H. M. Esq. so being such justice as aforesaid, as follows, that is to say, that there had been lately feloniously stolen, taken and carried away, in the said county, nine paper patterns, the goods and chattels of the defendant, and that the defendant had cause to suspect and believe, and did suspect and believe that the said goods and chattels, or some part thereof, were then knowingly concealed in the house

The defendant's
malicious
charge.

(1) An action on the case lies for maliciously obtaining and executing a warrant to search a house for smuggled goods, where none such are found; 1 T. R. 635, n.; 1 D.

& R. 97; 2 Chit. Rep. 304; and see the form in *Hensworth v. Fowkes*, 4 Bar. & Adol. 449; and 1 Nev. & Man. 321, S. C.

ments of a man named L. (meaning the plaintiff) situated at &c. ;
 n such complaint he the defendant falsely and maliciously, and
 any reasonable or probable cause whatsoever, caused and pro-
 e said H. M. Esq. so being such justice as aforesaid, to make and
 s certain warrant under his hand and seal, bearing date the day and
 resaid, and directed to all constables, and others her majesty's officers
 peace for the said county, whom it might concern, whereby, after
 ; that complaint upon oath had been made that day unto him the
 . M. by the defendant, that there had been then lately feloniously
 taken and carried away, in the said county, nine paper patterns, the
 and chattels of the defendant, and that there was just cause to
 t the said stolen goods were then knowingly concealed in the house or
 ents of a man named L. (meaning the plaintiff) at &c. the said H. M.
 ed such officers and constables, to whom the said warrant was directed
 resaid, forthwith to make diligent search in the day time in the said
 or apartments for the said stolen goods, and if they should find the
 or any part thereof, that they should then secure the said stolen goods,
 oring the person or persons in whose custody they should find the same
 e the said H. M. or some other of her majesty's justices of the peace
 he said county, to be examined and dealt with according to law. By
 ie and under colour of which said warrant, and by pretext of the execu-
 thereof, the defendant, together with one W. B. then being one of her
 esty's officers of the peace for the said county, afterwards, to wit, on the
 and year aforesaid, without any reasonable or probable cause whatever,
 without the leave or licence, and against the will of the plaintiff, entered
 dwelling-house of the plaintiff, situated at &c. and continued therein
 a long space of time, to wit, for the space of [two] hours, and during
 it time then searched and ransacked the said dwelling-house, and the
 oms and apartments thereof, and also the closets, drawers, desks and
 xes of the plaintiff and his family in the said dwelling-house, and
 ing, tossed and tumbled about the books, paper, furniture and wearing
 parel therein, and other the contents thereof, and thereby during that
 me then disturbed and disquieted the plaintiff in the possession of his
 aid dwelling-house; and the plaintiff in fact saith, that neither the nine
 aper patterns, nor any goods or chattels of the defendant, feloniously
 tolen, were found in the said dwelling-house, upon such search as afore-
 said, or otherwise, nor were there any such goods and chattels therein
 before, at the time of the said complaint, or at any other time whatever, nor
 had the defendant any reasonable or probable cause whatever for making
 the said complaint, or causing the said warrant to be issued or executed as
 aforesaid; and the plaintiff saith, that the defendant did not further prose-
 cute his said charge or complaint, but deserted and abandoned the same,
 and the said complaint wholly ended and determined. By means, &c. [See
 post, 448.

MALICIOUS PROSECUTIONS.

And obtaining
the search war-
rant.

Under colour
thereof defend-
ant and certain
peace officers
enter and search
plaintiff's dwel-
ling-house.

No goods felo-
niously stolen
found.

When two or more counts were permitted, it was usual to insert the following as a second:] And whereas also the defendant, further contriving and in-
 tending as aforesaid heretofore, to wit, on &c. aforesaid, went and appeared
 before the said H. M., Esq., so being such justice as aforesaid, and then
 and there falsely and maliciously, and without any reasonable or probable

The like more
general.

**MALICIOUS
PROSECUTIONS.**

cause, before the said H. M., Esq., so being such justice as aforesaid, charged the plaintiff with knowingly concealing in his house or apartments nine paper patterns, the goods and chattels of the defendant, the same having been, as the defendant then alleged, before then feloniously stolen, taken, and carried away, the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused the said H. M., Esq., so being such justice as aforesaid, to make and grant his certain warrant, under his hand and seal, for the searching of the said house or apartments of the plaintiff, in order to find the nine paper patterns so alleged to have been feloniously stolen. By virtue and under colour of which said last-mentioned warrant, and by pretext of the execution thereof, the defendant, together with one W. B., then being one of her majesty's officers of the peace for the said county, afterwards, to wit, on the day and year aforesaid, without any reasonable or probable cause whatever, and without the leave or license and against the will of the plaintiff, entered the dwelling-house of the plaintiff, and continued therein for a long time, to wit, for the space of [two] hours, and during that time then searched and ransacked the said dwelling-house, and the rooms and apartments thereof, and also the closets, drawers, desks, and boxes of the plaintiff and his family, in the said dwelling-house, and flung, tossed, and tumbled about the books, paper, furniture, and wearing apparel therein, and other the contents thereof, and also during all that time then disturbed and disquieted the plaintiff in the possession of the said dwelling-house; and the plaintiff in fact saith, that neither the said nine paper patterns, nor any goods or chattels of the defendant, or of any other person, which had been feloniously stolen, were found in the said dwelling-house upon such search as aforesaid, or otherwise, nor were there any such goods and chattels therein before or at the time of the said complaint, or at any time whatever, nor had the defendant any reasonable or probable cause for making the said last-mentioned charge, or causing the said warrant to be issued or executed as aforesaid; and the plaintiff saith, that the defendant did not further prosecute his said charge, but deserted and abandoned the same, and the said complaint has wholly ended and determined.

The damage and
injury to plain-
tiff.

By means of which said several premises the plaintiff hath been and is greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace with and amongst his neighbours and other good and worthy subjects of this kingdom, and divers of those neighbours and subjects, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the plaintiff hath been and is guilty of the offence by the defendant imputed to him as aforesaid, and also the plaintiff hath, by means of the premises, suffered great anxiety and pain of body and mind, and hath been greatly injured in his character, credit, reputation, and circumstances. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

For malicious
prosecution in
Middlesex, of
an indictment

Inducement of good character, &c. and that plaintiff had not been guilty of perjury, and of defendant's malicious intention, similar to the precedent, ante, 441, to the asterisk, and then proceed as follows:'] To wit, on the —

—, in the — year of the reign of our lady the now queen, at the session (n) of oyer and terminer of our said lady the queen, holden in the county of —, at the sessions house for the said county, before G. H., I. K., and L. M., Esquires, (o) and others their fellows, just our said lady the queen, assigned to hear and determine divers felonspasses, and other misdemeanors committed within the said county, defendant falsely and maliciously, and without any reasonable or probable whatsoever, indicted, (p) and caused and procured to be indicted, intiff, for that, &c. [*here state the substance or material parts of the indictment, and then proceed as follows:*] which said indictment our said lady queen afterwards, for certain reasons, caused to be brought before her, to be determined according to the law and custom of England. And the plaintiff further says, that the defendant afterwards falsely and maliciously, (r) without any reasonable or probable cause, prosecuted, and caused to be indicted, the said indictment against the plaintiff, until the plaintiff afterwards, to wit, at the sittings at nisi prius, (s) holden on — next after the end of term of —, in the — (t) year of the reign of our said lady the now queen, before Thomas Lord Denman, chief justice of our said lady the queen, assigned to hold pleas before the queen herself, A. B. Esquire, who was associated unto the said chief justice according to the form of the statute in such case made and provided, was in due manner and by due course of law acquitted of the said premises in the said indictment charged

MALICIOUS PROSECUTIONS.

for perjury, removed into Q.B. by certiorari, upon which the plaintiff was acquitted. (m)

Removal by certiorari. (q)

Trial and acquittal.

m) See the various forms in 8 Wentw. ex. xv. to xxi.; Herne, 88; Morg. 410, 1; Plead. Ass. 222; and the notes to the precedent, ante, 441. See a precedent for maliciously indicting plaintiff's wife at Hicks's 11, where she was acquitted, 2 Rich. C. P. 8. And see a precedent where the bill was returned not found, 5 Taunt. 187; 1 Marsh. 12; 8 Wentw. 344. The proceedings in the original prosecution are to be described as the record of acquittal, a copy of which must be produced on the trial of the action, the former prosecution were for a felony, but not when it was for a misdemeanor; 1 Bl. Rep. 385; 1 T. R. 518. Therefore, if the Court will not in the former case grant a copy of the record, no action for a malicious prosecution can be supported; 1 Chit. Crim. Law, 835, &c. In 10 B. & C. 70, it was made a question, but not decided, whether a person acquitted of felony has a right to have a copy of the record of his acquittal. This action is supportable, though the indictment was bad; 5 B. & A. 634; 1 D. & R. 266, S. C.; 4 T. R. 427. See the requisites necessary to sustain this action in Willes' Rep. 530, n. a.; 3 Bla. Com. by Chitty, 126, notes. The plaintiff must show express malice, or the absence of all probable cause; 9 East, 361; 1 Marsh. 12; 5 Taunt. 187, S. C.; 1 Marsh. 220; see ante, 435, 441.

(n) This statement is to accord with the caption or style of the particular sessions, and with the record of acquittal. In 2 Bla. Rep. 1050, a declaration for maliciously indicting at the general quarter sessions, instead of the general session, was held sufficient, be-

cause the indictment was cognizable at both sessions; see 3 D. & R. 226; 4 B. & Ald. 435. After verdict it is no objection to the description of the Court in which the indictment was found, that the names of the justices before whom the session of oyer and terminer is held are not set out; 1 D. & R. 266; 5 B. & A. 634, S. C. What are not variances, see Cro. Jac. 32; Yelv. 46; 9 East, 157. It should appear by the declaration that the Court before which the charge was preferred had authority to determine it; *id. ibid.*

(o) The allegation of the appointment of the justices by letters-patent is unnecessary, and is better omitted; 2 Rich. C. P. 158.

(p) This is the usual allegation; 2 Burr. 993. Where the jury have thrown out the bill, the declaration should describe the prosecution as "a bill," and not as "an indictment;" 1 Salk. 376; Com. Dig. Indictment, B.; 8 Wentw. 346; 5 Taunt. 187.

(q) If there was no removal, see 2 Rich. C. P. 169.

(r) Malice must be proved; 9 East, 361; ante, 435, 441.

(s) When the declaration stated that the acquittal was "in the Court of our lord the king, before the king himself," when it was at nisi prius, the variance was held fatal. See 11 East, 508; 2 Campb. 193, where see the law as to variances in general; and see 9 East, 157; 1 T. R. 235; 2 B. & C. 2; 3 D. & R. 226, S. C.

(t) This day should correspond with the record of acquittal. When a variance is fatal, and when not, see 4 T. R. 590, 560; Willes, 517; 9 East, 157.

MALICIOUS
PROSECUTIONS.Judgment
thereon.

upon him by a jury of the said county of Middlesex; (u) and whereupon it was afterwards, *to wit*, in [fifteen] days from the — day of St. Martin in Michaelmas Term, (x) in the 1st year of the reign aforesaid, considered (y) and adjudged by the Court of our said lady the queen, before the queen herself, the same Court then and still being holden at Westminster, in the county of Middlesex, that the plaintiff should depart thence without day in that behalf, and the plaintiff was and is duly discharged of and from the premises in the said indictment specified; as by the record and proceedings thereof remaining in the said Court of our said lady the queen herself, at Westminster aforesaid, appears. By means whereof, &c. [State the damage, as ante, 444, and any other damage which the plaintiff has sustained, and conclude, "To the damage of the plaintiff of £—, and therefore he brings his suit," &c.]

Another form,
stating the in-
dictment more
shortly. (z)

For that whereas heretofore, to wit, on &c., at a general session of oyer and terminer of our said lady the queen, holden in and for the county of —, at the sessions-house in and for the said county, before E. F. &c., Esquires, [naming the justices as in the caption of indictment,] and others their fellows, justices of our said lady the queen, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said county, the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted, the plaintiff, for [wilful and corrupt perjury], which, &c. [Proceed, and conclude as in the last form.]

For maliciously
indicting plain-
tiff for an as-
sault, at the
Guildhall Ses-
sions, at which
he was ac-
quitted. (a)

For that whereas heretofore, to wit, at (b) the general quarter sessions of the peace of our lady the queen, holden for the county of — at [the Guildhall, in King Street, Westminster,] in the said county, on &c., in the — year of the reign of our lady the now queen, before [W. M., A. C. &c. Esquires,] and others their fellows, justices of our said lady the queen, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in that county, that session of the peace was adjourned by the aforesaid justices of our said lady the queen above named, and others their fellows aforesaid, until the — day of the same month of —, at the hour of ten in the forenoon of the same day, to be holden at [the sessions-house on Clerkenwell Green,] in and for the said county. And thereupon the defendant, contriving and maliciously intending to injure the plaintiff, and to cause him to be imprisoned, and kept and detained in prison, and to put him to great charges and expense of his monies, and to vex, harass, oppress, impoverish and wholly ruin the plaintiff, heretofore, to wit, at the same session of the

(u) As to this allegation, see Cro. Car. 315, 316; Herne, 89.

(x) This also must agree with the record; see 4 T. R. 590, 560.

(y) It is sufficient to state that the plaintiff was acquitted by a jury; Willes, 517; 11 East, 513, 514.

(z) That this will suffice, at least after verdict, see 1 D. & R. 266; 5 B. & Ald. 634, S. C.

(a) See the requisites necessary to sustain this action in Willes's Rep. 520, n. (a); and

in the notes to the precedents, ante, 441, 442. It is not sufficient to support the action, to show that the defendant was guilty of the first assault; Peake's Rep. 135. If the defendant caused the plaintiff to be apprehended before the indictment preferred, by a justice's warrant, the first count will begin as ante, 441.

(b) The caption of the sessions at which the indictment was preferred must be accurately stated; see ante, 449, n. (a).

peace, being holden by adjournment aforesaid, at the sessions-house aforesaid, in and for the said county, on &c. aforesaid, before the said justices of our said lady the queen, and others their fellows aforesaid, the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted, (c) one I. H. and the plaintiff, for that [*here state the substance of the indictment, or if it be very short, set it out as thus:*] [the said I. H. and plaintiff, on &c., in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon him the said defendant, in the peace of God and our said lady the queen then and there being, did make an assault, and the said defendant did then and there beat, wound and ill treat, and other wrongs to the said defendant then and there did, to the great damage of the said defendant and against the peace of our said lady the queen, her crown and dignity:] and the plaintiff further says, that the now defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, prosecuted, and caused and procured to be prosecuted, the said indictment against the said I. H. and plaintiff, until the plaintiff afterwards, to wit, at the then next general sessions of the peace of our said lady the queen, holden in and for the said county of Middlesex, at the sessions-house for the said county, on &c., (d) in the year aforesaid, before W. M. &c., Esquires, and others their fellows, justices of our said lady the queen, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, was in due manner, and according to due course of law, by a jury of the said county, acquitted (e) of the premises in the said indictment charged upon him the plaintiff in manner aforesaid, whereupon it was then and there considered in and by the said Court, that the plaintiff of the premises in the said indictment specified should be discharged and should go without day, as by the record and proceedings thereof remaining in the said Court, reference being thereunto had, will more fully appear. By means of which said premises the plaintiff hath been forced and obliged to undergo and hath undergone many great troubles and labours both of body and mind, and to lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, to the sum of £—, in and about the defending himself in the premises, and the manifestation of his innocence therein, and hath been imprisoned and kept and detained in prison for a great length of time, to wit, for — days; and the plaintiff was also, by means of the premises, greatly hindered and prevented from transacting his necessary and lawful affairs and business for divers long spaces of time, and hath been and is otherwise greatly injured and damnified and very much impoverished. [*Or adopt the following shorter form.*]

Damages.

For that whereas the defendant, contriving and intending &c., [*as in last form*] heretofore, to wit, on &c., in the — year aforesaid, at the general

The like, stating the former proceedings with less particularity. (f)

(c) See *ante*, 449, n. (p).

(d) It must appear that the plaintiff was acquitted upon the prosecution before the action brought; but the day of the acquittal is not material; and though it vary from the record, the declaration will be sufficient; 9 East, 157; *ante*, 449, note (t).

(e) It is sufficient to say generally, that the plaintiff was acquitted, and it need not be stated that he was *acquiescens inde*, or *de premissis*; Yelv. 161.

(f) See 1 D. & R. 266; 5 B. & A. 634; *ante*, 450.

**MALICIOUS
PROSECUTIONS.**

quarter sessions of the peace of our said lady the queen, holden by adjournment on the day and year last aforesaid, at the sessions-house on Clerkenwell Green, in and for the said county of Middlesex, before certain then justices of our said lady the queen, assigned to keep the peace of our said lady the queen in the said county of Middlesex, and also to hear and determine divers felonies, trespasses and misdemeanors committed in the same county, the defendant falsely, maliciously, and without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted, the plaintiff, together with the said I. H. [for that the said I. H. and A. B., on &c., in the year aforesaid, with force and arms, at &c. [*venue*,] in and upon him the said defendant, in the peace of God and our said lady the queen then and there being, did make an assault, and the said defendant then and there did beat, wound and ill treat, and other wrongs to the said defendant then and there did, to the great damage of the said defendant, and against the peace of our said lady the queen, her crown and dignity;] (g) and the plaintiff further says that the defendant, further contriving and intending as aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, prosecuted, and caused and procured to be prosecuted, the said last-mentioned indictment against the said I. H. and plaintiff, until the plaintiff, afterwards, to wit, at the then next general sessions of the peace of our lady the queen, holden in and for the said county of Middlesex, at the sessions-house of the said county, on &c. in the — year aforesaid, before certain then justices of our said lady the queen, assigned to keep the peace of our said lady the queen in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county, was in due manner and according to the due course of law, by a jury of the said county, acquitted of the premises in the said indictment charged upon the plaintiff as aforesaid. By means of which said last-mentioned premises, the plaintiff hath been forced and obliged to undergo, and hath undergone, many great hardships, troubles and labours, both of body and mind, and hath been forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended, divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about the defending himself in the said last-mentioned premises, and the manifestation of his innocence therein; and the plaintiff hath, by means of the same premises, been greatly hindered and prevented from transacting his lawful affairs and business for divers long spaces of time, and hath been and is otherwise very much injured and damnified, and greatly impoverished. (h) To the damage of the plaintiff of £—, and therefore he brings his suit, &c.

**FOR MALICIOUS
PROCEEDINGS
IN
BANKRUPTCY.**
For maliciously
suing out a fiat
in bankruptcy

FOR MALICIOUS PROCEEDINGS IN BANKRUPTCY.

For that whereas the plaintiff, before and at the time of suing forth the proceedings in bankruptcy hereinafter mentioned, had not committed any

(g) Or if for a felony, say, as the fact may be, "for felony, (to wit), for feloniously stealing, taking, and carrying away the said goods and chattels in the said first count mentioned," or state the charge shortly, as in

the second count, *ante*, 450.

(h) If the defendant verbally slandered the plaintiff, independently of the prosecution, counts for the words when actionable may be added.

Defendant without reasonable cause issued a fiat in bankruptcy, and proceeded thereon.

Plaintiff declared a bankrupt until fiat superseded.

(k) It was held improper to state that a commission issued out of the Court of Chancery; 3 Camp. 58; 1 Taunt. 71. The statement of the fiat, commission and other proceedings should be examined with the originals.

FOR MALICIOUS
PROCEEDINGS
IN
BANKRUPTCY.

majesty's subjects to whom he was in anywise known, and lost the use, benefit and advantage of his said goods and chattels, books and effects, so seized and taken from him, and the said goods and chattels were sold and disposed of under the said fiat heretofore, to wit, on &c., for much less than the same were really worth, to wit, at the price of £—, being £— less than the same were then really worth; and the plaintiff hath also, by means of the premises, been forced and obliged to lay out and expend, and hath necessarily laid out and expended, a large sum of money, to wit, the sum of £—, in and about endeavouring to obtain an order for rescinding and annulling the said fiat, and the plaintiff hath been and is, by means of the premises, greatly injured in his credit, reputation, and circumstances, and in the way of his trade and business as a —, by him before then exercised and carried on, and hath been and is greatly impoverished, and hath suffered and undergone great annoyance, trouble, and great pain of mind. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

FOR LIBELS.

FOR LIBELS.

For the law and modes of framing declarations for libels and slanderous words, see fully, ante, vol. i. Index, tit. "Slander."

For a libel, indirectly accusing plaintiff of perjury or other specific offence. (l)

General inducement of good character.

And of innocence of the particular charge.

General consequences of good character.

Commencement ante, 13.] For that whereas (m) the plaintiff now is a good, true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit. And whereas also the plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the defendant as hereinafter mentioned, been suspected (n) to have been guilty of [*perjury* (o)] or any other such crime. By means of which premises, the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his

(l) See the forms of declarations for libels, and for words referred to, in 8 Wentw. Index, page iv. to xii.; 2 Rich. C. P. 152; and the forms, *post*; Kitch. 609; 4 Taunt. 355; *Moore v. Terrell*, 4 B. & Adol. 870; 2 Crom. M. & R. 78. In the first volume of this work will be found full observations on the mode of framing a declaration for a libel or verbal slander, and which will supersede the necessity of here inserting many of the notes in former editions of these precedents.

(m) It is usual to commence the declaration, either for a libel or for words, with an inducement of the plaintiff's good character, and of his innocence of the crime imputed to him by the defendant, (Com. Dig. Action for Defamation, G. 1.) but as these inducements are not traversable, (see Styles, 118; 11 Price, 235; 1 Lev. 297; 1 M. & Sel. 285,) they may be omitted, and the declaration

may commence with a statement of defendant's malicious intention to injure the plaintiff. When the libel, or slander, does not affect the plaintiff in his moral character, but merely imputes to him insolvency, or incapacity in the way of his trade or profession, this inducement of good character is inapplicable, and the declaration should commence with an inducement respecting the trade, &c.

(n) This general allegation is not material; 1 M. & Sel. 285.

(o) See *supra*, note (m). If the slander do not amount to a charge of any specific offence, such as perjury or theft, &c. the inducement, instead of this word in italics, should run thus: "*Of the misconduct or improper conduct hereinafter mentioned to have been charged upon and imputed to the plaintiff, or of any other such offences or misconduct.*"

neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known. (p) [*Here proceed to state the inducement, which in a libel charging perjury may be as follows:*] And whereas also, before the committing of the several grievances by the defendant as [in the first and second (r) counts] hereinafter mentioned, a certain action had been depending in the Court of our lady the now queen, before the queen herself, at Westminster, in the county of Middlesex, (s) wherein one E. F. was the plaintiff, and one G. H. was the defendant, and which said action had been then lately tried at the assizes in and for the county of —, and on such trial the plaintiff had been and was examined on oath, and had given his evidence as a witness for and on the part and behalf of the said E. F. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously (t) intending to injure the plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that he the plaintiff had been and was guilty of [perjury, (u)] and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, (x) and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, heretofore, to wit,

FOR LIBELS.

Special inducement that an action had been tried, and plaintiff examined as a witness. (q)

General statement of defendant's malicious intent.

(p) This inducement also is not traversable, but it is usually inserted. When the declaration is for a libel, or words affecting the plaintiff in his profession, trade, &c., the inducement respecting such profession, &c., usually precedes the above inducement, see forms, *post*; 4 Taunt. 355; 3 M. & Sel. 369, and which, in such cases, in addition to the statement of the plaintiff's good character as above, runs, "and also, by reason of the premises, the plaintiff, in the way of his aforesaid trade and business, was daily and honestly acquiring great gains and profits therein." 3 Mod. 112. Proof of a part of the inducement, stating that the plaintiff carried on two trades, suffices; 3 M. & Sel. 369; but see 1 Harr. & Wol. 6.

(q) The necessity for and use of an inducement will be found treated of, *ante*, vol. i. Index, tit. "Slander." In addition, it may be observed, that when the words themselves are such as can only be understood in a criminal sense, as when the plaintiff is directly charged with a theft or perjury, &c., no inducement of any extrinsic matter is requisite; 5 East, 467, 468; vide 5 B. & Adol. 27. But if, as in this case, the charge be not necessarily slanderous, the plaintiff must, by way of introduction or inducement, state, that some fact has taken place to which the defendant alluded, and to which the innuendoes must afterwards refer. This is fully explained, *ante*, vol. i. Index, tit. "Slander," and authorities there cited. So, if the libel be actionable only in respect of its affecting the plaintiff in his office, profession, trade, employment, &c., an inducement must be stated, showing such office, &c. But where the libel, or words, admit or import the fact to exist, no inducement or averment of the fact

is necessary; *id.* In a case where a count, after an inducement that one J. P. had become bankrupt, and that plaintiff was about to prove a debt justly due under his commission, charged defendant with saying of plaintiff, in his trade of a livery stable keeper, and in a discourse touching the matters before mentioned, "he is a regular prover under bankruptcies," meaning that the plaintiff was accustomed to prove fictitious debts under commissions: it was held ill, without a previous averment that defendant had been accustomed to employ the words in that sense; 7 Bingh. 119. See the mode of stating the inducement, *ante*, vol. i. tit. "Slander," and Bac. Abr. Slander, S. 2. Where the inducement is absolutely requisite, time should be stated; 4 T. R. 590, 560.

(r) When any of the counts either for a libel or for verbal slander, are for matter libellous, without inducement or reference to any extrinsic matter, the above inducement should be qualified, and confined merely to those counts which require an inducement.

(s) Herne, 137.

(t) The declaration must show a malicious intent in the defendant, but it is not necessary to use the word *maliciously*, for the word *falsely* or *wrongfully* is sufficient; 1 Saund. 242 a, note 2; 1 East, 563; 1 T. R. 545; Com. Dig. Action for Defamation, G. 5; but see 6 A. & E. 652.

(u) Or if the charge be not of any specific offence, insert the allegation as *ante*, 454, note (o).

(x) Or if the charge affect the plaintiff in his trade, &c. insert, "and thereby to injure the plaintiff in his said trade and business."

FOR LIBELS.

The libel and innuendoes.

on &c., (y)* falsely, wickedly, and maliciously (x) did compose (a) and publish, (b) and cause and procure (c) to be published, of and concerning the plaintiff, (d) and of and concerning the said [action which had been so depending as aforesaid, and of and concerning the evidence by the plaintiff given on the said trial, as such witness as aforesaid, (e)] a certain false, scandalous, malicious, (f) and defamatory libel, (g) containing, amongst other things, (h) the false, (i) scandalous, malicious, defamatory, and libellous matter following, (k) of and concerning the plaintiff, (l) and of and concerning [the said action, (m) and of and concerning the evidence given by the plaintiff on the said trial as such witness as aforesaid], (that is to say (n)), he (meaning (o) the now plaintiff) was forsworn on the trial, (p) (meaning the said trial, and thereby then meaning that the said plaintiff, in giving his evidence as such witness, on the

(y) The day of the publication, but the precise day is not material.

(x) As to the words *falsely* and *maliciously*, see preceding note (t), and *infra*, note (i).

(a) It is usual, when there is any evidence of that fact, to state, in one count, that the defendant composed the libel; as to the evidence of which, see *Bac. Abr. Libel*, B. 1; 2 *Phil. Evid.* 236, 237, 7th edit.

(b) The declaration must show a publication, (2 *Bla. Rep.* 1036; 1 *Saund.* 242, note 1; *Com. Dig. Action for Defamation*, G. 4; *Bac. Abr. Libel*, B. 2; *ante*, vol. i.) but the word "published" is not absolutely necessary, and the words "printed and caused to be printed," have been holden sufficient; 2 *Bla. Rep.* 1037; 1 *Saund.* 242, note 1; *id.* 132, note 2 and 3; *Com. Dig. Action for Defamation*, G. 4.

(c) A statement that the defendant published "or" caused to be published, is insufficient, but the uncertainty may be aided by the defendant's pleading; 8 *Mod.* 328; *Vin. Abr. Libel*, E. pl. 4; 1 *Show.* 124.

(d) The declaration must state that the libel was published of and concerning the plaintiff; *ante*, vol. i. tit. "Slander."

(e) Where an inducement of extrinsic matter is necessary, it must not only be shown that the imputation related to the plaintiff's character, but it must also be charged that it had reference to such extrinsic matter; *ante*, vol. i. tit. "Slander."

(f) As to these words, see *ante*, 455, n. (t).

(g) As to what is a libel, see 1 *Stark.* on Libels; *Com. Dig.* and *Bac. Abr. Libels*; 2 *Willes*, 403; 3 *Bla. Com.* 124, notes by Chitty; 9 *B. & C.* 172; 4 *M. & R.* 127, S. C.; 9 *B. & C.* 654; 4 *M. & R.* 605, S. C.; 5 *Bing.* 17; *Malachy v. Soper*, 3 *Bing. N. C.* 371; *Selw. N. P.* 10th edit; *Hearne v. Stowell*, 12 *A. & E.* 719. The judge is not bound to state his opinion whether the publication be libellous or not; *Baylis v. Lawrence*, 11 *A. & E.* 920; and it is for the jury to decide whether a charge is made with a motive, or under circumstances which take the case out of a privileged communication; *Padmore v. Lawrence*, 1 *A. & E.* 380.

(h) This allegation "inter alia" is sufficient; *Vin. Ab. Libel*, E. pl. 1; but if different parts of a libel not following each other, be set out in the same count, it is better not

to describe it as an entire libel, and the parts may be set forth thus, "in one part of which said libel there was and is contained the following false, &c. matter of and concerning the plaintiff, that is to say, &c., (stating that part of the libel, and then say) and in another part of the said libel there was &c.;" 1 *Camp.* 353; and see the form, *post*.

(i) As to the words *falsely* and *maliciously*, see the preceding page, note (t), and 1 *Saund.* 242, note 2; 2 *East*, 436; 6 *A. & E.* 652.

(k) This seems the proper mode of stating the libel, and it would be sufficient to prove that it was in substance correct; 2 *Salk.* 660, 661. It would be improper to state that the libellous matter was "to the effect following;" 2 *Salk.* 417, 600; 11 *Mod.* 78, 849; *Vin. Abr. Libel*, E.; 2 *Show.* 436; 1 *Marsh.* 522; 6 *Taunt.* 169, S. C.; and to state that the libel was to the substance following, would be bad, even in arrest of judgment after verdict; 3 *B. & Ald.* 603; 3 *M. & Sel.* 115; 4 *B. & Cres.* 473; 6 *D. & R.* 528, S. C.; *ante*, vol. i. tit. "Slander."

(l) This is necessary, unless the libel be stated to have been addressed to the plaintiff, and written in the second person, "You, &c." 1 *Saund.* 342 a, note 3; *Cro. Jac.* 231; *Com. Dig. Action on the Case for Defamation*, G. 7; 4 *M. & Sel.* 164; *ante*, vol. i.

(m) Whenever an inducement of extrinsic matter is necessary, (as to which, see *ante*, vol. i. tit. "Slander;" and *ante*, 455, n. (g)), it is equally necessary here to aver, that the libel related thereto, as that the libel or words were published of the plaintiff, "of and concerning his evidence in the said suit," or "of and concerning the plaintiff in the way of his said trade, &c." 8 *East*, 427; 1 *Saund.* 242, 243, notes 3 and 4; *ante*, vol. i.

(n) As to the mode of setting out the libel, and what is a variance, see fully, *ante*, vol. i. tit. "Slander."

(o) As to the nature and use of and necessity for an innuendo, see fully, *ante*, vol. i. tit. "Slander;" vide *Clegg v. Loffer*, 10 *Bing.* 250, 477; *Williams v. Gardner*, 1 *M. & W.* 245; *Gomperts v. Levy*, 1 *P. & D.* 215; *West v. Smith*, 4 *Dowl.* 703.

(p) If distinct passages are set out in the same count, see the mode, *ante*, vol. i. tit. "Slander;" 1 *Campb.* 353; 1 *Stark.* Slander, 2d edit. 380; and a form, *post*.

said trial as aforesaid, had committed wilful and corrupt perjury.) [*Add other counts stating different words according to the facts.* (q)] FOR LIBELS.

And the plaintiff further saith, (r) that the defendant, further contriving and intending as aforesaid, heretofore, to wit, on the day and year aforesaid, falsely, wickedly and maliciously did publish a certain other false, scandalous, malicious and defamatory libel of and concerning the plaintiff, and of and concerning [the said action, which had been so depending as aforesaid, (s) and of and concerning the evidence by the plaintiff given on the said trial, as such witness as aforesaid,] containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the plaintiff, and of and concerning [the said action, and of and concerning the evidence given by the plaintiff on the said trial, as such witness as aforesaid,] that is to say, [*stating the other libel with such proper innuendoes as may be advisable.*]

Second count.

And the plaintiff further saith, that the defendant, further contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, falsely, wickedly, maliciously, wrongfully and unjustly did publish, and cause and procure to be published, a certain other false, scandalous, malicious and defamatory libel of and concerning the plaintiff, containing, amongst other things, certain other false, scandalous, malicious, defamatory and libellous matters of and concerning the plaintiff, as follows, that is to say, [he (meaning the plaintiff) is perjured]. By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing

Third count for another libel, containing a direct charge of perjury. (t)

General damage. (u)

(q) If there be any doubt either as to the precise terms of the libel, or as to the evidence of the defendant's intention in the different parts of it, it was always deemed advisable to insert different counts varying the statement of the libel and innuendoes according to the supposed facts, and the evidence which it was expected might be adduced in support of them. But now the Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibits more than one count for the same injury or slander, and expressly declares in action of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed. So that now a second count cannot in strictness be added excepting when different sets of words or really different libels have occurred. If in one count a libel be set out with one or several innuendoes that each part meant the plaintiff, the jury may find a part for plaintiff, and negative the innuendoes of plaintiff as to the rest; in which case, defendant will be entitled to the costs of so much as is found not to refer to plaintiff, and therefore it is advisable to set forth only so much as certainly refers to plaintiff; *Prudhomme v. Fraser*, 1 Harrison's R. 6.

(r) If the second count commence, "*And whereas also,*" &c. it will nevertheless be sufficient; 2 Lev. 193; 3 Lev. 338; and see

Hughes v. Rees, 4 M. & W. 204, as to the form of commencing a second count.

(s) Though the second count may refer to matter stated in the first, or the inducement thereto, (see 2 Hen. Bla. 131; 2 Wils. 114, 115; Cro. C. C. 9th edit.; Cro. Eliz. 240; 2 Lev. 193,) yet it is necessary, when the libel is not actionable in itself, as stated in the second or subsequent count, that the inducement, *ante*, 455, note (q), should extend to such counts, and that it be averred that the libel was published, or the words uttered, with reference to the matter stated in such inducement.

(t) If there be any direct charge of perjury, or of any other offence obviously actionable, without any inducement or explanation, one or more counts should be inserted in the declaration as above, in order to avoid the necessity of proving the matter stated in the inducement, and in such case it should be merely stated that the libel was published, or the colloquium was had of and concerning the plaintiff generally, without any allegation that the same related to the action, or to the examination of the plaintiff as a witness, as in the preceding counts.

(u) This statement of general damage is not traversable.

FOR LIBELS. of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been and to be a person guilty of [perjury,] and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had. [*Here insert a statement of any special damage plaintiff has sustained in consequence of the libel. If the damage be the loss of service, it may be stated as follows:*] And also by reason thereof one E. F., who before and at the time of the committing of the said grievances was about to retain and employ, and would otherwise have retained and employed the plaintiff as his servant, for certain wages and reward to be therefore paid to the plaintiff, afterwards, to wit, on the day and year aforesaid, wholly refused to retain and employ the plaintiff in the service and employ of the said E. F., and the plaintiff hath, by reason of the committing of the said grievances, from thence hitherto remained and continued and still is wholly out of employ;] and the plaintiff hath been and is, by means of the premises, otherwise greatly injured. To the damage of the plaintiff of £—; and thereupon he brings suit, &c.

Special
damage. (x)

For a libel,
directly ac-
cusing plaintiff
of a theft or
other specific
offence. (y)

Commencement ante, 13.] For that whereas (x) the plaintiff now is a good, true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame and credit. And whereas also the plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of [theft] or any other such crime. By means of which said premises, the plaintiff, before the committing of the said several grievances by the defendant as hereinafter

(x) As to the statement of special damage, see *ante*, vol. i. tit. *Libel*; Com. Dig. Action on Case for Defamation, G. 11. When the libel or verbal slander is not in itself actionable, and the action is sustainable merely in respect of special damage, the declaration would be defective if such damage were not correctly stated, 1 Saund. 243, note 5; but if the libel or words be of themselves actionable, the plaintiff may recover, though no special damage be stated or proved; *id. ibid.*; 3 Esp. 133. In either case, however, the plaintiff cannot give evidence of any special damage, unless it be stated in the declaration; Bul. Ni. Pri. 7; 1 Stra. 666; 1 Saund. 243, note 5; 3 Esp. 134. The special damage must be the legal and natural consequence of the words spoken, 8 East, 3; and it should seem, that if the plaintiff might have his action over against the third person in respect of his refusal to complete a contract, &c. which he had entered into with the plaintiff, the damage is not sufficient; therefore care must be taken in the statement of the damage; 2 B.

& P. 289; 3 *id.* 372. The special damage, when the action is sustainable only in respect of it, must be particularly specified in the declaration; therefore in a declaration by a victualler, for calling his wife "whore," whereby several customers left off dealing with him, without naming any one in particular; this was held not to be a sufficient statement of special damage; Bul. Ni. Pri. 7; 1 Saund. 243 c, note 5; 8 T. R. 130; 2 B. & P. 288, 289; Sir W. Jones, 196; 1 Stark. 172. Loss of visiting of certain specified friends is sufficient damage, and see how to state it, 1 Taunt. 39; and a form, *post*.

(y) See another form, for imputing felony in *stealing flowers*, held sufficient, 2 Crom. M. & Ros. 78. For a libel by including plaintiff in the *Swindlers' List*, see 4 Car. & P. 8; as to when there is no necessity for any special inducements, see *ante*, vol. i. tit. *Slander*. Observe the notes to the preceding form.

(*) As to the inutility of this inducement, see *ante*, 455, note (p).

mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known. Yet the defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects, that the plaintiff had been and was guilty of [*theft*], and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish and wholly ruin the plaintiff, heretofore, to wit, on &c. [*the day of publishing the libel, but the precise day is not material*], falsely, wickedly and maliciously (a) did [compose (b) and] publish, (c) and cause and procure to be published, of and concerning the plaintiff, (d) a certain false, scandalous, malicious and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, (d) of and concerning the plaintiff, (that is to say) [he (meaning (e) the plaintiff,) stole Mr. B.'s sheep.] [See the form of a second or subsequent count for a distinct libel, ante, 457, and conclude with stating the damage, as ante, 458.]

FOR LIBELS.

For that whereas the plaintiff is a good, (f) true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame and credit. And whereas the plaintiff hath not ever been guilty, or, until the time of the committing of the grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him by the defendant, or of any other offences or misconduct. By means of which said several premises the plaintiff, before the committing of the several grievances hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known. [*If there be any occasion for any special inducement in order to explain the libel, as to which see ante, vol. i. Index. tit. "Inducement," and tit. "Innuendo," here insert it. In the case upon which this form was framed, the inducement was as follows:*] And whereas, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff was tenant to the Right Honourable Archibald Lord Douglas, of a messuage and premises, with the

For a libel imputing no specific offence, but general want of moral conduct.

Special inducement.

(a) As to the words *falsely* and *maliciously*, see ante, 455, note (t).

(b) It is usual, when there is any evidence of that fact, to state, in one count, that the defendant composed the libel, as to the evidence of which, see Bac. Abr. Libel, B. 1.

(c) The declaration must show a publication, see the notes, ante, 456, note (b).

(d) As to these words, see ante, 456.

(e) As to the necessity for and use of innuendoes, see ante, 456, n. (o); vol. i. tit. *Slander*; and as to the mode of setting out the libel, see *id.*

(f) That this general inducement of good character is not necessary, see ante, 454, note (m).

FOR LIBELS.

appurtenances, situate at &c., and the plaintiff being desirous and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish as such parishioner, agreed with the said Lord Douglas to pay the taxes of and for the said house, which he so inhabited as tenant thereof to the said Lord Douglas; and whereas also, before and at the time of the committing of the grievances by the defendant in the first count hereinafter mentioned, the defendant was the churchwarden of and for the said parish of ——. And the plaintiff so being desirous and intending to attend such vestry of the said parish as such parishioner, had thereupon, by his certain note in writing, given notice to the defendant of his said agreement with the said Lord Douglas. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending to injure him in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbours and subjects, that the plaintiff had been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him by the defendant, and to vex, harass and oppress the plaintiff, on &c. [*the day of publishing the libel*] falsely, wickedly and maliciously did compose and publish, and cause and procure to be published, of and concerning the plaintiff, [and concerning such agreement with the said Lord Douglas, and concerning the said note in writing,] a false, scandalous, malicious and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the plaintiff, [and of and concerning such agreement, &c.] that is is to say, &c. [*Here state the matter of the libel, with innuendoes, and add one or more other counts as the case may suggest. See the form of a second or subsequent count, ante, 457; conclude with stating the damage as follows:*] By means of the committing of which said several grievances by the defendant, the plaintiff hath been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, inso-much that divers of those neighbours and subjects, to whom the innocence of the plaintiff in the said offences and misconduct so as aforesaid mentioned to have been charged upon and imputed to the plaintiff, were unknown, have, on occasion of the committing of the said several grievances by the defendant, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been guilty of the offences and misconduct so as aforesaid mentioned to have been charged upon and imputed to him as aforesaid, and have, by reason of the committing of the said several grievances by the defendant, from thence hitherto refused, and still do refuse to have any acquaintance, intercourse or discourse with the plaintiff; and the plaintiff hath been and is, by means of the premises, otherwise greatly injured and damnified. [*Add special damage, if any.*] To the damage, &c.

Damage.

For a libel
upon the plain-
tiff, in his pro-
-tion as an

For that whereas the plaintiff, for a long time before and at the time of committing of the grievances by the defendant hereinafter mentioned, had been, and was, and still is, an attorney of the Court of our said lady the

queen, before the queen herself [*or if in C. P. say "before her majesty's justices of the bench,"*] and also a solicitor of the High Court of Chancery, and had used, exercised and carried on the profession and business of an attorney and solicitor with great credit and reputation. [And (*h*) the plaintiff and one E. F. another of the attorneys of our said lady the queen, before the queen herself, and also a solicitor of the said High Court of Chancery, had, as such attorneys and solicitors, been concerned in the prosecution of a certain fiat in bankruptcy against the defendant, and in divers proceedings and disputes concerning his estates and effects, and the plaintiff had always behaved and conducted himself therein with skill, care, judgment and integrity.] Yet the defendant, well knowing the premises, but contriving, and falsely and fraudulently intending to injure the plaintiff in his said credit and reputation, and also in his said profession and business, and to cause it to be suspected and believed that the plaintiff had [conducted himself dishonestly, injudiciously and improperly, in relation to the said fiat in bankruptcy, proceedings and disputes, *or "had been guilty of the misconduct hereafter mentioned to have been charged upon and imputed to him by the defendant,"*] and to vex, harass, oppress, impoverish and wholly ruin the plaintiff, heretofore, to wit, on &c., (*i*) wrongfully, maliciously and injuriously composed and published, and caused to be composed and published a certain false, scandalous, malicious and defamatory libel of and concerning the plaintiff [and E. F.] and of and concerning him in the way of and in respect to his [their] said profession and business [under the said fiat in bankruptcy,] containing, amongst other things, the false, scandalous, defamatory and libellous matter following, of and concerning the plaintiff [and E. F.] and of and concerning him in his [their] said profession and business, [under the said fiat in bankruptcy,] that is to say: [*here set out the libel verbatim, with appropriate innuendoes; as to the mode of doing which, see ante, vol. i. tit. Libel, and add any other counts the case may suggest.*] By means of which said premises, the plaintiff hath been and is greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy and disgrace, and is suspected to have been guilty of the misconduct so as aforesaid mentioned to have been charged upon and imputed to him, and to have acted dishonestly and unskilfully in the way of his said business and profession, [and to have conducted himself dishonestly, injudiciously and improperly, in relation to the said fiat in bankruptcy, proceedings and disputes,] and has been greatly vexed, harassed, oppressed and impoverished, and has also lost and been deprived of divers great gains and profits, which would otherwise have arisen and accrued to him in his said profession and business, and hath been and is otherwise much injured and damnified therein. [*If the plaintiff has sustained any special damage, state it.*] To the damage, &c.

FOR LIBELS.

attorney, reflecting on his mode of conducting a commission of bankruptcy. (*g*)

Damage.

(*g*) See the notes to the form, *ante*, 454, 455, and also the notes to the form, *post*, for verbal slander of an attorney. See forms in *Wentw. Ind.* iv. to xii.; 2 *Rich. C. P.* 152; 4 *Taunt.* 355. A joint action lies where two persons are injured in their trade; 3 *B. & P.* 150; *Williams v. Barumant*, 10 *Bing.* 260, where see declaration in name of chairman of

assurance company for libel on the company; but where two persons are charged with a felony, they must bring separate actions; *Cro. Car.* 513; 2 *Saund.* 117 a.

(*h*) This averment between brackets should be omitted, if not applicable to the case.

(*i*) Day of publication, or about it.

FOR LIBELS.

See declaration for a libel, charging an attorney "with disgraceful conduct," in having at an election disclosed confidential communications which he had acquired professionally, Moore v. Terrell, 4 B. & Adol. 870; 1 Nev. & Man. 559. In such action, the question for the jury is, whether the matters disclosed by the plaintiff were confidential communications acquired by him professionally, and not whether they were such as he would not be compelled to disclose if called as a witness in a court of justice; id. ibid.; and see a declaration for libel on a physician, Collins v. Carnegie, 1 A. & E. 695.

For a libel upon plaintiff in his trade, (k) imputing insolvency, &c.

For that whereas the plaintiff now is a good, (l) true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame and credit. And whereas also the plaintiff, before and at the time of the committing of the grievances by the defendant as hereafter mentioned, was a —, and the trade and business of a — then exercised and carried on, and still doth exercise and carry on. And whereas also the plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct as hereafter stated to have been charged upon and imputed to him by the defendant, or of any other such offences or misconduct, [*or if the libel do not charge the plaintiff with any misconduct, then omit the last averment, and in the case of a libel imputing insolvency, say, "and the plaintiff hath always exercised and carried on, and still doth exercise and carry on the said trade and business with integrity and punctuality of dealing, and has always been able and willing to pay his just debts, and hath never been in insolvent or bad circumstances."*] By means of which said premises, the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, and was daily and honestly acquiring great gains and profits in his aforesaid trade and business, to the comfortable support of himself and his family. [*If there be any occasion for an inducement to explain the libel, here insert it.*] Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, but contriving, and wickedly and maliciously intending to injure the plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbours, and other good and

(k) That this general averment of good character is not necessary, see *ante*, 454, note (m), and it had better be omitted if the libel do not charge the plaintiff with the want of any moral virtue; as if it merely charged him with being in insolvent circumstances. A statement in a newspaper that a ship, of which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts, was held to be a libel on the plain-

tiff in his trade and business, for which he might recover damages without proof of malice or allegation of special damage; *Ingram v. Sanson*, 6 Bing. N. C. 312. But words spoken of a tradesman, imputing to him that his trade is maintained by the prostitution of a female employed by him are not actionable, although said to be spoken of her in his trade, unless they can be construed as imputing that he kept a bawdy-house; *Brayne v. Cooper*, 5 M. & W. 249.

(l) See *ante*, 454, note (m).

worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of the offences and misconduct hereafter stated to have been charged upon and imputed to him by the defendant, [*or if the libel merely impute insolvency, then omit that allegation, and only say, "had been and was in bad and insolvent circumstances, and incapable of paying his just and true debts,"*] and to vex, harass, oppress, impoverish and wholly ruin the plaintiff in his aforesaid trade and business, and otherwise, heretofore, to wit, on &c., [*day of publication of the libel, or about it,*] unlawfully, falsely and maliciously did compose and publish, and cause and procure to be composed and published of and concerning the plaintiff, and of and concerning him in his aforesaid trade and business, [*if there be occasion to refer to a special inducement before stated, do so here, saying, "and of and concerning the said —,"*] a certain false, scandalous, malicious and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter of and concerning the plaintiff, and of and concerning him in his aforesaid trade and business [*if there be occasion to refer to a special inducement before stated, do so here, saying, "and of and concerning the said —,"*] as follows, that is to say, [*here set out the libel, with proper innuendoes, as to which see the notes, ante, 456; add other counts as the case may suggest; state the damage as follows:*] By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, [*or if the libel impute insolvency, say, "to whom the good and solvent circumstances of the plaintiff were unknown,"*] have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the defendant [*or if the libel impute insolvency, say, "to have been and to be in bad and insolvent circumstances, and incapable of paying his just debts,"*] and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to deal or have any transaction with the plaintiff in his aforesaid trade and business, or otherwise, as they were before used and accustomed to have and otherwise would have had, [*here add special damage, if any.*] To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

FOR LIBELS.

Damage.

For that whereas the plaintiff, before the committing of the grievances by the defendant as hereinafter mentioned, had been and was accustomed to employ himself as a domestic servant, and gain his living by that employment, and had been retained and employed by and in the service of the defendant, to wit, as his [footman] and servant, and in that capacity had

For a libel upon plaintiff, in his employment as a servant, against his master, in a letter to a person who was about to employ him, who, in consequence, refused to take him into his service. (1)

(1) This action is not sustainable unless express malice can be proved; see *Bul. N. P.* 9; 1 *T. R.* 110; 3 *B. & P.* 587. And see

fully the law in 1 *Stark. on Slander*, 2d ed. 293 to 300; 8 *B. & C.* 578; and 9 *id.* 403.

FOR LIBELS.

behaved and conducted himself with [good temper, activity and civility, (m)] and never was, nor until the time of the committing such grievances was suspected to have been, or to be [bad-tempered, lazy, or impertinent. (m)] By means of which premises the plaintiff, before the committing of such grievances by the defendant, had not only deservedly gained the good opinion of all his neighbours, and divers other good and worthy subjects of this realm, but had also supported himself, and would thereafter have supported himself, by his honest, faithful, diligent, and attentive exertions in the service of his masters and employers, had not such grievances been committed as hereinafter mentioned. And whereas also the plaintiff, before and at the time of the committing of such grievances, had quitted and left the service of the defendant, and had been recommended to, and was likely to be retained and employed by and in the service of one E. F., to wit, as a [footman] and servant, for certain wages, to be therefore paid to the plaintiff. Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in his said character, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, and particularly with the said E. F., and to cause it to be suspected and believed that the plaintiff was not fit to be employed as a servant, and that he was [bad-tempered, and a lazy and impertinent fellow,] and thereby to prevent the said E. F. from retaining and employing the plaintiff in his service, as he otherwise might and would have done, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, and to deprive him of the means of supporting himself by honest and industrious employment, heretofore, to wit, on &c., wrongfully and unjustly did compose and publish a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning him in his said employment as such servant, containing therein the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the plaintiff in his said employment, and as such servant as aforesaid, that is to say, [*here set out the libel with proper innuendoes, which in the case from which this form was drawn was as follows* : he (meaning the plaintiff) is a bad-tempered, lazy, impertinent fellow.]-[*Add other counts as the case may suggest, and a count stating the libel to be of and concerning plaintiff, without reference to his character of servant.*] By means of the committing of which said grievances the plaintiff hath been and is greatly injured in his said good character, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, insomuch that divers of those neighbours and subjects, and in particular the said E. F., to whom the [good temper, fidelity, activity, and civility (n)] of the plaintiff, in the capacity of a servant and otherwise, were unknown, have, on occasion of the committing of the said grievances, from thence hitherto suspected and believed, and the said E. F. still doth suspect and believe the plaintiff to have been and to be a [bad-tempered, lazy, and impertinent person, (n)] and unfit to be retained or employed in the capacity of a servant. And also by reason thereof, the said E. F. afterwards, to wit, on the day and year aforesaid,

Damage.

(m) These words must depend on the terms used in the libel.

(n) These averments must depend on the words used in the libel.

refused and declined to retain and employ the plaintiff in his service as a [footman] or otherwise, as he otherwise might and would have done; and by reason thereof the plaintiff hath not only lost and been deprived of the support, sustenance, wages, gains, and emoluments which might and would otherwise have arisen and accrued to him from and by reason of his being so retained and employed as last aforesaid, but hath from thence hitherto remained and continued and still is out of employ, and deprived of the opportunity of supporting himself by honest and industrious means, and hath been and is, by means of the premises, otherwise greatly injured and damaged. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

FOR LIBELS.

Proceed as usual, as in the form, ante, 454, to the asterisk, 456, and then as follows:] “In a certain newspaper called the —, [the title of the newspaper,] falsely and maliciously, &c.” [*Proceed as usual to set out the libel.*]

For a libel in a newspaper.(o)

Proceed as usual, as in the form, ante, 454, to the asterisk, 456, and then as follows:] “In the form of a letter addressed to one E. F., falsely and maliciously, &c.” [*Proceed as usual to set out the libel.*]

For a libel in a letter.(o)

Proceed as usual, and after the statement of the defendant's malicious intent, as ante, 455, or ante, 460, mutatis mutandis, proceed thus:] “falsely, wickedly, and maliciously did [compose and] publish, and cause and procure to be [composed and] published, of and concerning the plaintiff, [and of and concerning,] &c. if any special inducement to be referred to,] a certain false, scandalous, malicious, and defamatory libel, in a certain part of which said libel there was and is contained, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the plaintiff, [and of and concerning, &c. if any special inducement to be referred to,] that is to say, [here set out the libellous paragraph, with innuendoes, as usual, then proceed thus:] and in another part of which said libel there was and is contained, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the plaintiff, [and of and concerning, &c. if any special inducement to be referred to,] that is to say, [here set out the libellous paragraph, with innuendoes, as usual;] and in another part, &c. [so proceeding on to state any other libellous paragraph, and conclude as in other cases.]

For a libel containing distinct passages of libellous matter.(p)

FOR VERBAL SLANDER.

FOR VERBAL SLANDER.

The principles and rules affecting the structure of Declarations for Verbal Slander will be found stated in vol. i. Index, tit. Slander.

(o) There is no necessity for this averment, though it is usual. In *Richmond v. —*, M. T. 1830, the declaration stated that the defendant “published a certain libel, &c. in the *Times*,” without saying “in a certain newspaper called the *Times*,” and the Court held this sufficient. See forms, *Mountney v. Wat-ten*, 2 Bar. & Adol. 673; *Roberts v. Brown*, 10 Bing. 519; *Williams v. Beaumont*, 10 Bing. 260; *Curtis v. Curtis*, 10 Bing. 477.

(p) It is not necessary to set out the whole of the obnoxious publication, it is sufficient

to extract the obnoxious passages, provided their sense be clear and distinct; 8 Mod. 329; 1 Stark. on Slander, 2d edit. 380. But where distinct passages are extracted from the same libel, and set out in the declaration, care should be taken to distinguish them, as in the above form, or otherwise, for if the facts were to be set out continuously, and the sense were thereby to be altered, the variance would, it seems, be fatal; 1 Campb. 350; Ry. & Moo. C. N. P. 112; 1 Stark. on Slander, 380, 381; *sed quære*.

FOR VERBAL
SLANDER.
For slanderous
words, indi-
rectly accusing
the plaintiff of
a specific offence,
to wit, theft. (q)

Special induce-
ment.

Commencement as ante, 13.] For that whereas the plaintiff now is a good, (r) true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit. And whereas also the plaintiff hath not ever been guilty, or, until the time of the speaking and publishing of the several false, scandalous, malicious and defamatory words, [*or say, "committing of the said several grievances,"*] by the defendant, as hereinafter mentioned, been suspected to have been guilty of theft, [*the crime charged,*] or of any other crime as hereafter stated to have been charged upon and imputed to him by the defendant. By means whereof the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known. [*Here state the special inducement necessary to explain the slander, and as to which inducement see ante, 455, and vol. i. Index, tit. Slander. In the case upon which this precedent was framed, the inducement was as follows :*] And whereas also before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, divers goods and chattels, to wit, two spoons and six linen cloths of one E. F., of the value, to wit, of £5, had been and were feloniously stolen, taken, and carried away. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously (s) intending to injure the plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of [theft,] as hereafter stated to have been charged upon and imputed to him by the defendant, and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin him the plaintiff, heretofore, to wit, on &c. [*day of speaking the words or about it. The precise day stated need not be proved*] in a certain discourse, which the defendant then had of and concerning the plaintiff, and of and concerning the said [theft of the said goods and chattels,] in the presence and hearing of [one G. H. and of] divers (t) good and worthy subjects of our lady the queen, then in the presence and hearing of the said last-mentioned subjects, * falsely and maliciously (u) spoke and published,

(q) See a form, 1 Crom. M. & Rose. 181. As to the mode of framing declarations for slander in general, see *ante*, vol. i. Index, Slander, and the notes to the form, *ante*, 454; *Slouman v. Dutton*, 10 Bing. 402. The following words alleged to have been spoken by the defendant's wife of the plaintiff, "You robbed me, for I found the thing you have done it with," were held actionable *per se*, without any colloquium or innuendo to explain the sense in which they were used; *Rowcliffe v. Edmonds and Wife*, 7 M. & W. 12.

(r) That there is no necessity for this ge-

neral inducement, see *ante*, 454, n. (m).

(s) As to the statement of the defendant's malicious intent, see *ante*, 455, n. (t).

(t) It is said that if the words are laid to be spoken before E. F. and others, it is sufficient to prove that they were spoken in the presence of others only; *Bul. N. P. 6*.

(u) As to the statement of the malicious intent, see *ante*, 455, n. (t). The declaration may be either that the defendant "*falsely spoke*" the words, or that he spoke "*the false words*;" 1 Keble, 273.

of and concerning the plaintiff, (x) and of and concerning the said [theft of the said goods and chattels, (y)] the false, scandalous, malicious, (z) and defamatory words following, (a) that is to say, [he (b) (meaning the plaintiff) (c) had a hand in the affair (meaning the said theft of the said goods and chattels, and thereby then meaning that the plaintiff had been and was guilty of feloniously stealing, taking, and carrying away the said goods and chattels).

FOR VERBAL
SLANDER.

Since the pleading rules, *Hil. T. 4 W. 4, reg. 5*, two counts for the same cause of action, varying only in statement, are not now permitted. But if there have been distinct slanderous words, especially if in a distinct conversation, then a second count for the latter words may, and should be, introduced into the declaration. The following may be the form of a second or subsequent count for slander, indirectly accusing the plaintiff of an offence, and which may be explained by an inducement in the previous part of the said declaration. And afterwards, to wit, on the day and year last aforesaid, in a certain other discourse which the defendant then had of and concerning the plaintiff, and of and concerning the said &c., [the matter alluded to in the inducement] in the presence and hearing of divers other good and worthy subjects of this realm, the defendant further contriving and intending as aforesaid, then in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said &c., [the matter alluded to in the inducement] the false, scandalous, malicious, and defamatory words following, (that is to say,) &c., [Here set

Second count.

(x) The declaration must show, by a colloquium or otherwise, that the words were spoken of and concerning the plaintiff; see *ante*, vol. i. tit. *Slander*.

(y) This averment is material when the words are actionable only with reference to some prior inducement in the declaration; see *ante*, vol. i. tit. *Slander*; 2 *Saund.* 307, a, n. 1.

(z) As to this allegation being a sufficient averment of malice, see *ante*, 455, n. (t); 1 *Saund.* 242 a, n. 2; 1 *East*, 563. The word "false" is not necessary; *Rep. temp. Hardw.* 340.

(a) Verbal slander should be stated in this manner, and it would be improper to state that the words were "in substance and to the effect following;" *ante*, vol. i. *Slander*; *Rep. temp. Hardw.* 306; 3 *B. & Ald.* 503. These words, "vel consimilia," would be too uncertain; *Cro. Eliz.* 645. The very words themselves should be stated; 3 *M. & Sel.* 110; 6 *Taunt.* 169; and a count merely alleging that the defendant, "in a certain discourse &c. falsely and maliciously charged and asserted, and accused the plaintiff of being in insolvent circumstances," and stating special damage, without setting out the words, was held insufficient, and the judgment was arrested; 3 *M. & Sel.* 110. But sometimes a general statement would be cured by verdict; 3 *D. & R.* 519; 2 *B. & C.* 519, *S. C.*; *ante*, vol. i. tit. *Slander*.

(b) The slanderous words should be stated as they were uttered; *ante*, vol. i. *Index*, tit. *Slander*; *Gutsole v. Mathers*, 5 *Dowl. P. C.* 69. Proof of words spoken in the third person will not support a declaration for words

spoken in the second, and *vice versa*; 4 *T. R.* 217; *Bul. N. P.* 5. Nor will words spoken by way of interrogation support a charge of words spoken affirmatively; 8 *T. R.* 150. The plaintiff need not prove all the words laid, if they do not constitute one entire charge, and the non-proof would not alter its meaning, though he must prove such of them as will be sufficient to maintain his action, and it will not suffice to prove equivalent expressions; *ante*, vol. i. tit. *Slander*. Though some of the words spoken may not be actionable, yet if they be spoken at the same time as those which are actionable they may all be stated in one count; 10 *Rep.* 131 a; 2 *Saund.* 307 a, n. 1; 3 *Wils.* 185; *Dyer*, 75 a. But if words which are not actionable be stated by themselves in a distinct count, and entire damages be given, judgment will be arrested; *id. ibid.* It has been held, that words not stated in the declaration may, though actionable in themselves, be given in evidence, in aggravation of damages; *Peake, C. N. P.* 125, 22, 166; *Bul. N. P.* 7; 1 *Campb.* 48, 49. Where there is a variance between the allegation in the declaration, and the words proved, the judge may amend under the 3 & 4 *Will.* 4, c. 42, s. 24; *Smith v. Kinwelden*, 9 *Dowl. P. C.* 402.

(c) As to the use of and necessity for an innuendo, see *ante*, vol. i. tit. *Slander*. A demurrer to a declaration in slander does not admit the particular words spoken to have been spoken with the intent attributed to them by the innuendo; *Wheeler v. Haynes*, 1 *P. & D.* 65.

FOR VERBAL
SLANDER.

Damage.

out the slander with proper innuendoes. Conclude, stating the damage thus:]

By means of the speaking and publishing of which said several false, scandalous, malicious, and defamatory words, [or "committing of which said several grievances"] by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the speaking and publishing of the said several false, scandalous, malicious, and defamatory words, [or "committing of the said grievances"] by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been and to be a person guilty of [theft], so as aforesaid charged upon and imputed to him by the defendant, and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse, with the plaintiff, as they were before used and accustomed to have, and otherwise would have had, and also by reason of the premises, &c. [*Here state any special damage that may have arisen to plaintiff in consequence of the slander.*] And also by means of the premises the plaintiff hath been and is otherwise much injured and damnified. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

For charging plaintiff with perjury on the execution of a writ of inquiry, with a special inducement to explain the words. (d)

Commence with the usual inducement of the plaintiff's good character, as in the preceding form, and then proceed:] And whereas also before the speaking of the several false, scandalous, malicious, and defamatory words by the defendant of and concerning the plaintiff, hereinafter mentioned, a certain action was pending in her Majesty's Court of Exchequer at Westminster, wherein one W. H. was the plaintiff, and one W. S. the defendant, and in which said suit, before the speaking and publishing of the same words, to wit, on &c., a certain inquisition of damages sustained by the said W. H. was duly taken before the sheriff of &c., by the oath of twelve good and lawful men of his bailiwick, at &c., —, on the taking of which said inquisition the plaintiff was duly sworn, and did take his corporal oath upon the Holy Gospel of God, before the said sheriff, he the said sheriff then having sufficient and competent power and authority to administer an oath to the plaintiff in that behalf, and the plaintiff being so sworn, and having so taken his corporal oath, was then examined, and did give his evidence as a witness on the taking of the said inquisition; and the plaintiff further saith, that the defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and intending to injure the plaintiff in his aforesaid good name, fame, and character, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, and to cause it to be suspected and believed by those neighbours and subjects that he the plaintiff had been and was guilty of perjury,

(d) See the notes to the preceding form, and another form for a libel, charging plaintiff with perjury, *ante*, 464.

and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, and also to vex, harass, oppress, impoverish, and wholly ruin him the plaintiff, heretofore, to wit, on &c., in a certain discourse which the defendant then had with the plaintiff, in the presence and hearing of divers good and worthy subjects of this realm, the defendant, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said inquisition so taken as aforesaid, and of and concerning the said evidence so given by the plaintiff as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, &c. [*Here set out the words, with innuendoes.*] By means &c. [*as in the preceding form to the end.*]

FOR VERBAL
SLANDER.

Commencement as ante, 13.] For that whereas the plaintiff now is a good, (*f*) true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit. And whereas also the plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of [*perjury, the offence charged,*] as hereafter stated to have been charged upon and imputed to the plaintiff by the defendant, or of any other such crime. By means of which said premises the plaintiff, before the committing of the several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously (*g*) intending to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of [*perjury*], as hereafter stated to have been charged upon and imputed to him, and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin him, heretofore, to wit, on &c. [*day of speaking the words, or about it. The precise day stated need not be proved*], in a certain discourse which the defendant then had of and concerning the plaintiff, (*h*) in the presence and hearing of divers good and worthy subjects of our lady the now queen, and then in the presence and hearing of those subjects, falsely and maliciously spoke and published of and concerning the plaintiff, (*h*) the

For slanderous words, directly accusing the plaintiff of perjury or other specific offence. (*e*)

(*e*) See the notes to the preceding form.

(*f*) That there is no necessity for this inducement of general good character, see *ante*, 454, notes.

(*g*) See *ante*, 455, note (*t*).

(*h*) See *ante*, 467, notes (*x*) & (*y*); vol. i. Index, tit. "Slander."

FOR VERBAL SLANDER.	false, (i) scandalous, malicious, and defamatory words following, that is to say, [<i>here set out the words with the proper innuendoes, as thus, "he (meaning the plaintiff) is perjured."</i>] [<i>If there were other distinct words separately uttered on another occasion, a second count may be added. The following may be the form of a second or subsequent count :</i>] And afterwards, to wit, on the day and year aforesaid, in a certain other discourse which the defendant then had in the presence and hearing of divers other good and worthy subjects of this realm, the defendant further contriving and intending as aforesaid, then, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, [<i>here set out the different words ; conclude with a statement of the damage, which may be thus :</i>] By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be a person guilty of such [perjury,] so as aforesaid charged upon and imputed to him by the defendant, and have by reason thereof from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance, or discourse with the plaintiff as they were before used and accustomed to have, and otherwise would have had ; and also by means of the premises, &c. [<i>here state the special damage, if plaintiff has sustained any</i>], and also by means of the premises the plaintiff hath been and is otherwise greatly injured. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.
Second count.	
Damage.	
Special damage.	
For words slandering plaintiff in his office, as accus- ing a justice of peace with hav- ing pocketed fines, forfeited by persons convicted by him.(k)	For that whereas the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and now is an honest, upright and faithful subject of this realm, and at the several times hereinafter mentioned, and for a long time before, was and still is one of her majesty's justices of the peace, (l) assigned to keep the peace of our said lady the queen, in and for the county of S. and hath always, during the time of his being such justice, hitherto behaved and conducted himself righteously, faithfully, properly and honestly, in the execution of his said office of justice of the peace, and never was guilty of the offences or misconduct hereinafter stated to have been charged upon and imputed to him by the defendant, nor until the time of the committing of the grievances by the defendant as hereinafter mentioned was ever suspected of any such offences or misconduct ;

(i) See *ante*, 455, note (t), and 467, notes (x) and (y).

(k) Words imputing *corruption* or *mal-practices* to a magistrate are actionable ; 4 Rep. 19 ; Cro. Jac. 90 ; though words merely imputing want of *ability* do not appear to be so ; 2 Salk. 695. See also Holt, 652 ; Cro. Car. 14, 223 ; 3 Wils. 177. An indictment

will not lie unless the words are spoken to the justice whilst he was in the execution of his office ; 2 Campb. 142 ; Stra. 1157. And see further, Burn's Justice, vol. iii. 476, 477, 26th edit.

(l) This is a better averment than that plaintiff was "duly qualified," *ante*, vol. i. tit. Slander.

by reason whereof the plaintiff had deservedly acquired the honour, esteem and good will of all his neighbours and others, good and worthy subjects of our said lady the queen, to whom he was known. Nevertheless the defendant, well knowing the premises, but contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, credit, and reputation, and to bring him into great disgrace, scandal and distrust, as such justice as aforesaid, amongst all his neighbours, and other good and faithful subjects of our said lady the queen, and to subject him to punishment for the offences and misconduct imputed to him by the defendant as hereinafter stated, on &c. in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in the execution of his said office of justice of the peace, in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in the exercise of his said office of justice of the peace, in the presence and hearing of the said last-mentioned subjects, these false, scandalous and malicious words following, that is to say, &c. [*Here set out the words, with proper innuendoes, and conclude as follows :*] By means of which said premises the plaintiff hath been, and is greatly injured in his aforesaid good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff were unknown, have, on occasion of the committing of the said several grievances by the defendant, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been, and to be a person guilty of the offences and misconduct so as aforesaid mentioned to have been charged upon and imputed to the plaintiff by the defendant, and thereby, and otherwise by means of the premises, the plaintiff hath been and is greatly injured and damnified. [*If any special damage, here state it.*] To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

FOR VERBAL
SLANDER.

Damage.

For that whereas the plaintiff now is a good, (n) true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed and accepted, by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame and credit. And whereas also the plaintiff, before and at the time of the committing of the several grievances by the defendant as hereinafter mentioned, had been and was and still is an attorney of the Court of our said lady the queen, before the queen herself, [*or if in C. P. "before her majesty's justices of the bench,"*] and hath always used, exercised and carried on, and still doth use, exercise and carry on the profession

For words
slandering
plaintiff in his
profession, as
for slandering
an attorney.(m)

(m) Words which impute the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession or trade in which the party is engaged, are actionable; 1 Mal. Ent. 244; 3 Wils. 59, 187; 2 Bla. Rep. 750; 7 Moore, 200; 3 B. & B. 297,

S. C.; 3 B. & A. 702; 2 Car. & P. 146. See the form of declaration for a libel on an attorney, *ante*, 460; see also *Boydell v. Jones*, 4 M. & W. 446.

(n) That this general inducement of good character is unnecessary, see *ante*, 454.

FOR VERBAL
SLANDER.

and business of an attorney, (o) with honesty, integrity, credit and reputation, and hath not ever been guilty, or until the time of the committing of the said grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of the dishonesty or misconduct as hereinafter mentioned to have been charged upon and imputed to him by the defendant. By means of which said premises, the plaintiff, before the committing of the several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known. And also by reason of the premises, the plaintiff, in the way of his aforesaid profession and business, was daily and honestly acquiring great gains and profits therein. [*If any special inducement be necessary to explain the words, here insert it.*] Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and falsely and maliciously intending to injure the plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to injure the plaintiff in his said profession and business of attorney as aforesaid, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had conducted himself improperly and dishonestly, and without integrity, in his said profession and business, and to vex, harass, oppress, impoverish and wholly ruin the plaintiff, heretofore, to wit, on &c. [*on or about the day when the words were spoken,*] in a certain discourse which the defendant then had, in the presence and hearing of divers good and worthy subjects of our lady the now queen, then in the presence and hearing of the said subjects, falsely and maliciously spoke and published, of and concerning the plaintiff, and of and concerning the plaintiff in the way of his said profession and business, (p) these false, scandalous, malicious, and defamatory words following, that is to say, &c. [*Here state the words and add such other counts as the case may require, and see the form of a second or subsequent count, ante 470, mutatis mutandis. Conclude with the following averment of damage:*] By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame and credit, and also greatly injured in his said profession and business, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the

Damage.

(o) A simple statement, that plaintiff exercised his profession, is sufficient, without alleging he was "duly qualified," &c. *ante*, vol. i. tit. *Slander*. It need not, it seems, be expressly averred, that "at the time of the speaking the words," &c. plaintiff exercised the profession. If it be alleged that he "was and is an attorney, &c. and hath for a long time carried it on, &c." it will suffice; 2 Roll. Rep. 84; *ante*, vol. i. Index, tit. *Slander*. Where an averment of extrinsic matter is material, the allegation, that the slander applies to such extrinsic matter is matter of

description, and must in general be proved as laid, though unnecessarily minute. Thus, in slander of an attorney, if, after stating he was an attorney, it be averred he had conducted a particular suit, &c. and then state that the slander was published of and concerning his conduct in that suit, &c. it is essential to prove the existence of the suit, &c. and that the scandal had reference to the particular occasion stated, *ante*, vol. i. tit. *Slander*, and authorities there collected.

(p) That this averment is divisible, see *ante*, vol. i. tit. *Slander*.

innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be a person guilty of dishonesty and fraudulent practices, and to have acted dishonestly and improperly in his said profession and business of an attorney as aforesaid, and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any acquaintance or discourse with the plaintiff, or to employ or have any transactions with the plaintiff in the way of his said profession and business, as they were before accustomed to have, and otherwise would have had. And by reason of the premises, the plaintiff has been greatly vexed, harassed, oppressed and impoverished, and has also lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him, in his said profession and business and otherwise, [*here add any special damage plaintiff has sustained,*] and the plaintiff, by means of the premises, hath been and is otherwise much injured and damnified therein. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

FOR VERBAL
SLANDER.

After the usual averment of the plaintiff's good and chaste character, and her innocence of the offence imputed to her, as ante, 459.] And whereas also the plaintiff, at the time of the committing of the grievances by the defendant hereinafter mentioned, and long before, did use and exercise the business and employment of a domestic governess and instructress of children and young persons, living and residing together with such children and young persons, and thereby acquired great gains, profits and advantages, and had always conducted herself with decorum, chastity, modesty and propriety. And whereas also the plaintiff, before the speaking and publishing of the words hereinafter mentioned, had lived in the families of divers persons, to wit, the defendants, one Mrs. —, &c. &c. respectively, as such governess, and at the time of the committing of the grievances by the defendant as hereinafter mentioned, lived in the family of the said Mrs. —, &c. Yet the defendant well knowing the premises, and greatly envying the happy state and condition of the plaintiff, but contriving and falsely and maliciously intending to injure and prejudice her in her good name, fame and credit, and in her aforesaid business, and to be reputed an indecorous, unchaste, immodest and improper person, and unfit to be employed as such governess, on, &c. in a certain discourse which she the defendant then had with one R. J. of and concerning the plaintiff, and of and concerning her in her said business, and of and concerning her behaviour while she lived with the defendant, falsely and maliciously, in the presence and hearing of the said R. J. spoke and published these several false, scandalous, malicious, and defamatory words of and concerning the plaintiff, and of and concerning her in her said business and her behaviour while she lived with the defendant, following, that is to say, &c. [*Here set out the words with innuendoes, and add such other counts as may be useful; state the damage as ante, 461, observing*

For accusing
a governess of
fornication.(y)

(y) See the notes to the forms, ante, 466 to 472.

FOR VERBAL SLANDER. *the notes, and any other special damage which the plaintiff may have sustained. See a form of special damage, post, 479.]*

By baron and
feme for words
spoken of the latter in the way of her trade. *See 4 B. & Adol. 514.*

For words
slandering
plaintiff in his
trade, as by call-
ing him a rogue,
&c. (r) *Commencement, as ante, 13.]* For that whereas the plaintiff now is a good, (s) true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame and credit. And whereas also the plaintiff was, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, and from thence hitherto hath been and still is a —, (t) and has always exercised and carried on, and still doth exercise and carry on the same trade and business with integrity, honesty and propriety of conduct. And whereas also the plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct as hereinafter stated to have been charged upon and imputed to him by the defendant, or of — or any other offences or misconduct whatever. By means of which said premises the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known; and had also thereby acquired, and was then daily and honestly acquiring great gains and profits in his said trade and business, to the comfortable support of himself and his family. [*Here insert a special inducement, if any be requisite, to explain the slanderous words.*] Yet the defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbours

(r) Observe the general notes to the form, *ante*, 469. Words which impute to a person in his trade, however inferior, (1 Lev. 115; 5 B. & C. 160,) of fraudulent or dishonourable conduct, or of being in insolvent circumstances, are actionable; Lord Raym. 1480; 3 Bing. 104. It is said, however, that an action is not sustainable for saying a tradesman has charged an exorbitant sum for his goods, &c. unless fraud be imputed, &c.; Bac. Ab. Slander, B. 4. If defamatory words be spoken of two persons affecting them in their joint trade, they may join in an action for the injury; 3 B. & P. 150; *vide Williams v. Beaumont*, 10 Bing. 260. In an action for speaking the following words: "I will bet £5 to £1. that Mr. J. (the plaintiff) was in a spunging house for debt within the last fortnight, and I can produce the man

who locked him up; the man told me so himself." And in answer to the following question from a by-stander, "Do you mean to say that Mr. J., brewer, of Rosehill, has been in a spunging house within the last fortnight for debt?" The defendant said, "Yes, I do." The jury found the words were spoken of the plaintiff in the way of his trade, and it was held that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer; *Jones v. Littler*, 7 M. & W. 423.

(s) That this general inducement of good character is unnecessary, *see ante*, 454, n. (m).

(t) As to the averment of the plaintiff's trade, *see ante*, vol. i. Index, tit. *Slander*.

FOR VERBAL
SLANDER.

and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of the offences and misconduct hereafter stated to have been charged upon and imputed to him by the defendant, and to vex, harass, oppress, impoverish and wholly ruin the plaintiff in his said trade and business, and otherwise &c., heretofore, to wit, on [*day of speaking the words, or about it,*] in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in his said trade and business, [*and if the words refer to matter stated in a special inducement, say "and of and concerning the said, &c."*] in the presence and hearing of divers good and worthy subjects of our lady the queen, and then in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said trade and business [*and of and concerning the said, &c.*] the false, scandalous, malicious and defamatory words following, that is to say, "he" [*meaning the plaintiff*] "is a great rogue and keeps false books." [*Here set out the slanderous words with proper innuendoes, and as to which innuendoes see ante, vol. i. Index, tit. Slander, add one or more other counts as the case may suggest. The following is the form of a second or subsequent count:*] And afterwards, to wit, on the day and year aforesaid, in a certain other discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in his said trade and business, in the presence and hearing of divers other good and worthy subjects of this realm, the defendant further contriving and intending as aforesaid, then, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said trade and business, the false, scandalous, malicious and defamatory words following (that is to say) [*here set out the words with proper innuendoes, and conclude with the following damage:*] By means of the committing of which grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in these premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the defendant, and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused and still do refuse to deal or have any transaction, acquaintance or discourse with the plaintiff in his said trade and business, or otherwise, as they were before used and accustomed to have, and otherwise would have had. [*Here insert any special damage plaintiff may have sustained in consequence of the slanderous words, and if the damage be the loss of customers, it may be stated as follows:* "and also by means of the premises divers persons, to wit, A. B. and Co. and C. D. and E. F. who respectively, before the times of the committing of the said

Second count.
(u)

Damage.

(u) As to the form of a second count, see *Hughes v. Ross*, 4 M. & W. 204.

FOR VERBAL
SLANDER.

grievances had been and were customers of, and used and accustomed to deal with the plaintiff in the way of his aforesaid trade and business, to the great profit and advantage of the plaintiff, have from thence hitherto wholly neglected and refused, and still do neglect and refuse to continue as such customers, or to deal with the plaintiff:"] and also, by means of the premises, the plaintiff hath been and is otherwise greatly injured and damnified. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

For words
imputing in-
solvency to
plaintiff in the
way of his
trade. (u)

For that whereas the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is a ——, and has always exercised, followed and carried on, and still doth exercise, follow and carry on, the same trade or business with integrity and punctuality of dealing, always well and truly and punctually paying and discharging his just debts, and until the time of committing the said grievances, has not ever been suspected to be unable or unwilling to pay his just debts. By means of which said several premises the plaintiff, before the committing of the grievances by the defendant hereinafter mentioned, not only deservedly obtained the good opinion of all his neighbours, and other good and worthy subjects of this realm, but had also thereby acquired, and was then daily and honestly acquiring great gains and profits in his said trade or business, to the comfortable support of himself and his family, and the great increase of his riches. [*If any special inducement be necessary, here state it. In the case upon which this form was framed, the inducement was as follows:—* And whereas also the plaintiff, before the committing of the said grievances, had bought of one R. M. a large quantity of goods and chattels, to wit, [one ton weight of cheese] at and for a certain price or sum of money to be paid by the plaintiff to the said R. M. at a certain time not elapsed at the time of the committing of such grievances. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his aforesaid good name, fame and credit, and to bring him into great scandal, infamy and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff was poor, and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby and otherwise to injure the plaintiff in his aforesaid trade and business, and otherwise, [and to deprive him of the benefit of his said bargain with the said R. M.] and to vex, harass, oppress, impoverish and wholly ruin him, heretofore, to wit, on &c., in a certain discourse which the defendant then and there had of and concerning the plaintiff, and of and concerning him in the way of his aforesaid trade and business, falsely and maliciously spoke and published, in the presence and hearing of [one E. F. and] divers other persons of and concerning the plaintiff, and of and concerning him in the way of his aforesaid trade and business, the false, scandalous, malicious and defamatory words following: that is to say, &c. [*set out the words fully, with innuendoes, and such other counts as the case may require.*] By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and

General da-
mage.

(u) Observe the notes to the preceding form.

is not only greatly injured in his aforesaid good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known, insomuch that divers of those neighbours and subjects, to whom the integrity and good circumstances of the plaintiff were unknown, have, on occasion of the committing of the said grievances, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been and to be in indigent and bad circumstances, and incapable of paying his just debts, and to have been insolvent, and to be likely to remain insolvent, and have thereby, and on no other account whatsoever, refused to deal or have any transaction with the plaintiff in his aforesaid trade or business, or otherwise; and thereby also one E. F. who, before and at the time of the committing of the said grievances, had been used and accustomed to deal with, and who otherwise would have continued to have dealt with the plaintiff in the way of his aforesaid trade and business, hath from thence hitherto wholly neglected and refused so to do, and thereby also afterwards, and before the time appointed for the payment of the said price of the said goods and chattels, to wit, on &c. aforesaid, when the plaintiff requested the said R. M. to deliver the said goods and chattels to the plaintiff, he the said R. M. wholly refused to deliver the same or any part thereof to the plaintiff, unless the plaintiff would, before such delivery, pay the price thereof; and thereupon afterwards, and before the time appointed by the said contract for payment of the said price of the said goods and chattels, to wit, on &c. aforesaid, the plaintiff, in order to procure the delivery thereof, was forced and obliged to pay, and did then pay to the said R. M. a large sum of money, to wit, the sum of £ —, and the plaintiff, by means of the premises, hath been and is otherwise greatly injured and damnified. To the damage of the plaintiff of £ —, and thereupon he brings suit, &c.

FOR VERBAL
SLANDER.

For that whereas the plaintiff, before and at the time of the defendant's committing the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is lawfully possessed of certain rooms, with the appurtenances, at &c., and during all that time kept the same, for the purpose of persons bathing therein, for certain reward to the plaintiff in that behalf, whereby the plaintiff had acquired, and was then daily and honestly acquiring sundry great gains and profits, to the comfortable support of himself and his family. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, one E. F. had been and was, and still is, suspected by divers persons, subjects of this realm, to have been guilty of sodomitical practices. Yet the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure him in his aforesaid good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of sodomy and sodomitical practices, and to subject him to the pains and penalties of this kingdom made and provided against and inflicted on persons guilty thereof, heretofore, to wit, on

By the keeper
of bathing rooms
for words im-
puting a pro-
pensity to com-
mit an unnatu-
ral crime, spo-
ken in answer
to a question
put to defend-
ant by a third
person.

FOR VERBAL SLANDER.	&c., in a certain discourse which the defendant then had in the presence and hearing of one J. S. in answer to a certain question then put to him by the said J. S. why he the defendant had not returned to sleep at the plaintiff's house, falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say &c. [<i>here set out the slander, with innuendoes</i>]; with this, that the plaintiff will verify that the defendant thereby then meant to insinuate, and have it understood by the said J. S., and so the said J. S. then understood, that the plaintiff had been suspected to have been, and had been, guilty of sodomy and sodomitical practices, and so the said J. S. then understood the said words. And afterwards, to wit, on &c., in a certain other discourse which the defendant then had with the said J. S., in the presence and hearing of divers good and worthy subjects of this realm, the defendant, further contriving and intending as aforesaid, then in the presence and hearing of the said last-mentioned subjects, in answer to a certain question then put to him by the said J. S., that is to say, why the defendant had not returned to the plaintiff, the defendant then, in the presence and hearing of the said J. S., falsely and maliciously spoke and published, of and concerning the plaintiff, these other false, scandalous, malicious, and defamatory words following, that is to say: [<i>here state other words, and add such other counts as may be useful; state the damage thus:</i>] By means of the committing of which said grievances by the defendant, the plaintiff not only hath been and is greatly injured in his aforesaid good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the said premises were unknown, have, on occasion of the speaking and committing of the said grievances, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been and to be a person guilty of sodomitical practices, and have, on that account, from thence hitherto shunned and avoided the company and conversation of the plaintiff, and have wholly refused, and still do refuse to have any acquaintance or discourse with him, as they were before used and accustomed to do, and would have done again had not the said grievances been so committed as aforesaid, but also, by reason and by means of the committing the said grievances, and on no other account whatsoever, the Rev. Mr. C. and family, Mr. L. and Mr. A., Mr. P., &c. &c., and divers other persons who would otherwise have frequented and bathed in and from the said rooms, with the appurtenances, of the plaintiff, and paid him certain reward in that behalf, have, on occasion of the committing of the said grievances by the defendant, wholly declined and neglected so to do; and the plaintiff hath thereby lost and been deprived of divers great gains and profits which might and would have otherwise arisen and accrued to him from the said persons so bathing in the said rooms, with the appurtenances, as aforesaid, and the plaintiff hath been, and is, by reason of the committing of the said several grievances, otherwise greatly injured and damnified. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.
Second count.	
Damage general and special.	

For slander,
actionable only

For that whereas the plaintiff now is a good, (x) true, honest, just, and

(x) That this averment of general good character is unnecessary, see *ante*, 454, n. (m).

faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame and credit. And whereas also the plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the defendant as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct as hereinafter stated to have been charged upon and imputed to the plaintiff by the defendant; by means of which said premises the plaintiff, before the committing of the said several grievances by the defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours and other good and worthy subjects of this realm, to whom he was in anywise known; Yet the defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff and to bring him into public scandal, infamy and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of the offences and misconduct hereafter stated to have been charged upon and imputed to him by the defendant, and to vex, harass, oppress, impoverish and wholly ruin the plaintiff, heretofore, to wit, on &c. [*the day of speaking the words, or about it*], in a certain discourse which the defendant then had with the plaintiff of and concerning him the plaintiff, in the presence and hearing of divers good and worthy subjects of our lady the queen, in the presence and hearing of the said last-mentioned subjects, then falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous, malicious and defamatory words following, that is to say, "he" (meaning the plaintiff) "is a rogue." (x) [*Here set out the words, with proper innuendoes; add the following general damage:*] By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and

FOR VERBAL
SLANDER.

by reason of
special da-
mage. (x)

Damage.

(y) Though the law will not permit the inference of damage in general, when the words spoken were not in themselves actionable, yet when damage has actually been sustained, the party aggrieved may sustain an action for the malicious publication of any untruth; 1 Lev. 53; 1 Sid. 79, 80; Com. Dig. Action on Case for Defamation, D. 30; 1 Stark. on Slander, 2d edit. 190, et seq. The special damage sufficient to support an action must be a certain actual loss, (as of a particular marriage), or the acquaintance or friendship of some specified person; 1 Rol. Ab. 36; 2 B. & P. 284, 3d edit. 372; 1 Taunt. 39; 8 T. R.

130. When probable damage may be sufficient, as to say to a father of an heir apparent that he is a bastard, &c., see 1 Rol. Ab. 38; 1 Lev. 261; 3 Bla. Com. notes by Chitty, 123 c. The special damage must be incident to and a natural consequence of the words spoken, and not the consequence of the unlawful act of a third person; 8 East, 1; ante, vol. i. tit. "Slander."

(x) To call a person a *rogue* is not actionable, because it does not necessarily impute the guilt of a *felony*; but still if any actual damage ensued, an action may be sustained.

**FOR VERBAL
SLANDER.**

believe the plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him, and have, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance or discourse with the plaintiff, as they were before used and accustomed to have and otherwise would have had; and also by means of the premises [*here state the special damage; see several statements of special damage in the preceding forms, and another, infra; conclude thus:*] and also by means of the premises the plaintiff hath been and is otherwise greatly injured and damnified. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Special damage
that plaintiff
lost acquaint-
ances, &c. (a)

By means of which premises the plaintiff hath been and is greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours, friends and acquaintance, inasmuch that divers of those friends and neighbours, and especially A. B., C. D., E. F., &c. [the persons hereinbefore in that behalf named], have wholly refused to permit any intercourse or society with him, or to receive and admit him into their respective houses or company, or to find or provide for him meat, drink, or any other benefit and advantages in any manner whatsoever, as they before that time had done and otherwise would have continued to have done, whereby the plaintiff hath lost all those valuable benefits and advantages, being to him theretofore of great value, to wit, of the value of £—, and hath been and is greatly reduced and prejudiced in his fortune and pecuniary circumstances, and obliged to incur a much greater expense in his necessary living and supporting himself, to a large amount, to wit, to the annual amount of £— than he theretofore had done and otherwise would have continued to do, and hath been and is greatly impoverished, and divers of his friends and acquaintance have, by reason of the premises, greatly withdrawn their friendship and acquaintance. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

For slander,
where the words
are spoken iro-
nically. (b)

Proceed as usual, as in the above form, to the statement of the colloquium inclusive, and then proceed thus: In an ironical manner falsely and maliciously spoke and published of and concerning the plaintiff, the ironical, false, scandalous, malicious and defamatory words following, that is to say, he (meaning the plaintiff) is no thief, (thereby then meaning that the plaintiff had been and was a thief, and had been and was guilty of feloniously stealing some personal chattel, and the said subjects of our said lady the queen then understood that that was the meaning of the said words). [*Conclude as in other cases.*]

For slander,
where it is to be
collected from a
question and
answer. (c)

Proceed as usual, as in other cases, until the colloquium, and instead of the usual colloquium and averment of speaking the words, proceed as follows: to wit, on &c., in a certain discourse which the defendant then had with the

(a) This general statement of damage was held sufficient; see 1 Taunt. 40.

(b) If words are spoken ironically, there must be an express averment that they were so spoken; 11 Mod. 86; see also *Boydell v.*

Jones, 4 M. & W. 446.

(c) It is requisite to state the slander in this case, as in the above form; see 8 T. R. 160; 4 B. & C. 247.

plaintiff of and concerning the plaintiff, in the presence and hearing of divers good and worthy subjects of our lady the now queen, and in answer to the following question, then in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say, "What, do you (meaning the defendant) mean to say I (meaning himself the plaintiff) am a sheep-stealer?" then, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke and published to and of and concerning the plaintiff these false, scandalous, malicious and defamatory words following, that is to say, "Yes, you (meaning the plaintiff) are," thereby then meaning that the plaintiff had been and was guilty of felonious sheep-stealing. And afterwards, to wit, on the day and year aforesaid, in a certain other discourse which the defendant then had with the plaintiff of and concerning the plaintiff, in the presence and hearing of divers good and worthy subjects of our lady the queen, and in answer to a certain question, whereby the plaintiff did then, in the presence and hearing of the said last-mentioned subjects, interrogate and ask of the defendant, whether the defendant meant to say that the plaintiff was a sheep-stealer, then, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke and published to and of and concerning the plaintiff the false, scandalous, malicious and defamatory words following, that is to say, "Yes, you (meaning the plaintiff) are," thereby then meaning that the plaintiff had been and was guilty of sheep-stealing.

FOR VERBAL
SLANDER.

Second count.

FOR SLANDER OF TITLE.

FOR SLANDER
OF TITLE.

For that whereas the plaintiff, before and at the time of the committing of the grievances by the defendant hereinafter mentioned, was seised as of fee (e) of and in the reversion of and in certain land, with the appurtenances, situate, lying and being in the county of —, immediately expectant upon the death of one E. F., who was then seised of the same premises in her demesne as of freehold for the term of her natural life. And whereas the plaintiff, before and at the time of the committing the grievances hereinafter mentioned, was desirous of selling his said estate and interest by public auction, and for that purpose the plaintiff, before and at the time of the committing of the said grievances, to wit, on &c. caused his said estate and interest to be, and the same then were, put up and exposed to sale by public auction, by one G. H. as the auctioneer and agent of the plaintiff, in order that the same might be then sold for the plaintiff. Yet the defendant, well knowing the premises, but contriving and falsely and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed that he the plaintiff had no title, estate or interest of, in or to the said land, with the appurtenances, and to hinder and prevent the plaintiff from selling or

For slander of title, in procuring a third person to attend at a public auction room, and slander plaintiff's title to the estate he was about to sell there. (d)

(d) See other forms and law, 8 Wentw. 297; 3 Taunt. 246; 1 M. & Sel. 304, 639; 4 Burr. 2422; 1 Rep. 177 b; Vin. Ab. Sland. of Title, pl. 16; 1 Stark. on Slander, 2d edit. 192, 193.

(e) Where in declaration for slander of title it was stated that plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant (from whom he derived that interest) he had a clear right to dispose of the whole of that interest,

but only a doubtful right to dispose of any portion of it; and the plaintiff averred that he had put up his said interest to auction, and that defendant published a libel of and concerning his right to sell the said interest, the evidence being that he offered for sale a portion of that interest only, it was held a fatal variance; 2 H. & C. 486; 3 Dow. & Ry. 728, S. C. As to when special damage must be alleged, see 3 Bing. N. C. 371.

**FOR SLANDER
OF TITLE.**

disposing of his said estate or interest in the same, and to cause and procure the plaintiff to sustain and be put to divers great expenses attending the said exposure to sale, and to vex, harass, oppress, impoverish and wholly ruin the plaintiff, heretofore, to wit, on &c. aforesaid, wrongfully, injuriously, falsely and maliciously caused and procured a certain person, to wit, one W. M., to attend and be present at and upon such exposure to sale of his the plaintiff's said estate and interest as aforesaid, and then upon such exposure to sale, and before the said estate and interest had been sold and disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said W. M. did then accordingly, in the presence and hearing of divers liege subjects of our said lady the queen then present at and upon such exposure to sale as aforesaid, of and concerning the plaintiff, and of and concerning the said G. H. so being such auctioneer as aforesaid, and of and concerning the said land, with the appurtenances, and the plaintiff's estate and interest therein, that &c. [*here set out the words.*]

Second count.

And whereas also the defendant afterwards, to wit, on &c. aforesaid, further intending and contriving as aforesaid, then falsely and maliciously caused and procured a certain person, to wit, the said W. M., to attend and be present at and upon the said exposure to sale of the plaintiff's estate and interest, and then at and upon such exposure to sale, and before the said estate and interest had been sold or disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said W. M. did then represent and assert, in the presence and hearing of divers other subjects of our said lady the queen then present at and upon such exposure to sale as aforesaid, of and concerning the plaintiff and the said G. H., and of and concerning the said land and the estate and interest of the plaintiff therein, that &c. [*stating the other words, with the appropriate innuendoes.*]

Damage.

By means of the committing of which said several grievances by the defendant as aforesaid, divers of the said liege subjects of our said lady the queen, who were so present at and upon the said exposure to sale as aforesaid, and who were then about to be and become purchasers of the said estate and interest of the plaintiff, and who might and would otherwise have bid for and purchased the same, and especially I. K., who was then about to bid for and who would otherwise have purchased the same, were then deterred and prevented from bidding for and becoming the purchasers of the said estate and interest of the plaintiff, and then and from thence hitherto have respectively wholly declined to purchase the same, and thereby the plaintiff was then hindered and prevented from selling and disposing of his said estate and interest, and hath thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but hath been forced and obliged to pay, lay out and expend, divers large sums of money, amounting in the whole to a large fum of money, to wit, the sum of £—, in and about the said exposure to sale and expenses incidental thereto. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

For saying to a person who was about to hire plaintiff's ship, that she

For that whereas the plaintiff, before and at the time of the defendant's committing the grievance hereinafter mentioned, was possessed, as of his own property, of a certain ship or vessel called &c., and which said ship or vessel one P. B., before and at the time of the committing the grievances

hereinafter mentioned, was about to hire, and would, had not such grievances been committed, have hired of the plaintiff to go and proceed on a certain voyage for certain freight and reward to be therefore paid to the plaintiff. Nevertheless the defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure the plaintiff, and to induce the said P. B. not to hire the said ship or vessel, and thereby to deprive the plaintiff of all the profits, emoluments, rewards and advantages he would have derived and acquired from the said ship or vessel being so hired as aforesaid, heretofore, to wit, on &c., in a certain discourse which the defendant then had with the said P. B. of and concerning the said ship or vessel, in the presence and hearing of the said P. B. falsely and maliciously spoke and published, of and concerning the said ship or vessel, the false, scandalous and malicious words following, that is to say, &c. they, meaning the keel and floors of the said ship or vessel, were broken at the time when I (meaning the defendant) saw the same. Whereas in truth and in fact at no time when the defendant saw the said ship or vessel, nor when he spoke and published the said slander as aforesaid, were the keel or floors of the said ship or vessel broken, &c. [*here state the other slanderous words.*] By means of the speaking and publishing of which said several false, scandalous and malicious words as aforesaid, the said P. B. giving credit to and believing that the said representations and assertions were true, afterwards, to wit, on &c. aforesaid, wholly refused to hire the said ship or vessel as aforesaid, and thereby the plaintiff then lost and was deprived of all the profits, emoluments and advantages he would have derived of and from the said ship or vessel having been so hired as aforesaid; and the plaintiff hath been also, by means of the speaking and publishing the said several words as aforesaid, otherwise greatly injured and damnified.

FOR SLANDER
OF TITLE.

was broken and
unfit to proceed
to sea, whereby
he refused to
hire the ship.
(f)

TO RELATIVE RIGHTS.

FOR CRIMINAL CONVERSATION.

Commencement as ante, 18.] For that whereas the defendant contriving and wrongfully, wickedly and unjustly intending to injure the plaintiff, and to deprive him of the comfort, fellowship, society, aid and assistance of E. the wife of the plaintiff, and to alienate and destroy her affection for the

FOR CRIMINAL
CONVERSATION.
(g)

(f) See the last form, and notes.

(g) See form in trespass, *post*, which is most usually adopted. See the points relating to this action in Selw. N. P. Adultery; Bul. N. P. 26; Bac. Ab. Marriage, E. 2; 3 Bla. Com. 139. The venue may be changed, 10 East, 32. In actions of crim. con. it has always been the practice to bring trespass or case indiscriminately, on the ground that the party aggrieved might waive all damages resulting from the trespass, *per* Lord Abinger, C. B., *Chamberlain v. Haslewood*, 5 M. & W. 517. The action, however, is in effect in case, 6 East, 387, 251, because, *first*, the wrong complained of is not immediate, but consequential, 6 East, 389; *secondly*, that the plaintiff may declare with a *quod cum*, which is improper in trespass; *thirdly*, that the injury may be stated to have been

committed "on divers days and times, &c." which is improper in trespass for an assault, 6 East, 391, 395; *fourthly*, that the plea of the Statute of Limitations is not guilty within six years, 2 Burr. 753; 6 East, 387; and not as in trespass for an assault within four years, 2 Salk. 420; and, *lastly*, that the plaintiff before the late statute 5 & 6 Vict. c. 97, was entitled to full costs, though he did not recover 40s. damages; 3 Wils. 319; 1 Salk. 206; 2 Lord Raym. 831. When it may be doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away or harbouring the wife, it may then be advisable to declare in case as above, and add a count for enticing away or harbouring the plaintiff's wife, and which may be framed as in the form in Willes, 578, 579, 580, or as *post*, 486.

FOR CRIMINAL
CONVERSATION.

plaintiff, heretofore, to wit, on &c., and on divers other days between that day and the commencement of this suit, wrongfully, (h) wickedly, and unjustly debauched and carnally knew the said E. F., then and still being the wife (i) of the plaintiff, and thereby the affection of the said E. for the plaintiff was then alienated and destroyed, and also, by means of the premises, the plaintiff hath thence hitherto wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said E. his said wife, in his domestic affairs, which the plaintiff during all that time ought to have had, and otherwise might and would have had. To the damage of the plaintiff of £—, and thereupon he brings suit &c.

FOR
DEBAUCHING
DAUGHTERS,
&c.

For debauching
a daughter and
servant. (k)

FOR DEBAUCHING DAUGHTERS, &c.

Commencement as ante, 13.] For that whereas the defendant contriving and wrongfully and unjustly intending to injure the plaintiff, and to deprive him of the service and assistance of E. F. the daughter and servant of the plaintiff, heretofore, to wit, on &c. and on divers other days and times between that day and the commencement of this suit debauched and carnally knew the said E. F. then and from thence for a long space of time,

(h) In an action for debauching a wife or servant, it is not necessary to allege or prove that the defendant *knew* that the female was the wife or servant of the plaintiff, though in an action for seducing away or harbouring a wife or servant such allegation and proof are necessary; Peake, C. N. P. 55; Peake's Law of Ev. 334; Willea, 677.

(i) In an action for crim. con. the plaintiff must prove an actual marriage; 4 Burr. 2057; Peake's Law of Ev. 300; Phil. on Ev. 7th edit. 206; Selw. N. P. 10th ed. 12; but in an action of trespass by husband and wife, for the battery of the wife, it is sufficient to prove reputation of marriage; Stra. 480.

(k) As to actions by a parent or master, in that character, see Bac. Ab. Master and Servant, O.; Peake's Law of Ev. 333; 2 New R. 476; 1 Phil. Ev. 7th edit. 215. This action lies for debauching an adopted daughter; 11 East, 23. For the battery of a servant it is clear that trespass *vi et armis* is proper, though the injury to the master is not immediate, but consequential, *ante*, 483, n.; 6 East, 390. A parent in that character merely, cannot support an action for debauching or beating his daughter, which is only sustainable in respect of the supposed loss of service, some slight evidence of which must in general be adduced; 5 East, 46; 5 T. R. 360; 2 T. R. 168; Peake's C. N. P. 55, 233; Sir T. Raym. 259; 9 Rep. 113 a; Holt, C. N. P. 451; see 2 Star. 493; *Harris v. Butler*, 2 M. & W. 539; and an action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person, although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father when she quitted her service, unless she should go into another service; *Blaymire v. Haley*, 6 M. &

W. 55. See vol. i. p. 69. The declaration may be *vi et armis*; 3 Wils. 18; and in 2 New Rep. 476, the Court said that form of action was proper, but it may be framed in *case* when the action is merely for the seduction and loss of service; 2 T. R. 167; 6 East, 587; *Chamberlain v. Hazlewood*, 5 M. & W. 515; but where the offence is accompanied with an illegal entry into the father's house, he may declare in trespass for the entry, and allege the seduction and loss of service as consequential; 2 T. R. 167; 2 N. R. 476; 2 M. & Sel. 438, where see a form in *trespass, post*. The daughter is a good witness, 2 Stra. 1364, though she need not be called as a witness for plaintiff; Holt, C. N. P. 451. The not calling her, however, renders the plaintiff's case open to observation. The daughter cannot be cross-examined as to illicit intercourse with other men, and evidence of a promise of marriage is not admissible, and the plaintiff cannot call witnesses to the girl's good character, unless the defendant has by evidence attacked it; 3 Campb. 519; 1 Campb. 463. Evidence of mental pain is admissible; 3 Esp. 119; and the state and situation of the family may be proved in aggravation of damages; *id.* It may also be proved in aggravation of damages that the defendant professed to visit the family and was received as the suitor of the daughter; 5 Price, 641. Expenses actually incurred (such as physician's fee) and paid, may be proved and recovered; 1 Stark. C. N. P. 287. The defendant may in mitigation of damages adduce any evidence of the improper, negligent and imprudent conduct of the plaintiff himself; and where he knew that the defendant was a married man, and allowed his visits on the probability of a divorce, Lord Kenyon held the action could not be supported; Peake's Rep. 240.

to wit, hitherto, being the [daughter and] servant (*l*) of the plaintiff, whereby the said E. F. became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, on &c., she the said E. F. was delivered of the child with which she was so pregnant as aforesaid. By means of which several premises the said E. F. for a long time, to wit, from the day and year first aforesaid hitherto became and was unable to do or perform the necessary affairs and business of the plaintiff, so being her [father and] master as aforesaid, and thereby the plaintiff during all that time lost and was deprived of the service of his said [daughter and] servant, and also, by means of the said several premises, the plaintiff was forced and obliged to, and did necessarily pay, lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—— in and about the nursing and taking care of the said E. F. his said [daughter and] servant, and in and about the delivery of the said child. To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

FOR
DEBAUCHING
DAUGHTERS,
&c.

If the female were not the daughter of the plaintiff, or the legitimacy or proof thereof be doubtful, omit the words "daughter" and "father" throughout the declaration: see ante, 484, note; Peake, C. N. P. 55.

FOR ENTICING AWAY APPRENTICES.

FOR ENTICING
AWAY
APPRENTICES.

Commencement as ante, 13.] For that whereas, before and at the time of the committing of the several grievances by the defendant as hereinafter mentioned, one E. F. was, and from thence hitherto hath been, and still is, the servant [or "apprentice"] of the plaintiff, in his trade or business of a ——, which the plaintiff then exercised and carried on, and still doth exercise and carry on. Yet the defendant well knowing the premises, (*n*) but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff in his aforesaid trade and business, and to deprive him

By a master for
enticing away
his servant or
apprentice. (*m*)

(*l*) It is not necessary to allege or prove that the defendant knew that the female was the daughter or servant of the plaintiff; *ante*, 484, note (*h*).

(*m*) See form, Lil. Ent. 72. As to this action in general, see Bac. Ab. Master and Servant, O.; 3 Bla. Com. 142; Cowp. 54; 2 H. Bl. 511; 2 Esp. Rep. 734; 6 Mod. 183; 1 Burn, J. 26th ed. 175. Case is the usual and proper form of action for the reasons stated, *ante*, 483, n.; 1 Salk. 380; Ld. Raym. 1116; Cowp. 54; 2 Saund. 169. As to when the plaintiff may waive the tort, and sue in assumpsit for money had and received, see Skin. 579; 1 Taunt. 112; 3 M. & Sel. 191; 1 Burn, J. 26th ed. 174; *ante*, vol. i. The defendant cannot avail himself of any objection to the indenture of apprenticeship, or contract of hiring; 2 Hen. Bl. 511; 7 T. R. 310, 311, 314; 1 Anstr. 256. An apprenticeship *de facto* would always suffice as against a wrong-doer, though there were no legal apprenticeship; 6 Mod. 69; 1 Salk. 68. It was indeed held in 4 Taunt. 876, that no action can be maintained for harbouring an apprentice as such, if the master

to whom he was bound was then not a house-keeper, and of the age of twenty-four years. It should be observed, however, that that decision was before the passing of the 54 Geo. 3, c. 96. Sometimes by way of inducement, the indentures of apprenticeship, or contract of hiring, are stated at length; but this appears unnecessary and injudicious; see the precedents, 2 Saund. 169; 8 Wentw. Index, 31. It is necessary to allege and prove that the defendant knew that the third person was the apprentice or servant of the plaintiff; Peake, C. N. P. 55; Peake's Law of Evid. 334; 3 Bla. Com. 142; Willes, 582; but it is not necessary to state what means of enticement the defendant adopted; Willes, 577. The damage *per quod servitium amisit* must be alleged and proved; 5 East, 39; Burr. 1352; 3 Bla. Com. 142. In this action the measure of damages is not to be ascertained at the actual loss plaintiff sustained at the time, but for the injury done by causing the servant or apprentice permanently to leave plaintiff's employment; 4 Moore, 12.

(*n*) This is necessary, see preceding note.

FOR ENTICING
AWAY
APPRENTICES.

of the service of the said E. F. as such servant [or "apprentice"] as aforesaid, and of the profits, benefits and advantages which might and would otherwise have arisen and accrued to him from such service, whilst the said E. F. was such servant [or "apprentice"] as aforesaid, to wit, on &c., unlawfully, wrongfully and unjustly enticed, persuaded and *procured* the said E. F. to depart from and out of such service of the plaintiff. By means of which said enticement, persuasion and procurement, the said E. F. then unlawfully, wrongfully and unjustly, and without the licence or consent, and against the will of the plaintiff, departed from and out of the said service of the plaintiff, and hath remained and continued absent from such service for a long time, to wit, from thence hitherto. Whereby the plaintiff hath, for and during all that time, lost and been deprived of the service of the said E. F. in his aforesaid trade and business, and of all the profits, benefits and advantages, which might and would otherwise have arisen and accrued to him from such service, and hath been and is otherwise greatly injured in his aforesaid trade and business.

Second count
for harbouring. (o)

And whereas also the said E. F. heretofore, to wit, on the day and year aforesaid, being the servant [or "apprentice"] of the plaintiff, unlawfully, wrongfully and unjustly, without the licence or consent and against the will of the plaintiff, departed and went away from and out of the service of the plaintiff, and afterwards, to wit, on the day and year aforesaid, went and came to the defendant. Yet the defendant, well knowing the said E. F. to be the servant [or "apprentice"] of the plaintiff, but contriving and wrongfully and unjustly intending to injure him and to deprive him of the service of the said E. F., his said servant [or "apprentice"] and of all the profits, benefits and advantages, which might and would otherwise have arisen and accrued to him from such service, then unlawfully, wrongfully and unjustly *received* (p) the said E. F., so then being and continuing to be the servant [or "apprentice"] of the plaintiff as aforesaid, into the service of the defendant, and wilfully harboured, detained and kept the said E. F. in his said service for a long time, to wit, from the day and year last aforesaid hitherto, whereby the plaintiff for and during all that time lost and was deprived of the service of the said E. F. and of all the profits, benefits and advantages, which might and would otherwise have arisen and accrued to him from such service.

FOR CARELESS
DRIVING.

Against owners of a stage coach, for over-loading and improperly driving same, whereby the coach was overturned, and plaintiff's leg broken. (q)

FOR CARELESS DRIVING.

For that whereas the defendants, before and at the time of committing the grievances hereinafter mentioned, were owners and proprietors of a certain stage coach, for the carriage and conveyance of passengers from &c.

(o) As to this count see 6 T. R. 221.

(p) Was formerly added, omitting this allegation, and only stating that after notice and request not to do so, defendant harboured, &c.

(q) See forms and notes in *assumpsit*, ante, 262, and those *post*, 490. As against common carriers it is now enacted that the non-joinder of a co-proprietor shall be no ground for pleading in abatement, though the declaration be in *assumpsit*; 11 Geo. 4 & 1 Will. 4, c. 68, s. 5. All the proprietors may be

joined, though one only was driving; 4 B. & C. 223; see further, ante, 262, notes. A plaintiff is not precluded from recovering for an injury negligently done by the defendant, by the fact that he himself has been guilty of unlawful or negligent conduct, unless he might by the exercise of ordinary care at the time have avoided the injury; *Butterfield v. Forrester*, 11 East, 60; *Armitage v. G. J. R. Company*, 6 Dowl. 343; *Davies v. Mann*, 10 M. & W. 546.

to &c. (r) for hire and reward to them in that behalf, and thereupon heretofore, to wit, on &c., the plaintiff, at the request of the defendants, became and was an [outside] passenger upon [or "in"] the said coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from &c. aforesaid to &c. aforesaid, for reward to the defendants in that behalf, and the defendants then received the plaintiff as such outside passenger as aforesaid, and thereupon it became and was the duty of the defendants to use due and proper care that the plaintiff should be safely and securely (s) carried and conveyed by and upon the said stage coach on the said journey from &c. aforesaid to &c. aforesaid. Yet the defendants, not regarding their duty in that behalf, did not use due or proper care that the plaintiff should be safely and securely carried and conveyed by and upon the said stage coach on the said journey from &c. aforesaid to &c. aforesaid, but wholly neglected so to do, and suffered and permitted one of the wheels of the said coach to be so insufficiently secured, that the same then came off, and also suffered and permitted the said coach to be then so greatly overloaded, that by reason thereof, afterwards, and whilst the said coach was proceeding with the plaintiff thereon, in and along the queen's highway, on the said journey from &c. aforesaid, and before the arrival thereof at &c. aforesaid, to wit, on the day and year aforesaid, the said coach then became and was overturned, and thereby one of the legs of the plaintiff became and was fractured and broken, and he was otherwise greatly bruised, wounded and injured; and also by means of the premises the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, hitherto, during all which said time the plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages, which he might and otherwise would have derived and acquired, and thereby also the plaintiff was forced and obliged to and did then pay, lay out, and expend divers monies, amounting in the whole to the sum of £—, in and about the endeavouring to be cured of the said fractures, bruises and injuries; and also thereby the plaintiff was then hindered and prevented from continuing his said journey, and was kept and detained at a certain inn, (t) to wit, at —, in the county of —, a long time, to wit, for the space of — weeks, and during that time incurred great expenses, in the whole amounting to a large sum, to wit, £—, in and about his necessary support and maintenance. [Before the pleading rules, *H. T. 4 W. 4, reg. 5*, it was usual to add two other counts varying the description of the implied duty, or breach or injury; see those counts in 5th edit. 648 to 650.]

FOR ENTICING
AWAY
APPRENTICES.

Defendant's
breach of duty.

Damages.

For that whereas, before and at the time of committing the grievances by the defendant as hereinafter next mentioned, he was owner of a certain stage coach by him used and employed in carrying passengers from &c. to &c. (u) and divers other places, and being such owner of the said stage

Against the
proprietor of a
stage coach for
negligently
driving, where-
by coach was

(r) The places from which plaintiff went and was to go. As to what a variance, see *ante*, 263, note. If any doubt exist, it would be better to omit the *termini* altogether.

(s) See 1 C. & P. 636.

(t) All these averments should correspond with the facts.

(u) See as to what a variance, *ante*, 263. If any doubt, this averment as to the *termini* had better be omitted.

CARELESS
DRIVING.

overturned, and plaintiff's wife so much hurt, that she, after being ill for some time, died. (x)

coach, the said defendant, on &c., received [into] his said coach one E. F., the wife of the plaintiff, as a passenger [therein] to be carried and conveyed thereby on a journey, to wit, from &c. aforesaid to &c. aforesaid, for reward to the defendant in that behalf, and by reason thereof the defendant ought carefully to have conveyed or caused to be conveyed the said E. F. by the said coach on the said journey from &c. aforesaid to &c. aforesaid. Yet the defendant, not regarding his duty in this behalf, conducted himself so carelessly, negligently, and unskilfully in that behalf, that by and through the carelessness, negligence, unskilfulness, and default of himself and his servants, and for want of due care and attention to his duty in that behalf, the said coach afterwards, and whilst the same was carrying and conveying the said E. F. on the said journey as aforesaid, and before the arrival thereof at &c. aforesaid, to wit, on the day and year aforesaid, was upset and thrown down. By means whereof the said E. F., then being therein, was greatly cut, bruised and wounded, and divers bones of the body of the said E. F. were then and there broken, insomuch that the said E. F. thereby then became and was very sick, weak and disordered, and remained and continued so weak and disordered for a long time, to wit, from thence until the — day of —, in the year aforesaid, during all which time the plaintiff lost and was deprived of the comfort and society of his said wife, and also her aid and assistance in the management of his domestic affairs, which he otherwise would have had and enjoyed, and was forced and obliged to lay out and expend, and did actually lay out and expend, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the attempting the cure of his said wife, and the procuring necessary assistance and attendance for her during her said sickness, weakness and disorder, which ensued in consequence of her being so overturned and wounded as aforesaid, and which continued until the said — day of —, in the year aforesaid, on which said last-mentioned day the said E. F. of her said wounds died.

Against the owner of a coach for the negligence of his

See the form of declaration and notes as to the defendant's liability in such cases, post.

Against a surgeon for improper treatment. (y)

Commencement, ante, 13.] For that whereas before the committing of the grievances hereinafter mentioned, the plaintiff at the special instance and request of the defendant had employed the defendant to bestow the care, diligence and attendance of him the defendant in the profession and business of a surgeon and apothecary in and about the endeavouring to cure her the said plaintiff of a certain complaint and disorder under which she then laboured, and the defendant then accepted and entered upon such employment as such surgeon and apothecary, and it then became and was the duty of the defendant as such surgeon and apothecary to use due and proper care and diligence in and about the endeavouring to cure the plaintiff of the said

(x) Observe the notes to the preceding form, and forms in assumpsit, *ante*, 262; and *post*, 490, in notes, where the liability of carriers will be found discussed. Damages in this case can only be recovered up to the time of the death of the plaintiff's wife. See 1 Campb. 193.

(y) See precedent, *Gladwell v. Steggall*, 5 Bing. N. C. 733; where it was held that it was immaterial by whom the defendant was employed; or that, if material, the plaintiff's submitting to the defendant's treatment was sufficient proof of the allegation of employment by her.

complaint and disorder under which the plaintiff then laboured as aforesaid. Yet the defendant disregarding his said duty conducted himself so carelessly and unskilfully in and about the endeavouring to cure the plaintiff of the said complaint and disorder, that by reason thereof the plaintiff was greatly injured in health and constitution, and underwent great suffering, &c. [*state any other special damage*]. To the plaintiff's damage of £——, and thereupon she brings suit, &c.

CARELESS
DRIVING.

II. FOR TORTS TO PERSONAL PROPERTY.

TORTS TO PER-
SONAL PRO-
PERTY.

Declarations of this nature are sometimes for the breach of *express* or *implied contracts*, either by nonfeazance, misfeazance, or malfeazance. They are principally against carriers, innkeepers, wharfingers, attornies, or other agents, or bailees—for deceit on the sale of goods, &c.—for negligence in driving carriages, or navigating ships—for excessive or irregular distresses or levies—for rescue of goods distrained for rent or damage feasant—or of prisoners—against sheriffs and other officers for escapes, false returns, &c.—for unduly exercising trades or imitating inventions—in trover—or for injuries to personal property in reversion.

It is most usual to declare in assumpsit against *attornies* and *agents*, and see the forms and notes, *ante*, 246 to 283; see the forms in case, *post*; 8 Wentw. Index, 29, 39, 47; 2 Wils. 325; 3 Wils. 443; 4 Burr. 2061; 2 Bla. Rep. 906; 1 T. R. 656, 101; but against *bailees* of different descriptions it is sometimes advisable to declare in case, as in the following forms. The forms in *assumpsit* against bailees of different descriptions, *ante*, 246 to 252, may easily be varied into *case*, observing the form of the following precedent. See a form in case for the loss of a dog, and in trover, 1 T. R. 274; for negligence in shipping a hogshead, 3 East, 62; and for not accounting for the produce of a bill of exchange, 6 East, 333; 1 New Rep. 43. These declarations must show a legal duty, or an express contract, founded on sufficient consideration; 12 East, 89; *Boorman v. Brown*, 4 P. & D. 401. But care must be observed that no count be framed in substance in assumpsit; 6 B. & C. 268.

FOR BREACH OF IMPLIED CONTRACT.

FOR BREACH
OF IMPLIED
CONTRACT.

See declaration in case against bankers for not paying check of customer, *Marjetti v. Williams*, 1 Bar. & Adol. 415. A banker is bound by law to pay a check drawn by a customer within a reasonable time after he the banker has received sufficient funds belonging to the customer; and the latter may maintain an action against the banker for refusing payment of a check under such circumstances, although he has not thereby sustained any actual damage; *id. ibid.*

Against bankers
for not honour-
ing plaintiff's
check.

AGAINST CARRIERS BY LAND.

AGAINST
CARRIERS BY
LAND.

Commencement as *ante*, 13.] For that whereas the defendant, before and at the times hereinafter next mentioned, was, and from thence hitherto hath

Against a car-
rier by land for
losing a box. (s)

(s) See the old forms, Herne, 76; Bro. Red. 11; and see the forms in assumpsit, and the notes, *ante*, 262, &c. which will, for the most part, be here applicable; Bac. Ab.

Carriers; 8 Wentw. Index, 43, 47, 48. See declaration for refusing to carry goods, *Pickford v. G. J. R. Company*, 8 M. & W. 372; 2 Chit. Rep. 1. Formerly it was usual to

AGAINST
CARRIERS BY
LAND.

been and still is a common carrier (a) of goods and chattels for hire, to wit, from — to —. (b) And thereupon the plaintiff heretofore, to wit, on &c., at &c., [the real place], caused to be delivered to the defendant, and he then accepted and received of and from the plaintiff, a certain [box, (c)] containing divers goods and chattels, to wit, &c. [specify the articles according to the exact description, or as in trover, (d)] of the plaintiff, of great value, to wit, of the value of £—, to be safely and securely carried and conveyed by the defendant from — aforesaid to — aforesaid, and there, to wit, at &c., (e) aforesaid, safely and securely to be delivered for (f) the plaintiff, for certain reasonable reward (g) to the defendant in that behalf. Yet the defendant, not regarding his duty (h) as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure the plaintiff in this behalf, did not nor would safely or

declare setting out the custom of the realm; 1 Sid. 245; Com. Dig. Action on Case for Negligence, C. 2. But this custom being the common law need not be stated; Hob. 18; 1 Wils. 281; Bac. Ab. Carriers, A.; and see the form, 3 Wils. 429. Afterwards the practice appears to have been to state the defendants to be common carriers for hire, *totidem verbis*, as in the above form, but this practice was departed from in *Brotherton v. Wood*, 3 B. & B. 54, to a considerable extent; and still further in the late case of *Possi v. Shipton*, 8 A. & E. 963, where it was held that although a declaration might be bad on special demurrer for want of some such averment, yet the defect (if any) would be aided by verdict. The declaration must show a duty or a contract; 12 East, 89; *Boorman v. Brown*, 4 P. & D. 401. As to when the carrier's exceptions in the contract or notice should be noticed in the declaration, *ante*, 263, note; under this count the plaintiff cannot recover for a loss before the actual carriage of the goods commenced, 2 Stark. 461; he should declare against the defendant for not forwarding the parcel, &c. see form, *post*, 493. If a coachman lose a parcel, the master, and not the coachman, should be sued, 2 Stark. 82; 1 Price, 328; but a coachman is responsible for the loss of a parcel which he receives to carry without reward, if it be lost through gross negligence on his part; *Beauchamp v. Powely*, 1 M. & Rob. 38. A common carrier is a person who undertakes to transport from place to place for hire the goods of such persons as think proper to employ him, and the law charges this person, thus intrusted to carry goods, against all events, but the acts of God and the queen's enemies; for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable for the full value of the goods, unless his liability be limited by act of parliament, or otherwise; see the judgment of Lord Holt in *Coggs v. Bernard*, Lord Raym. Rep. 918; *Forward v. Pittard*, 1 T. R. 27; *Davies v. Garrett*, 6 Bing. 716; and see the cases referred to, *ante*, 263. A person who carries passengers only, is not a common carrier; *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; *Sharpe v. Grey*, 9 Bing.

460. But the proprietors of stage-coaches carrying goods, the owners and masters of vessels, *Morse v. Sluc*, 2 Lev. 69; *hoymen, ibid.*; *Wardell v. Mourellyan*, 2 Esp. 693; *Maving v. Todd*, 1 Stark. 72; wharfingers and bargemen, *Rich v. Kneeland*, Cro. Jac. 330, are liable as common carriers. If a man travel in a stage-coach, and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is liable if the portmanteau be lost; *Robinson v. Dunmore*, 2 B. & P. 419; *Middleton v. Fowler*, 1 Salk. 282; *Brook v. Pickwick*, 4 Bing. 218; 12 B. Moore, 447, S. C. The party who has the legal property in the goods should sue for their loss; see *Coates v. Chaplin*, 2 G. & D. 552; *ante*, 263.

(a) As to the necessity for this, see 6 Moore, 158.

(b) As to what would be a variance, see *ante*, 263. If any doubt exist as to the *termini*, it would seem better to omit the averment as to it.

(c) Or "parcel," according to the fact.

(d) It is said that the goods must be set out with the same certainty as in *trover*; 2 Vent. 78; Com. Dig. Action on Case for Negligence, C. 2.

(e) In 7 B. & C. 301, where in case the declaration stated that the plaintiff delivered a trunk to the defendant, to be put into a coach at *Chester*, in the county of *Chester*, to wit, at &c., and safely carried to *Shrewsbury*, and that through the defendant's negligence it was lost, and it appeared in evidence that the trunk was delivered to the defendant at the city of *Chester*, which is a county of itself, separate from the county of *Chester* at large, but within its ambit; it was held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called *Chester*.

(f) Or "to" the said plaintiff, as the fact was.

(g) This suffices, without showing what reward; 13 East, 114, note; 2 New Rep. 458; 2 Ld. Raym. 115.

(h) The declaration must state a breach of duty according to the fact; 2 Stark. 247; *Boorman and others v. Brown*, 4 P. & D. 401.

securely carry or convey the said [box] and its contents aforesaid from — aforesaid to — aforesaid, nor there, to wit, at — aforesaid, safely or securely deliver the same for (i) the plaintiff, but on the contrary, the defendant so carelessly and negligently (j) behaved and conducted himself in the premises, that by and through the carelessness, negligence and default of the defendant in the premises, the said [box] and its said contents, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff. [Before the pleading rules, *Hil. T. 4 W. 4, reg. 5, prohibiting more than one count on the same cause of action, a second count, varying the statement of the cause of action, might in general be added; but those rules prohibit a second varying count for the same cause of action. Sometimes, however, the following count may be preferable to the last preceding.*

And whereas also, heretofore, to wit, on the day and year aforesaid, the plaintiff, at the request of the defendant, caused to be delivered to the defendant a certain other [box] containing certain other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description and value, as those in the said first count mentioned of the plaintiff, to be taken care of, and safely and securely carried and conveyed by the defendant to — aforesaid, and there, to wit, at — aforesaid, to be safely and securely delivered by the defendant for the plaintiff, within a reasonable time then next following, for reward to the defendant in that behalf; and although the defendant then accepted and had and received the said last-mentioned [box] and its contents aforesaid, for the purpose and on the terms aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid hath long since elapsed. Yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff in this respect, did not nor would, within such reasonable time as aforesaid, or at any time afterwards, (although often requested so to do,) take care of, or safely or securely carry and convey the said last-mentioned [box] and its contents aforesaid to — aforesaid, nor there, to wit, at — aforesaid, safely or securely deliver the same for the plaintiff, but hath hitherto wholly neglected and refused so to do: and by means of the negligence and improper conduct of the defendant in that behalf, the said last-mentioned [box] and its said contents have not been delivered to or for the plaintiff at — aforesaid or elsewhere, and are wholly lost to the plaintiff. [Add a count in trover, if there be any evidence of a conversion; 3 East, 70. Trover lies against a carrier, though he, by mistake, deliver goods to a wrong person; Peake, C. N. P. 42; 2 B. & Adol. 703; 1 M. & P. 357; Jones on Bailm. 96 to 99; but trover cannot be supported against a carrier or wharfinger where the goods have been stolen or lost, 5 Burr. 2825; 1 Ventr. 223. Conclude,] To the damage of the plaintiff of £—, and therefore he brings suit, &c.

Second count, for not carrying within a reasonable time, and for losing the box. (k)

(i) Or "to" the said plaintiff, as the fact was.

(j) This is a sufficient averment to admit of proof of gross negligence; 2 Moore. 18.

(k) See the counts in 3 Wils. 429; and as to the necessity of alleging the defendant to be a common carrier, see note (s), ante, 489, 490. As the above count states the loss of

the goods, it is sustainable, though case for a mere non-feasance might not be sustainable; 6 East, 333; 3 Wils. 348; 5 T. R. 143; 1 New R. 43; 1 T. R. 274. As to the effect of using the word "other" in a second or subsequent count, see *Holford v. Dunnnett*, 7 M. & W. 348; *Deere v. Ivey*, 12 L. J. R., N. S., Q. B. 132.

AGAINST
CARRIERS BY
LAND.

Against coach-
proprietors, for
the loss of a
parcel which
they engaged
to carry with a
passenger. (1)

For that whereas the defendants, before and at the time of the delivery of the goods and chattels to them, and the committing of the grievances as hereinafter next mentioned, were the owners and proprietors of a certain common stage coach, to wit, a coach going and passing from a certain place (m) called [the Green Man, in the county of Middlesex,] to [Uxbridge, in the same county,] and divers other places, for the carriage and conveyance thereby of passengers and their luggage, for reasonable hire and reward to the defendants in that behalf. And thereupon the defendants, as such owners and proprietors, on &c. [*day of loss, or about it*] received [into] the said stage coach the plaintiff as a passenger therein, to be carried and conveyed thereby from the said place called [the Green Man] to [Uxbridge] aforesaid, together with a certain [trunk] containing divers goods and chattels, to wit, [*here specify them according to their exact description, or as in trover,*] of the plaintiff, of great value, to wit, of the value of £—, to be carried and conveyed by the said coach from the said place called [the Green Man] to [Uxbridge] aforesaid, and there, to wit, at [Uxbridge] aforesaid, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants in that behalf. Yet the defendants, not regarding their duty in that behalf, but contriving and fraudulently intending, craftily and subtly to deceive, defraud and injure the plaintiff in this behalf, did not nor would safely or securely carry or convey the said [trunk] and its contents aforesaid from the said place called [the Green Man] to [Uxbridge] aforesaid, nor there, to wit, at [Uxbridge] aforesaid, safely or securely deliver the same for the plaintiff; but on the contrary, so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence and improper conduct of the defendants in the premises, the said [trunk] and its contents aforesaid, being of the value aforesaid, then became and were wholly lost to the plaintiff. [*Before the Pleading Rules, Hil. T. 4 W. 4, reg. 5, prohibiting more than one count on the same cause of action, the three following counts were added. But now only one count can be introduced, and the pleader must select that which is most applicable to his particular case.*]

Second count,
stating the *termini* of the
journey with
less particu-
larity.

And whereas also the defendants, before and at the time of the delivery of the goods and chattels to them, and of the committing of the grievances as hereinafter next mentioned, were common carriers of passengers and luggage in and by a certain coach, for reasonable hire and reward to the defendants in that behalf. And thereupon the defendants, on the day and year aforesaid, as such common carriers, received into the said coach the plaintiff as a passenger thereby, to be carried and conveyed to [Uxbridge] aforesaid, together with a certain [trunk] and divers goods and chattels, of the like number, quantity, quality, description and value as those in the said first count mentioned of the plaintiff, to be carried and conveyed by the said coach to [Uxbridge] aforesaid, and there, to wit, at [Uxbridge] aforesaid, safely and securely to be delivered for the plaintiff, at and for certain reasonable reward to the defendants in that behalf. Yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving and wrongfully and

(1) Observe the notes to the preceding form.

(m) See the note, *ante*, 263.

unjustly intending craftily and subtly to deceive and injure the plaintiff in this behalf, did not nor would safely or securely carry or convey the said [trunk] and the said last-mentioned goods and chattels to [Uxbridge] aforesaid, nor there, to wit, at [Uxbridge] aforesaid, safely or securely deliver the same for the plaintiff; but on the contrary, the defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence and improper conduct of the defendants in the premises, the said [trunk] and the said last-mentioned goods and chattels became and were wholly lost to the plaintiff.

AGAINST
CARRIERS BY
LAND.

And whereas also, heretofore, to wit, on the day and year aforesaid, the plaintiff, at the request of the defendants, caused to be delivered to them a certain other [trunk] containing certain other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value as those in the said first count mentioned, of the plaintiff, to be taken care of, and safely and securely carried and conveyed by the defendants to [Uxbridge] aforesaid, and there, to wit, at [Uxbridge] aforesaid, to be safely and securely delivered by the defendants for the plaintiff; and although the defendants then accepted and had and received the said last-mentioned [trunk] and its said contents for the purpose aforesaid, and undertook the carriage, conveyance and delivery thereof as aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, hath long since elapsed. Yet the defendants, not regarding their duty in that behalf, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff in this respect, did not nor would, within such reasonable time as aforesaid, or at any time afterwards, although often requested so to do, take care of or safely or securely carry or convey the said last-mentioned [trunk] and its contents aforesaid, to [Uxbridge] aforesaid, nor there, to wit, at [Uxbridge] aforesaid, safely or securely deliver the same for the plaintiff, but have hitherto wholly neglected and refused so to do, and by means of the carelessness, negligence and improper conduct of the defendants in that behalf, the last-mentioned [trunk] and its said contents have not been delivered to or for the plaintiff at [Uxbridge] aforesaid or elsewhere, and are wholly lost to the plaintiff.

Third count, merely stating that defendants had plaintiff's parcel to carry to its destination, without describing them as coach owners, or the termination of the journey.

And whereas also, afterwards, to wit, on the day and year aforesaid, the defendants, at their request, had the care and custody of a certain other [trunk], together with divers other goods and chattels, of the number, quantity, quality, description, and value as those in the said first count mentioned, of the plaintiff. Yet the defendants, not regarding their duty in that behalf, did not nor would, whilst they so had the care and custody of the said last-mentioned [trunk] and goods and chattels, take due and proper care of the same, or any part thereof, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on the day and year aforesaid, the said last-mentioned [trunk] and goods and chattels became and were wholly lost to the plaintiff.

Fourth count, for not taking care of the parcel generally.

For that whereas, before and at the time of the delivery of the [parcel] and committing the grievances by the defendant as hereinafter next mentioned, the defendant was the proprietor of a certain warehouse or coach-

Against the proprietor of a coach-office, for neglecting to

AGAINST
CARRIERS BY
LAND.

forward a
parcel, which
plaintiff had
booked. (n)

office, for the receipt and booking of parcels and packages, goods and merchandizes, intended to be forwarded and sent from, &c. to divers places in this kingdom, by divers coaches or other carriages for the carriage and conveyance of parcels, packages, goods and merchandize for hire, from, &c. aforesaid, to such places as aforesaid, and for the delivery thereof to the coachmen, guards, or other persons having the care of such coaches or carriages, for the purpose of the same being forwarded, sent and carried by such coaches or carriages, and the taking care thereof, previous to and until the delivery of such parcels, packages, goods and merchandize, to such coachmen, guards, or other persons as aforesaid, for the purpose aforesaid, for reasonable reward to the defendant in that behalf. And whereas heretofore, and whilst the defendant was such proprietor of such warehouse or coach-office as aforesaid, to wit, on &c., the plaintiff caused to be delivered to the defendant at his said warehouse, a certain parcel containing divers goods and merchandize, to wit, [*here specify them either according to their exact description, or as in trover*], of the plaintiff of great value, to wit, of the value of £——, to be by the defendant booked and delivered to the coachman, guard, or other person having the care of a certain coach for the carriage and conveyance of packages and parcels for hire from &c., aforesaid, to —— for the purpose of the same being carried and conveyed by such coach to —— aforesaid, and there to be delivered for the plaintiff, and in the mean time, and until the delivery thereof to the said coachman, guard, or other person having the care of the said last-mentioned coach, to be taken care of by the defendant in his said warehouse, and then paid to the defendant a certain sum of money, to wit, the sum of 2*d.* as and for his hire and reward in that behalf, and the defendant then accepted and received the said package and its contents for the purpose aforesaid, and thereupon it then became and was the duty of the defendant to deliver the same to the said coachman, guard, or other person having the care of the said last-mentioned coach for the purpose aforesaid, and in the meantime, and until such delivery, to take due and proper care thereof. Yet the defendant, not regarding his duty in that behalf, but contriving and intending to deceive and defraud and injure the plaintiff, did not nor would deliver or cause to be delivered the said parcel and its contents to the coachman, guard, or any other person having the care of the said coach for the purpose aforesaid, and in the meantime, and until the delivery, take due and proper care thereof, but, on the contrary thereof, so carelessly, negligently and improperly conducted himself in the premises, that, by and through the negligence, carelessness and default of the defendant in the premises, the said parcel and its contents, being of the value aforesaid, after the delivery thereof to, and receipt by, the defendant, as such proprietor of the said warehouse or office as aforesaid, for the purpose, and before the delivery thereof to the said coachman, guard, or other person having the care of the said coach as aforesaid,

(n) As to the utility of this count, see 2 Stark. 461. A carrier may not always be bound to keep goods in a warehouse until he has an opportunity of forwarding them; and if he do so at the request of the owner, he is not answerable for a loss by accidental fire; 4 T. R. 581. The book-keeper is not in ge-

neral excused by the usual notice; see 2 C. & P. 76. The contract entered into by a booking-office keeper who takes in parcels to be forwarded to carriers, is only to deliver safely to a carrier; see *Gilbert v. Dale*, 1 N. & P. 22, ante, 263.

to wit, on the day and year aforesaid, became and were wholly lost to the plaintiff. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, it was usual to add a count, declaring against defendant as a warehouseman, (see form in assumpsit, ante, 261), and a general count for negligence, as ante, 493, fourth count.*]

AGAINST
CARRIERS BY
LAND.

AGAINST CARRIERS BY WATER.

AGAINST
CARRIERS BY
WATER.

For that whereas heretofore, to wit, on &c., the plaintiffs delivered to the defendant, being then the master of a certain ship called [Susanna], and the defendant then, as such master of the said ship, received from the plaintiffs, on board of the said ship, a large quantity, to wit, [fifty tons of hemp], of the plaintiffs, of great value, to wit, of the value of [£600], to be by the defendant carried and conveyed in the said ship from [London] aforesaid to [Dartmouth, in the county aforesaid], the act of God, (p) the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever excepted, for certain reasonable reward to be therefore paid by the plaintiffs to the defendant; and whereas the defendant afterwards, to wit, on &c., aforesaid, being then such master as aforesaid, departed and set sail with the said ship, then having the said [hemp] on board of the same, to be carried and conveyed as aforesaid, except as aforesaid, from [London] aforesaid to [Dartmouth] aforesaid. And it then became and was the duty of the defendant as such master of the said ship, so having the said [hemp] on board of the same as aforesaid, for the purpose aforesaid, by reason and in respect thereof, to have proceeded with the said ship from [London] aforesaid to [Dartmouth] aforesaid, the act of God and such other matters and things excepted as are above mentioned to have been excepted, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from or delay or hindrance in the same. Yet the defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the plaintiff in this respect, did not proceed with the said ship from [London] aforesaid to [Dartmouth] aforesaid, although not prevented by the acts, matters and things excepted as aforesaid, or any of them, by and according to the direct, usual and customary way and passage, without any voluntary and unnecessary deviation or departure from or delay or hindrance in the same, but, on the contrary thereof, afterwards, and before the arrival of the said ship at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, without the knowledge and against the will of the plaintiffs, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course and passage, with the said ship so having the said [hemp] on board of the same, to wit, unto [Portsmouth, in the county of Hants,] and did then and there voluntarily and unnecessarily touch and stay with the said ship at [Portsmouth] aforesaid for a long space of time, to wit, for the space of [twenty days] then next following, and although the said ship, with the said [hemp]

Against a captain on a coasting voyage, who had signed bill of lading, for deviating from voyage, whereby ship was exposed to storm, &c. (o)

That defendant wrongfully deviated.

(o) See forms in assumpsit, ante, 262, &c. and notes; and 6 Moore, 158, 415. See a form in case against the owner for the loss of goods on a bill of lading, 8 B. & C. 166; 2 M. & R. 47, 8. C.; and see a form of declaration against shipowners for negligence in conveying goods, 7 Bing. 190.

(p) Examine with the bill of lading, and let these averments correspond therewith.

AGAINST
CARRIERS BY
WATER.

Whereby the
cargo was ex-
posed to and
damaged by a
storm.

on board of her as aforesaid, did afterwards, to wit, on the same day and year aforesaid, proceed and sail from thence towards [Dartmouth] aforesaid, yet the said ship, so having the said [hemp] on board of the same as aforesaid, was, by reason of such deviation, departure, touching and staying as aforesaid, afterwards, and before her arrival at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, exposed to and assailed by a great storm, and a great and heavy sea, near to a certain part of the coast of England, and was thereby then driven on shore, wrecked and greatly shattered and broken; and by means thereof the said [hemp] of the plaintiffs was then wetted, damaged, spoiled, sunk in the sea, and wholly lost to the plaintiffs. *[Before the pleading rules of Hil. T. 4 W. 4, reg. 5, the declaration contained several counts, varying the statement, to avoid the risk of variance, see such counts vol. ii. 5th edit. 658 to 664. But now there cannot properly be more than one count on each cause of action.]*

Against a car-
rier by water,
for the loss of
goods, and in-
juring them in
unloading. (q)

For that whereas heretofore, to wit, on &c., the plaintiff, at the request of the defendant, then caused to be delivered to the defendant divers goods and merchandizes, to wit, &c. *[here specify them either according to the exact description or as in trover,]* of the plaintiff of great value, to wit, of the value of £—, to be carried and conveyed by the defendant in and by a certain ship or vessel of the defendant, called &c., from [London] aforesaid to [Hull], in the county of [York], and there, to wit, at [Hull] aforesaid, to be delivered to the plaintiff for freight and reward to the defendant in that behalf (the dangers of the seas, the queen's enemies, and the act of God excepted, (r)) and the defendant then took and received the same accordingly for the purposes aforesaid. And although the said ship or vessel afterwards, to wit, on &c. (s) safely arrived at [Hull] aforesaid, and no dangers of the seas, nor the act of God, nor the queen's enemies, prevented the safe carriage or delivery of the said goods and merchandizes as aforesaid, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiff in this behalf, did not deliver the said goods and merchandizes to the plaintiff, but so negligently, carelessly and improperly conducted himself in this behalf, that, for want of due care in the defendant and his servants in that behalf, the said goods and merchandizes afterwards, to wit, on the day and year last aforesaid, became and were wholly lost to the plaintiff. And whereas also, on the day and year last aforesaid, the plaintiff, at the like request of the defendant, then delivered to the defendant divers other goods and merchandizes of the like number, quantity, quality, description and value as those in the said first count mentioned of the plaintiff, to be carried and conveyed by the defendant in and by a certain other ship or vessel called —, to [Hull] aforesaid, and there, to wit, at [Hull] aforesaid, to be

Second count,
formerly added,
and still some-
times to be
preferred. (t)

(q) It may be advisable to insert, according to the fact, a count stating defendants to be owners of a general ship, (i. e. carrying the goods of all who chose to send them); see 6 Moore, 158. As to how far owner and captain (a part owner) may be sued in case, though a charter-party entered into, see *ante*, 162, n.; 8 B. & C. 166; 2 M. & R. 47, S. C., and cases there cited. See form against owners of ships for the negli-

gence of their captain in delaying voyage, &c. whereby goods were injured, 6 Moore, 415; 3 B. & B. 171, S. C.

(r) Examine with and let these averments correspond with the bill of lading.

(s) The day of arrival or about it.

(t) As to the effect of using the word "other" in a second or subsequent count, see *Holford v. Dunnott*, 7 M. & W. 348; and *Deere v. Levy*, 12 L. J. R., N. S., Q. B. 132.

delivered for the plaintiff, for freight and reward to the defendant in that behalf, (the dangers of the seas, the queen's enemies, and the act of God excepted,) and the defendant then took, accepted and received the same accordingly for the purposes last aforesaid; and it then became and was the duty of the defendant to take due and proper care of the said last-mentioned goods and merchandizes, and in and about the carriage and conveyance of the same, and the delivery thereof as aforesaid; Yet the defendant, not regarding his duty in that behalf, but contriving and intending to injure the plaintiff, afterwards, to wit, on the day and year last aforesaid, took so little and such bad and improper care of the said last-mentioned goods and merchandizes, and in and about the carriage and conveyance of the same and delivery thereof as aforesaid, that the same then by reason of the bad and improper conduct of the defendant in that behalf, and not by reason of any dangers of the seas, or the queen's enemies, or the act of God, became and were wholly lost to the plaintiff. [*Formerly a general count for negligence, as in the fourth count, ante, 493, and 2 Chit. on Pl. 661, 5th edit. was added; also a count in trover, if there were any ground for supposing defendant had been guilty of a conversion.*]

AGAINST
CARRIERS BY
WATER.

For that whereas the defendant, before and at the time of the delivery of the goods and chattels to him as hereinafter next mentioned, was the owner of a certain ship or vessel called &c.; and thereupon the plaintiff &c., to wit, at [the port of Cork, in that part of the United Kingdom of Great Britain and Ireland called Ireland,] caused to be delivered to the defendant, and the defendant then accepted and received on board the said ship or vessel of and from the plaintiff, divers goods and merchandizes, to wit, [one thousand boxes of candles,] of great value, to wit, of the value of £—, to be safely and securely carried and conveyed therein by the defendant from [the port of C.] aforesaid to certain parts beyond the seas, to wit, to [Kingston, in the island of Jamaica,] and there, to wit, at [Kingston] aforesaid, to be delivered to the plaintiff for reasonable reward to be therefore paid to the defendant in that behalf;* and thereupon it then became and was the duty of the defendant, as such owner of the said ship or vessel, safely and securely to convey and deliver the said goods and merchandizes to the plaintiff at [Kingston] aforesaid, and to prepare and provide all things necessary in that behalf, and, amongst other things, to procure a cocquet or clearance from the proper officer or officers of her majesty's customs at the port of C. aforesaid, certifying that the said goods and merchandizes were laden on board the said ship or vessel at the port of C. aforesaid. Yet the defendant, not regarding his duty as such owner of the said ship or vessel as aforesaid in that behalf, did not nor would safely and securely carry and convey the said goods and merchandizes from the port of C. aforesaid to [Kingston] aforesaid, nor there, to wit, at [Kingston] aforesaid, safely or securely deliver the said goods and merchandizes to the plaintiff, although he was then ready and willing to have received the said goods and merchandizes at [Kingston] aforesaid; nor did the defendant procure a cocquet or clearance from the proper officer of her majesty's customs at [the port of C.] aforesaid, certifying that the said goods and merchandizes were laden on board the said ship or vessel at [the port of C.] aforesaid, but therein wholly made default; and by and through the mere carelessness

Against the
owner of a ship,
for not obtain-
ing the proper
cocquet and do-
cuments neces-
sary on exporta-
tion of goods,
whereby they
were forfeited.

AGAINST
CARRIERS BY
WATER.

Second count.

Third count.

and negligence of the defendant in the premises, and by reason of his not procuring a cocquet or clearance from the proper officer of her majesty's customs at [the port of C.] aforesaid, certifying that the said goods and merchandizes were laden on board the said ship or vessel at the said last-mentioned port, the said goods and merchandizes, being of the value aforesaid, were afterwards, to wit, on &c. aforesaid, taken and seized and forfeited to our said lady the queen, by certain officers of our said lady the queen, in parts beyond the seas, at [Kingston] aforesaid, and thereby then became and were wholly lost to the plaintiff. [*Before the pleading rules Hil. T. 4 W. 4, reg. 5, there was a second count, same as the first, as far as the asterisk,* and which then proceeded as follows:*]—Whereupon it then became the duty of the defendant, as such owner of the said last-mentioned ship or vessel, to procure the proper document from the proper officer or officers of her majesty's customs at [the port of C.] aforesaid, to authorize the exportation of the said last-mentioned goods and merchandizes from [the port of C.] aforesaid, and the importation thereof into the port of [Kingston] aforesaid; Yet &c.—[*Same as first, negative of duty.—Third count, same as the first, to the asterisk.**] Whereupon it then became the duty of the defendant, as such owner as last aforesaid, safely and securely to carry and convey the said last-mentioned goods and merchandizes as last aforesaid, and to deliver the same to the plaintiff and the said G. A. as last aforesaid. Yet &c. [*Conclude as in first count. Another count for negligence generally was added, like the fourth count, ante, 493, and in vol. ii. of Chit. on Pleading, 661, 5th edit.*]

AGAINST
INNKEEPERS.

Against an inn-
keeper for the
loss of a box.(t)

* AGAINST INNKEEPERS.

Commencement, ante, 18.] For that whereas, by the law and custom of this realm, innkeepers, who keep common inns for the reception, lodging and entertainment of travellers putting up at and abiding in the same, are bound to keep the goods and chattels brought by such travellers into and being within their respective inns safely and without any diminution or loss. And whereas the defendant, before and at the time of the loss hereinafter next mentioned, was, and from thence hitherto hath been and still is, an innkeeper, and as such innkeeper the defendant hath for and during all that time kept and still doth keep a certain common inn for the reception, lodging and entertainment of travellers, that is to say, a certain inn commonly called or known by the name and sign of ——. And whereas also the defendant, so being such innkeeper and so keeping the said inn as aforesaid, the plaintiff, [*or if his servant, "one E. F. then being the servant of the plaintiff,"*] heretofore, to wit, on &c., put up and was then received into the said inn as a traveller by the defendant, and then brought into the said inn a certain [box,] containing certain goods and chattels, to wit, &c. [*enumerate the chat-*

(t) Case is the best form of action. As to the liability, &c. of an innkeeper, see Bac. Ab. Inns; Com. Dig. Action on Case for Negligence, B. 1, &c. and Pleader, 2 Q.; 5 T. R. 273; 4 M. & Sel. 306; and Burn's Justice, 26th ed. vol. i. 101 to 105; for the printed declarations against innkeepers, see Rast. Ent. 104; Co. Ent. 347; Thomp. 42; 1 Rich. C. P. 480; post, 499; 8 Went. Index, 44,

47, 48; Jones v. Tyler, 1 Adol. & Ellis, 522; and the ancient mode of declaring, Bac. Ab. Inns, C. 6. An hotel-keeper is liable as an innkeeper, but he should be declared against as such; 2 Chit. Rep. 484; 3 B. & Ald. 283. In conformity to the usual practice, the custom of the realm is recited, but this being the common law seems to be unnecessary; ante, 490, note; and 1 Wils. 281.

tels either by their exact description, or as in trover,] of the plaintiff, of great value, to wit, of the value of £——, and which said [box] and its contents aforesaid were then and from thence until and at the time of the loss hereinafter mentioned within the said inn, and that the plaintiff, [or “the said E. F. the servant of the plaintiff,”] during all that time abided as a traveller therein; Yet the defendant, so being such innkeeper as aforesaid, not regarding his duty as such innkeeper, did not keep the said box and its contents aforesaid, so brought into and so being in the said inn as aforesaid, safely and without diminution or loss, but on the contrary thereof, the defendant and his servants so negligently and carelessly behaved and conducted themselves in that behalf, that afterwards, and whilst the plaintiff, [or “the said F. F. so then being the servant of the plaintiff,”] so abided in the said inn as aforesaid, to wit, on the same day and year aforesaid, the said [box] and its contents aforesaid were, by and through the carelessness, negligence, default and improper conduct of the defendant and his servants in that behalf, wrongfully and unjustly taken and carried away by some person or persons to the plaintiff, [or “to the plaintiff and the said E. F. his said servant,”] as yet unknown, and were and still are thereby wholly lost to the plaintiff. [Before the pleading rules, Hil. T. 4. W. 4, reg. 5, a count for negligence generally, as ante, 493, was added; also a count in trover, if there were any probability of supporting it in evidence, ante, 491; 5 Burr. 2825; 1 Vent. 223.

AGAINST
INNKEEPERS.

For that whereas the defendant, before and at the time of the committing the grievance hereafter mentioned, was an innkeeper, and did keep a common inn for the accommodation of travellers, that is to say, a certain common inn called &c.; and thereupon heretofore, to wit, on &c. the plaintiff then being a traveller, came and was received by the defendant into the said inn, and then required the defendant to suffer and permit the plaintiff to stay and lodge at the said inn for and during the night of the same day, and although the defendant then had sufficient room and accommodation in his said inn to enable him to continue the plaintiff therein as a guest during the same night, and the plaintiff was then ready and willing and offered to pay the defendant a reasonable sum of money for such lodging, and the defendant then had notice of the premises; Yet the defendant, not regarding his duty as such innkeeper, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to put him to great trouble and expense, annoyance, distress and inconvenience, did not nor would, at the said time when he was so requested as aforesaid, or at any time afterwards, suffer or permit the plaintiff to stay or lodge at the said inn as aforesaid, during the time aforesaid, but wholly neglected and refused so to do, whereby the plaintiff was forced and obliged to quit the said inn, and to go and travel in the night-time divers, to wit, [five] miles, in order to procure a lodging elsewhere; and upon that occasion the plaintiff was, by means of the said

Against an innkeeper for refusing to lodge plaintiff during the night. (u)

(u) See the observations 5 T. R. 143, 273; 8 Rep. 32; 2 Lord Raym. 909; ante, 498; and Burn, J. 26th ed. vol. i. p. 101. Although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist

on occupying a bed-room for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose; *Fell v. Knight*, 8 M. & W. 269.

**AGAINST
ATTORNEYS.**

several premises, put to great trouble, inconvenience and expense of his monies, and was and is otherwise greatly annoyed, distressed, injured and damaged.

**AGAINST
ATTORNEYS.**

Against an attorney for negligently conducting a cause to trial, without proper evidence.(x)

AGAINST ATTORNEYS.

For that whereas before the committing of the grievances by the defendant as hereinafter next mentioned, the plaintiff, at the request of the defendant, had retained and employed him as an attorney of the Court of our said lady the queen, before the queen herself, to prosecute and conduct a certain action of [trover] in the same Court, by and at the suit of the plaintiff, against one E. F., for [taking away and converting to his own use certain goods and chattels claimed by the plaintiff to be his own proper goods and chattels,] for reasonable fees and rewards to be therefore paid by the plaintiff to the defendant; and the defendant then accepted and entered upon such retainer and employment; and thereupon it then became and was the duty of the defendant to prosecute and conduct the said action in a proper, skilful and diligent manner. Yet the defendant not regarding such his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the plaintiff in this behalf, did not nor would prosecute or conduct the said action in a proper, skilful, or diligent manner, but on the contrary prosecuted and conducted the same to trial in so improper, unskilful and negligent a manner, [to wit, in particular, in not having a certain instrument purporting to be a sale and assignment of the said goods and chattels by the said E. F. to the plaintiff, stamped according to law, so that the same might have been given in evidence on the trial of the said action,] that the plaintiff by the said neglect and default of the defendant in that behalf was [hindered and prevented from giving the same instrument in evidence upon the trial of the said cause,] and by reason thereof was afterwards, to wit, on &c. [day of nonsuit or about it,] compelled to suffer himself, the plaintiff, to be nonsuited in the said action, whereby the plaintiff was not only hindered and prevented from recovering from the said E. F. the damages by the plaintiff sustained, by reason of [his taking away and converting the said goods and chattels] as aforesaid, but hath also been forced and obliged to pay and hath paid to the said E. F. a large sum of money, to wit, the sum of £100 for his costs and charges in and about his defence of the said action, and hath also paid to the defendant another large sum of money, to wit, the sum of £100 for his costs and charges for the prosecution and conduct of the said action. [Before the pleading rules Hil. T. 4 W. 4, reg. 5, the following general count was added.

General count against an attorney, for improperly conducting an action.

And whereas also, before and at the time of the committing of the grievances by the defendant hereinafter mentioned, the plaintiff, at the request of the defendant, had retained and employed him as then being an attorney of the Court of our lady the queen, before the queen herself, [or if in C. P. instead of the words "before the queen herself," say, "of the bench,"] to

(x) The plaintiff may either declare in assumpsit or case against an attorney; see the form in assumpsit, and the notes, *ante*, 273, 274; 6 Car. & P. 192; which will super-

sede the necessity of further notes here. See a form in Case and the law, *Kemp v. Burt*, 4 Bar. & Adol. 424.

prosecute, conduct and manage, a certain action in the said Court, by and at the suit of the plaintiff, against one E. F., for the recovery of a certain sum of money, to wit, the sum of £—— [*state a sufficient sum*] then alleged and claimed by the plaintiff to be due and owing to him from the said E. F. [*or if not for a debt, but for damages, say, "for the recovery of certain damages amounting, to wit, to the sum of £——, [state enough]* then alleged and claimed by the plaintiff to have been sustained by him by reason of certain acts and wrongs before then done and committed by the said E. F. to the plaintiff's damage of £——,"] for fees and reward to the defendant in that behalf; and the defendant then accepted and entered upon such retainer and employment; and thereupon it then became and was the duty of the defendant to prosecute, conduct and manage the said action with due and proper care, skill and diligence; Yet the defendant not regarding such his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the plaintiff in this behalf, did not nor would prosecute, conduct or manage the said action with due and proper care, skill and diligence, and on the contrary thereof prosecuted, conducted and managed the said action in such a careless, unskilful, undue and improper manner, and with such want of due and proper care, skill and diligence in that behalf, that the said action afterwards, to wit, on &c. [*day of nonsuit or about it,*] became and was rendered wholly abortive and of no avail, and the plaintiff then was forced and obliged to be and he then was nonsuited, [*or if a verdict found against him or otherwise, state the fact shortly accordingly,*] whereby the plaintiff was and hath been hitherto not only greatly delayed and hindered and prevented from recovering his said debt [*or "damages"*] from the said E. F., but is likely to lose the same, and also hath been forced and obliged to incur and pay, and hath incurred and paid to the said E. F. a large sum of money, to wit, the sum of [£100] [*state enough*] for his costs and charges in and about his defence to the said action, and hath also incurred the loss of and paid to the defendant another large sum of money, to wit, the sum of [£100] for the plaintiff's costs and charges in and about the prosecuting and conducting the said action.

For that whereas before and at the time of the committing of the grievances by the defendant as hereinafter next mentioned, to wit, on &c. [*day of retainer of defendant or about it,*] the plaintiff had contracted and agreed with certain persons, to wit, E. F. and G. H., for the purchase from them of certain tenements and premises, with the appurtenances, situate in the county of I—— in fee simple, at and for a large sum of money, to wit, &c. to be therefore paid for the same, which said tenements and premises, with the appurtenances, the said E. F. and G. H. then assumed to have sufficient power to sell and convey to the plaintiff in fee simple; and thereupon heretofore, to wit, on the day and year aforesaid, the plaintiff, at the request of the defendant, retained and employed him as then being an attorney, to ascertain the title of the said E. F. and G. H. to the said tenements and premises, with the appurtenances, and to cause and procure an estate and interest therein in fee simple to be duly conveyed by the said E. F. and

Against an attorney, for not taking due care in endeavouring to cause a sufficient title to an estate bought by plaintiff to be conveyed to him, per quod he could not resell it.(y)

(y) See the form and notes, *ante*, 273, 274; and see 3 Bing. N. C. 235.

**AGAINST
ATTORNEYS.**

G. H. to the plaintiff, for reasonable fees and reward to the defendant in that behalf, in a reasonable time then next following ; and the defendant then accepted and entered upon such retainer and employment. And thereupon it then became and was the duty of the defendant, under and by virtue of the said retainer, *to use due endeavours to ascertain whether or not* a good and sufficient title to the fee simple of and to the said tenements and premises, with the appurtenances, could be conveyed to the plaintiff in a reasonable time then next following ; and although a reasonable time for the defendant using such due endeavours hath long since elapsed, whereof the defendant hath always then had notice ; Yet the defendant, not regarding such his duty or his said retainer and employment, but contriving and intending to injure, aggrieve, harass and oppress the plaintiff in this behalf, did not nor would use due endeavours to ascertain whether or not a good and sufficient title to the fee simple of and in the said tenements and premises, with the appurtenances, could be conveyed to the plaintiff within such reasonable time as aforesaid, or at any time since, but hath hitherto wholly neglected and refused so to do ; and afterwards, to wit, on &c. wrongfully and injuriously, so carelessly, negligently and ignorantly conducted himself as such attorney as aforesaid in the premises, that by reason of his want of due care in the premises, the defendant then wrongfully and injuriously caused and procured the plaintiff to pay to the said E. F. and G. H. a large sum of money, to wit, the sum of £——, as and for the purchase-money of the said tenements and premises, with the appurtenances, without having a good and sufficient title to the fee-simple of and in the same conveyed to the plaintiff, and by reason of the neglect and improper conduct of the defendant in that behalf, the plaintiff hath not obtained a good or sufficient title to the said tenements and premises, with the appurtenances, in fee-simple, and thereby hath been hindered and prevented from selling and disposing thereof ; and the said tenements and premises, with the appurtenances, have become and are of little use or value to the plaintiff.

The like against
an attorney for
negligence in
investigating
title.

For that whereas before and at the time of the committing of the grievance by the defendant hereinafter next mentioned, to wit, on &c., a certain person, to wit, one H. J., was desirous of obtaining from the plaintiff a loan of a certain sum of money, to wit, the sum of [£1000] upon interest, to wit, at the rate of £5 per cent. per annum, and then, as a security for the repayment thereof and interest as aforesaid to the plaintiff, proposed to encumber certain lands, tenements and premises, situate in the county of I. And thereupon heretofore, to wit, on the day and year aforesaid, the plaintiff, at the request of the defendant, retained and employed him as an attorney for fees and reward to him in that behalf, to ascertain the title of the said H. J. to the said lands, tenements and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of money and interest. And the defendant then accepted and entered upon such retainer and employment. And thereupon it then became and was the duty of the defendant to use due and proper care, skill and diligence in and about ascertaining the title of the said H. J. to the said lands, tenements and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of money with interest. Nevertheless the plaintiff in fact saith, that the defendant

not regarding such his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the plaintiff in this behalf, did not nor would take due and proper care to ascertain the title of the said H. J. to the said lands, tenements and premises, nor take due and proper care that the same should be a sufficient security for the repayment of the said sum of [£1000] and interest thereon. And the plaintiff further saith, that he, confiding in the performance by the defendant of his said duty, afterwards, to wit, on the day and year aforesaid, did lend and advance to the said H. J. the said sum of [£1000] upon the security of certain lands, tenements and premises, in the county aforesaid, as and for a sufficient security in that behalf; and the defendant then, in pursuance of his said retainer, caused to be prepared and executed a certain indenture and certain securities relating to the supposed estate and interest of the said H. J. in the said last-mentioned lands, tenements and premises, as and for such sufficient security for the repayment of the said sum of [£1000] and interest as aforesaid, the same being then by reason of the defendant's carelessness, unskilfulness, negligence, and improper conduct in the premises, a bad and insufficient security for the repayment of the said sum of [£1000] and interest as aforesaid.

AGAINST
ATTORNEYS.

AGAINST A DISTRESS BROKER.

AGAINST A
DISTRESS
BROKER.

For that whereas heretofore, to wit, on &c., the plaintiff, at the request of the defendant, retained and employed him as his broker, bailiff, and agent, (the defendant then being a distraining broker,) to seize and take divers goods and chattels then being in and upon certain premises situate in the county of —, as for and in the name of a distress for certain arrears of rent, to wit, the sum of [£42,] then claimed by the plaintiff to be due and in arrear from one C. G. to the plaintiff, for and in respect of the said premises with the appurtenances, at and for reward to be paid to the defendant, and the defendant then accepted such retainer and employment; and thereupon it then became and was the duty of the defendant to take due and proper care of the said goods and chattels whilst the same, after having been so distrained, should be in his hands and possession under the said distress, so that the said goods and chattels might be appraised, sold and disposed of in satisfaction of the said arrears of rent, and the costs of the said distress in due course of law, if not replevied. And although the defendant, as such broker, bailiff and agent of the plaintiff, then seized and took the said goods and chattels in and upon the said premises, as and for such distress as aforesaid, and then had the said goods and chattels in his possession under the said distress, and therewith and thereout the said arrears of rent and the costs of the said distress might have been satisfied; Yet the defendant not regarding his duty in that behalf, but contriving and intending craftily and subtly to deceive and defraud the plaintiff in this respect, did not nor would take due and proper care of the said goods and chattels whilst the same remained and were in his possession under the

Against a broker employed to distrain on plaintiff's tenant, for negligence in conducting the distress, whereby the goods were eloiigned and lost to plaintiff. (s)

(s) This declaration with four counts was drawn before the pleading rules, Hil. T. 4 Will. 4, Reg. 5, which prohibits more than one count for the same cause of action, but permits several breaches to be stated. Since that rule it would be proper to comprise all the counts in one, stating that it was the de-

fendant's duty to observe and fulfil his duty in and relating to the said distress, and then aver as breaches of the same duty the breach stated in first count, then the breach in second count, then the breach in third count, and lastly that stated in the fourth count.

AGAINST A
DISTRESS
BROKER.

Second count,
for not duly
selling the
goods. (a)

Third count, for
carelessness
generally.

said distress, but afterwards, to wit, on the day and year aforesaid, took so little and such bad care of the same, that by and through the carelessness, negligence and improper conduct of the defendant in that behalf, the said goods and chattels were then by divers persons, without the knowledge and consent of the plaintiff, wrongfully removed and taken away out of and from the said premises, and out of the custody of the defendant, and became and were secreted and wholly lost to the plaintiff, and the plaintiff thereby lost the benefit and advantage he otherwise might and would have derived and acquired from the said distress, and the plaintiff hath been and is thereby hindered and prevented from recovering the said arrears of rent so due and owing to him the plaintiff from the said C. G. and the costs of the said distress, and hath not received and is likely to lose the said arrears of rent. And whereas also heretofore, to wit, on the day and year aforesaid, the plaintiff, at the like request of the defendant, had then retained and employed the defendant for reward to make a distress upon such goods and chattels as the defendant might find in certain other premises for rent, to wit, the sum of [£42,] then due from the said C. G. as tenant of such premises, to the plaintiff, the landlord thereof, and the defendant had then accepted such retainer and employment; and thereupon it then became and was the duty of the defendant to sell and dispose of any goods and chattels he might distrain as last aforesaid, and which by law he might be entitled to sell under the said last-mentioned distress, in a careful and proper manner, and for the best price he could reasonably procure for the same, and to render to the plaintiff a just, true, and reasonable account of the proceeds of the said last-mentioned goods and chattels on such sale thereof, when he the defendant should be thereunto requested; and the plaintiff avers, that the defendant, by virtue of the said last-mentioned retainer, did afterwards, to wit, on the day and year aforesaid, seize and distrain upon divers goods and chattels then found and being in and upon the said last-mentioned premises, for the said last-mentioned arrears of rent, the said last-mentioned goods and chattels then being of great value, to wit, of sufficient value to satisfy the said last-mentioned arrears of rent, and the costs of the said last-mentioned distress, and that afterwards, to wit, on &c. aforesaid, the defendant was legally entitled to sell the said last-mentioned goods and chattels, under the said last-mentioned distress, and did accordingly then dispose of the same for divers sums of money; nevertheless the defendant not regarding his said last-mentioned duty, but contriving and intending craftily and subtly to deceive and defraud the plaintiff, did not nor would on the occasion last aforesaid sell and dispose of the said last-mentioned goods and chattels in a careful and proper manner, and for the best price he might reasonable have procured for the same, and thereby the said last-mentioned goods and chattels then fetched much less than the amount of the said last-mentioned arrears of rent and costs of the said last-mentioned distress, and the plaintiff is likely to lose the residue of such arrears of rent. And whereas also heretofore, to wit, on the day and year aforesaid, the plaintiff, at the like request of the defendant, had then retained and employed the defendant (for reward to him) as the bailiff and agent of the plaintiff, to seize and distrain upon certain other goods and chattels then being in and

(a) As to the effect of using the word "other" in a second or subsequent counts, see *Holford v. Dunnett*, 7 M. & W. 348, and *Deere v. Ivey*, 12 L. J. R., N. S., Q. B. 132.

upon certain other premises, with the appurtenances, for a certain other sum of money, to wit, the sum of [£42,] then due and in arrear from the said C. G. to the plaintiff, for rent of the said last-mentioned premises, and which said last-mentioned goods and chattels were then liable to such distress, and the defendant had then accepted and entered upon such last-mentioned retainer and employment; and thereupon it then became and was the duty of the defendant to conduct the said last-mentioned distress in a diligent, careful and proper manner; and the plaintiff avers, that the defendant did then under and by virtue of the said last-mentioned retainer and employment, seize and distrain divers goods and chattels, then being in and upon the said last mentioned premises, for the said last-mentioned arrears of rent, and then, as such bailiff and agent of the plaintiff, had the conduct of the said last-mentioned distress; nevertheless the defendant not regarding his said last-mentioned duty, but contriving and intending craftily and subtly to deceive and defraud the plaintiff in this behalf, then conducted the said last mentioned distress in so careless, negligent and improper manner, that by reason of the carelessness, negligence and improper conduct and breach of duty of the defendant in that behalf, the benefit of the said last-mentioned distress became and was wholly lost to the plaintiff, and the said last-mentioned distress became ineffectual and inoperative, and the said last-mentioned arrears of rent, and the said costs of the said last-mentioned distress were not satisfied by means of the said last-mentioned distress, as they otherwise might and would have been, and the plaintiff is likely to lose the said last-mentioned arrears of rent. And whereas also heretofore, to wit, on the day and year aforesaid, the plaintiff, at the like request of the defendant, retained and employed the defendant (for reward to him) as the bailiff and agent of the plaintiff, to make a distress for other rent, to wit, [£42,] then due from the said C. G. to the plaintiff, in respect of certain other premises, and the defendant then accepted and entered upon such last-mentioned retainer and employment, and it then became and was the duty of the defendant to use due and proper care and diligence in and about the making of the said distress as aforesaid; and the plaintiff avers, that under the said last-mentioned retainer, the defendant afterwards, to wit, on the day and year last aforesaid, entered upon the said last-mentioned premises to make the said last-mentioned distress, and although there were on the said last-mentioned premises divers goods and chattels which were liable to be seized and distrained by the defendant, and which he might have distrained for the said last-mentioned arrears of rent on the occasion last aforesaid, whereof the defendant then had notice, and although it then was the duty of the defendant to seize the said last-mentioned goods and chattels under the said last-mentioned distress, Yet the defendant not regarding his duty in that behalf, but contriving and intending to deceive and injure the plaintiff, then wrongfully and negligently omitted to seize and distrain the said last-mentioned goods and chattels under the said last-mentioned distress, and wrongfully and negligently seized other goods and chattels then evidently of insufficient value to satisfy the said last-mentioned arrears of rent and the expenses of the said last-mentioned distress, whereby the plaintiff lost the benefit he might and otherwise would have derived from the said last-mentioned distress, and the greater part of the said last-mentioned arrears of rent is still unsatisfied to the plaintiff, and he is likely to lose the same.

AGAINST A
DISTRESS
BROKER.

Fourth count,
for not distrain-
ing.

AGAINST
BAILEES.

Against a bailee with or without reward, for negligence, stating particular purpose of bailment. (a)

Commencement as ante, 13.] For that whereas heretofore, to wit, on &c., the plaintiff, at the request of the defendant, caused to be delivered to the defendant certain goods and chattels, to wit &c., [*specify them according to their exact description, or as in trover,*] of the plaintiff, of great value, to wit, of the value of £——, to be by the defendant [*here state shortly the purpose for which the goods were delivered, as thus, "safely and securely loaded on board a certain ship or vessel for the plaintiff,"*] for reasonable reward (b) to the defendant in that behalf, and the defendant then had and received the said goods and chattels for the purpose aforesaid. Yet the defendant, not regarding his duty in that behalf, afterwards, to wit, on the day and year aforesaid, by himself and his servants in that behalf, conducted himself so carelessly, negligently, and improperly, in and about the [loading of the said goods and chattels on board the said ship or vessel,] that by and through the negligence and improper conduct of the defendant and his servants in that behalf, the said goods and chattels then became and were greatly broken, damaged, and destroyed, and wholly lost to the plaintiff. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, prohibiting more than one count on the same cause of action, although permitting several breaches, it was usual to add the general count for negligence, post, 507, as stating that the defendant "had the loading of the hogshead, &c." or the performance of the matter which it was his duty to perform, which count may be framed as in Govett v. Radnidge, 3 East, 62; and if there be any evidence of a conversion, a count in trover was added. But now in general only one count can be inserted, and more care is essential in selecting the best. If, however, there has been a conversion, that, being a distinct cause of action, may be added at the risk of plaintiff paying costs, if it be found against him.*

AGAINST BAILEES.

Against a bailee without reward, for not taking care of goods, and re-delivering on request. (c)

For that whereas heretofore, to wit, on &c., the plaintiff, at the request of the defendant, caused to be delivered to the defendant divers goods and chattels, to wit &c., [*describing same*] of the plaintiff, to wit, of the value

(a) As to the different description of bailees, see *ante*, 246, &c., where see other forms, which may be readily altered to a declaration in case. See also 8 Wentw. Index, 22; Morg. 422, 426, 445. Care should be taken *not to frame* the count in *assumpsit*, and then add a count in *case* or *trover*, for that would constitute a misjoinder. Thus, in a declaration in *case*, one count stated that plaintiff had caused to be delivered to him certain boars, pigs, &c. to be taken care of by defendant for plaintiff, defendant, in consideration thereof, *undertook and agreed* with the plaintiff to take care of the boars, &c. and *re-deliver* the same on request; it was holden, on motion in arrest of judgment, that this was a count in *assumpsit*, and could not be joined with counts in *case*; 6 B. & C. 268. But where the plaintiff declared in *case*, that being desirous of publishing a certain work, he employed and retained the defendant to print the same, and delivered to him large quantities of paper to be used in the printing; that upon the acceptance of the retainer it became the duty of the defendant to use due diligence in printing the

said work, but that he neglected his retainer and proceeded in the printing in a dilatory manner, and that he further disregarded his duty and retainer and wrongfully and in violation of his said duty pawned and pledged large quantities of the paper which had been delivered to him, instead of using it for the purpose of printing the work. Upon special demurrer, that the cause of action was the non-performance of a promise, and that *case* would not lie, it was held that the declaration was rightly drawn; *Smith v. White*, 8 Dow. 265. See also *Possi v. Shipton*, 8 A. & E. 963. The declaration in these cases must be so framed as to show a violation of some particular duty; and if no such breach be alleged, the declaration will be bad in arrest of judgment; see *Boorman and others v. Brown*, 4 P. & D. 401.

(b) If no reward were to be paid, this should be omitted; *Coggs v. Bernard*, 2 Lord Raym. 909; 1 Hen. Bla. 158; 5 T. R. 143; *ante*, 246, as to *mandatum*, being the second description of bailment.

(c) See the notes to the preceding form.

of £——, to be taken care of and safely and securely kept by the defendant for the plaintiff, and to be re-delivered by him to the plaintiff on request; and it thereupon then became and was the duty of the defendant to take due and proper care of the said goods and chattels, and safely and securely keep the same for the plaintiff, and to re-deliver the same to the plaintiff when he the defendant should be thereunto afterwards requested. And although the defendant was afterwards, to wit, on &c., requested by the plaintiff to re-deliver the said goods and chattels to the plaintiff, Yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiff in this behalf, did not nor would take due and proper care of the said goods and chattels, or safely or securely keep the same, or any part thereof, for the plaintiff, nor did nor would, when he was so requested as aforesaid, or at any time before or afterwards, re-deliver the same to the plaintiff, but on the contrary thereof, the defendant so carelessly behaved and conducted himself with respect to the said goods and chattels, and took so little and such bad care thereof, that by and through the carelessness, negligence, and improper conduct of the defendant, the said goods and chattels being of the value aforesaid, afterwards, to wit, on the day and year last aforesaid, became and were wholly lost to the plaintiff. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, it was usual to add the following count, with a third count in trover, but now a second special count would be inadmissible. A count in trover might however be added when it can be supported in evidence.*]

AGAINST
BAILLES.

For that whereas also, heretofore, to wit, on the day and year aforesaid, the defendant, at his request, had the care of certain other (d) goods and chattels, to wit &c., [*describe concisely*] of the plaintiff; and thereupon it then became and was the duty of the defendant, whilst he so had the care of the said goods and chattels, to take due and proper care thereof; Yet the defendant, not regarding his duty in that behalf, did not nor would, whilst he so had the care of the said last-mentioned goods and chattels, take due and proper care of the same, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on &c. aforesaid, the said last-mentioned goods and chattels became and were greatly damaged and injured, and wholly lost to the plaintiff.

The like on a general bailment for not taking care of goods generally.

For that whereas heretofore, to wit, on &c., the plaintiff, at the request of the defendant, delivered to the defendant a certain indenture of lease of certain premises, with the appurtenances, to wit, of the value of £—— to be taken care of, and safely and securely kept by the defendant for the plaintiff, and to be re-delivered by the defendant to the plaintiff, when he the defendant should be thereunto afterwards requested. Yet the defendant, not regarding his duty in that behalf, afterwards, to wit, on &c., fraudulently and unlawfully pawned and delivered the said lease to a certain person, to wit, to one I. B., as a pledge and security for the payment of a large sum of money, to wit, the sum of £——, to the said I. B., by the defendant; and the plaintiff, by means of such fraudulent and improper conduct of the defendant, and in order to procure a return of the said lease, afterwards, to wit, on &c., was forced and obliged to and did commence

Against the bailee of a lease, for pawning it, whereby plaintiff was obliged to commence an action against the third person, and thereby incurred costs, &c.

(d) As to the effect of this word in a second or subsequent count, see *Holford v. Dunnett*, 7 M. & W. 348, and *Deere v. Ivey*, 12 L. J. R., N. S., Q. B. 132.

AGAINST
BAILLEES.

and prosecute a certain suit in the Court of Exchequer of our said lady the queen, at Westminster, in the county of Middlesex, against the said I. B. and against certain other persons, to wit &c., and such proceedings were thereupon had, in order to regain the possession of the said lease, that he the plaintiff was forced and obliged to and did necessarily lay out and expend divers large sums of money, amounting in the whole to the sum of £—, in and about the costs and expenses of the suit, and the procuring the said lease to be delivered to him as aforesaid. [*Second count in trover.*]

Against a miller, for mixing corn, sent to him to be ground, with other corn of inferior quality.

For that whereas the defendant, before and at the time of committing the grievances hereinafter next mentioned, was a miller, and thereupon heretofore, to wit, on &c., the plaintiff caused to be delivered to the defendant, at his request, a large quantity, to wit, — loads, containing a large quantity, to wit, [— bushels of wheat,] of the plaintiff, to wit, of the value of £—, to be ground by the defendant, as such miller, for the plaintiff, for certain reasonable reward to be paid to the defendant; Yet the defendant, not regarding his duty in that behalf, but contriving and falsely and fraudulently intending to injure the plaintiff, afterwards, to wit, on &c. aforesaid, wrongfully and injuriously converted and disposed of a great part, to wit, [— bushels] of the said wheat, of great value, to wit, of the value of £—, to his own use, and also then falsely, deceitfully, wrongfully, and injuriously mixed with the residue of the said wheat of the plaintiff divers large quantities of other wheat, of bad, smutty, and inferior quality to the said wheat of the plaintiff, and caused and procured the said wheat so mixed to be ground together, by means whereof the plaintiff was not only deprived and defrauded of the said wheat which the defendant so converted and disposed of to his own use, but also by means of the premises the residue of the said wheat of the plaintiff then became and was greatly spoiled and lessened in value, and rendered of little use and value to the plaintiff. [*A count in trover may be added.*]

For taking away and selling, before default of payment, a cow which had been deposited with the defendant as a security for the payment by plaintiff of a sum of money on a future day.

For that whereas heretofore, to wit, on &c., it was agreed between the plaintiff and the defendant, that the defendant should lend to the plaintiff a certain sum of money, to wit, the sum of £—, to be returned when the said plaintiff should be thereunto requested; and that a certain [cow with calf, and a certain yearling calf,] to wit, of the value of, &c. of the plaintiff, should be a security to the defendant for the repayment of the said sum of money, when the defendant should require the same, but that the said [cow with calf and the said yearling calf] should remain in the possession of the plaintiff until such default, and that after such default the defendant should have power and authority to take away from the possession of the plaintiff and to dispose of the said [cow with calf and yearling calf]. And the plaintiff further saith, that afterwards, to wit, on &c. aforesaid, the defendant lent and advanced the said sum of £— to the plaintiff on the terms aforesaid; and that afterwards, to wit, on &c., the defendant did give notice to the plaintiff to repay the said sum of £— on or before the — day of —, &c. Yet the defendant, contriving and intending to injure the plaintiff in this behalf, before the said — day of —, &c. the time so appointed by the defendant for the repayment of the said sum of money, to wit, on &c., did wrongfully and unjustly take and drive away the said [yearling calf and cow with her calf] from and out of the possession of the plaintiff, and

did sell and dispose of the same for certain small sums of money, and converted and disposed thereof to his own use, although the plaintiff afterwards, and before the said — day of —, to wit, on &c., was ready and willing, and then tendered and offered to pay to the defendant the said sum of £ —, whereby the plaintiff hath been and is greatly injured. [*In the original declaration, adopted before the pleading rules, Hil. T. 4 W. 4, reg. 5, prohibiting several counts upon the same cause of action, there were two other counts and a count in trover, see 5th edit. vol. ii. 675. But now it will be necessary or advisable to confine the declaration to one count.*]

AGAINST
BAILLEES.

For that whereas the defendants, before and at the times of committing the grievances hereinafter mentioned, was one of the meters appointed to measure and superintend the delivery of coals from and on board of ships laden therewith, in the pool or river Thames, in the port of London, and as such meter had been and was, before the committing of the grievances hereinafter next mentioned, to wit, on &c., duly stationed in and on board of a certain ship or vessel called the —, then being in the said pool or river Thames duly to measure and superintend the delivery of a certain cargo of coals, then being in and on board of the said ship or vessel, to the respective buyers thereof, and it thereupon became and was the duty of the defendant as such meter, justly, truly, and without fraud, to measure and superintend the delivery of the said cargo to the respective buyers thereof, and to make just and true returns thereof and of the several quantities from time to time delivered to them, in order that they might thereafter be duly debited and be charged for the same, and the duty thereon due and payable. And whereas the plaintiff heretofore, to wit, on &c., aforesaid, bargained for and bought a certain part, to wit, one fourth part of the said cargo of coals to be thereafter delivered to him or his assigns from and out of the said ship or vessel, and a certain quantity of coals was thereupon afterwards, to wit, on &c., aforesaid, measured and delivered from and out of the said ship or vessel, and her aforesaid cargo, as and for a part of the said cargo so by him bargained for and bought as aforesaid by and under the metage, measurement, and superintendence of the defendant as such meter as aforesaid. Yet the defendant, not regarding his duty as such meter, but contriving and wrongfully intending to injure the plaintiff, did not justly, truly, and without fraud, measure and superintend the delivery of the said coals, which were so measured and delivered unto the plaintiff as aforesaid, nor make a just and true return of the last-mentioned cargo or quantity thereof, according to his aforesaid duty in that behalf, but omitted and neglected so to do, and therein failed and made default, and on the contrary, the defendant as such meter as aforesaid, afterwards, to wit, on &c., aforesaid, did falsely and fraudulently measure and deliver the said last-mentioned coals, and suffer and permit the same to be measured and delivered unto the plaintiff from and out of the said ship or vessel and her aforesaid cargo, as and for, and as then being, divers, to wit, twelve chaldrons and one vat of such parcel of the said coals so bargained for and bought by the plaintiff as aforesaid, and did afterwards, to wit, on &c., aforesaid, as such meter as aforesaid, falsely and fraudulently report and return the said coals which were so measured and delivered to the plaintiff as aforesaid, as then being twelve chaldrons and one vat of coals, in order that the plaintiff, as such buyer thereof as aforesaid, might be de-

Against a coal meter for not properly measuring coals, and not rendering a true account of coals delivered, whereby plaintiff paid for more than he received.

**AGAINST
BAILLES.**

bited for the same, and be charged with and become liable to pay duty thereon accordingly; whereas in truth and in fact the said coals so measured and delivered to the plaintiff as aforesaid, as and for twelve chaldrons and one vat of coals as aforesaid, were not nor did contain twelve chaldrons and one vat of coals, but a much less quantity, to wit, 420 bushels of coals, whereby, and by reason of which said several premises, he the plaintiff was hindered and prevented from receiving, and lost and was deprived of the difference in the quantity between the said coals so measured and delivered to him as aforesaid, and twelve chaldrons and one vat of the said coals, so by him bought as aforesaid, being divers, to wit, twenty-one bushels of coals, and was afterwards debited, and forced and obliged to and did pay for the said coals so to him measured and delivered as aforesaid, as being twelve chaldrons and one vat of the said coals so by him bought as aforesaid, together with the duty thereon accordingly, and was thereby obliged to and did lay out and pay divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—— more than was justly due and payable from him, for and in respect of the said coals so delivered to him as aforesaid, and the duty thereon accordingly. [*In the original declaration there were five other varying counts, see 2 Chitty on Pleading, 5th edit. 677, but which since the pleading rules, Hil. T. 4 W. 4, reg. 5, would be inadmissible unless there have been really more than one cause of action.*]

For putting plaintiff's mare, taken damage-feasant, into defendant's farm-yard, whereby the mare was gored and died.

For that whereas the defendant, before the committing of the grievances hereinafter mentioned, took and distrained a certain [mare] of the plaintiff, of great value, to wit, of the value of £—— as doing damage to the defendant, and then impounded the said [mare] as such distress for such damage in a certain private pound, that is to say, in a certain farm and premises, with the appurtenances, of the defendant, and thereupon it then became and was the duty of the defendant to take due and proper care of the aforesaid [mare] whilst the same was so impounded by him in such pound as aforesaid; nevertheless the defendant, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending to injure and damnify the plaintiff, whilst the said [mare] was so impounded as aforesaid, to wit, on &c., so carelessly and negligently behaved and conducted himself, that the said [mare] then became and was greatly gored, torn and lacerated, in so much that the said [mare] afterwards, to wit, on the day and year aforesaid, on account thereof, died, and was wholly lost to the plaintiff.

**FOR TORTIOUS
DAMAGE, &c.**

Against an engraver for using for his own purposes plates engraved by him for the plaintiff.

FOR TORTIOUS DAMAGE TO PERSONAL PROPERTY.

See 1 Bar. & Adol. 804.

Against bankers for not honouring a draft or check of a customer.

See Whittaker v. Bank of England, 5 Tyr. 268; 1 Bar. & Adol. 415.

Against the acceptor of a bill of exchange, for cancelling his acceptance,

For that whereas the plaintiff at the time of the committing of the grievances hereinafter next mentioned, was lawfully possessed of and entitled unto a certain bill of exchange, bearing date &c., and drawn by one E. M. upon and accepted by the defendant, and whereby the said E. M. required

the defendant, three months after the date thereof, to pay to the order of the said E. M. the sum of £—, and which said bill of exchange had been duly indorsed and delivered by the said E. M. to the plaintiff; and the plaintiff, by reason thereof, became and was lawfully entitled to receive the money in the said bill of exchange specified, when the same should become due and payable; and whereas also afterwards, and after the said bill of exchange was so accepted by the defendant, and indorsed to the plaintiff as aforesaid, and before the same became due and payable according to the tenor and effect thereof, to wit, on &c., the plaintiff applied to and was then treating and about to agree with one G. H. for the discounting of the same bill of exchange by the said G. H. for the plaintiff; and thereupon, previous to the agreement for discounting the said bill of exchange being entered into and finally concluded, the plaintiff suffered and permitted the said G. H. to take the said bill of exchange, in order that the said G. H. might make inquiries of and concerning the same; and the plaintiff further saith, that the defendant, whilst the said G. H. so had the said bill of exchange in his possession and custody for the purpose aforesaid, to wit, on &c., contriving and intending to injure the plaintiff, and to hinder and prevent the plaintiff from getting the said bill of exchange discounted, or otherwise transferring the same, wrongfully and unjustly, and without any reasonable cause whatever, and without the license or consent and against the will of the plaintiff, defaced, erased, and cancelled his said acceptance of the said bill of exchange; by means whereof the said bill of exchange became and was of much less value than it otherwise would have been to the plaintiff, and the plaintiff hath thence hitherto been wholly unable to get discounted, or otherwise to transfer, the said bill of exchange, and the same hath become and is of no use or value to the plaintiff, and the plaintiff hath been and is, by means of the premises, otherwise greatly injured. [*A count in trover for the bill might be added.*]

TORTIOUS
DAMAGE, &c.

whereby plaintiff could not get the bill discounted.

FOR DECEIT.

Commencement as ante, 13.] For that whereas the plaintiff heretofore, to wit, on &c., at the request of the defendant, bargained with him to buy of

FOR DECEIT.

For a false warranty of a horse. (d)

(d) As to what constitutes a good cause of action for deceit, see Selw. N. P. 10th edit. 637 to 654. As to warranties in general, *ante*, 204, n. If there was no warranty, but only a false representation, not connected with the contract, the declaration should be in case for the deceit; 4 Campb. 22; 12 East. 11. The general rule is, that whatever a seller represents at a sale is a warranty. If a person, at the time of his selling a horse, say, "I never warrant, but he is sound as far as I know," this is a qualified warranty, and may be sued on in assumpsit, showing that defendant knew of the unsoundness; 4 C. & P. 45. In some cases, though there be a warranty and stipulation that the vendor will take back the article, yet the vendee may sue for the deceit; 2 Stark. 162. Some deceit, for the purpose of putting the plaintiff off his guard, must be proved, unless there was a warranty; 1 Stark. 75; 3 Campb. 156. A vendor must either be silent or speak the truth; 2 Stark. 565. A vendor may repudiate a contract on

the ground of fraud, but to entitle him so to do the vendor must be put in *statu quo*. Therefore, if the vendor have derived any benefit from the contract, he should sue for the deceit, and, in such case, he cannot, in an action for the price of the thing sold, &c., resist the action on account of the fraud; see *ante*, 204. See the use of declaring in case, 3 East, 62; and the precedents in 3 Wils. 40 to 43; 2 East, 446; 8 Wentw. Index, 28 to 30; 2 Rich. C. P. 165; 12 East, 632; Morg. 255, 257; Plead. Assist. 240; 1 Rol. Ab. 91, l. 10, pl. 8; 2 Marsh. 217; *post*, 512, &c., of declarations for deceit on the sale of goods, &c., and *ante*, 204 to 208, in *notis*. In this action upon an express warranty, the *scienter* need not be alleged, nor, if stated, need it be proved; 2 East, 446. It seems an indictment will lie against two or more persons for conspiracy to cheat and defraud a man by selling him an unsound horse; 1 Stark. 402; 2 B. & Ald. 204. An action of deceit does not lie against a person

DECEIT.

him a certain [horse], at and for a certain price or sum of money, to wit, the sum of £——, and the defendant by then falsely and fraudulently warranting the said [horse] to be [sound and quiet in harness], then sold (e) the said [horse] to the plaintiff for the said sum of £——, which was then paid by the plaintiff to the defendant; whereas, in truth and in fact, the said [horse] was, at the time of the said warranty and sale thereof, [unsound, unsteady, restive, and ungovernable in harness], and hath from thence hitherto so remained and continued. And the plaintiff further saith, that the defendant, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff on the sale of the said [horse] as aforesaid. And thereby the said [horse] afterwards, to wit, on the day and year aforesaid, not only became of no use or value to the plaintiff, but also then greatly kicked, hurt, injured, and spoiled a certain other horse of the plaintiff, of great value, to wit, of the value of £——, and thereby also the plaintiff was then put to great expense of his monies, in the whole amounting to a large sum of money, to wit, the sum of £——, in and about the feeding and taking care of and selling and disposing of the said [horse]. *[Where a declaration contained two counts, one for a breach of warranty of the soundness of a horse, and the other for breach of warranty that "a certain other horse" was free from vice, it was held that the plaintiff could not recover damages in respect of the breaches alleged in both counts, there being in fact one contract only for the purchase of one horse; Deere v. Ivey, 12 L. J. R., N. S., Q. B. 132.]*

For a deceitful warranty on the exchange of a horse.

For that whereas the plaintiff heretofore, to wit, on &c. at the request of the defendant, bargained with him to exchange with him a certain [horse] of the defendant for a certain [horse] of the plaintiff, of great value, to wit, of the value of £—— and for a certain sum of money, to wit, the sum of £—— to be therefore paid and delivered by the plaintiff to the defendant, together with the said [horse] of the plaintiff in exchange for the said [horse] of the defendant, and the defendant, by then warranting the said [horse] of the defendant to be sound, then falsely and fraudulently sold and exchanged the same [horse] with the plaintiff for the said [horse] of the defendant, and for the said sum of money, to be paid and delivered by the plaintiff to the defendant, together with the said [horse] of the plaintiff as aforesaid; and the plaintiff, confiding in the said warranty, afterwards, to wit, on the day and year aforesaid, delivered his said [horse] to the defendant, in exchange for the said horse of the defendant; whereas in truth and in fact, at the time of the making of the said false warranty as aforesaid, and of the said exchange, the said [horse] of the defendant was not sound, but, on the contrary thereof, then was, and still is, unsound, and hath become and is of no use or value to the plaintiff; and also, by means of the premises, the plaintiff hath lost and been deprived of the use of his said [horse,] and so the plaintiff saith that the defendant, on the said sale and exchange, falsely and fraudulently deceived and defrauded the plaintiff as aforesaid.

making an untrue representation to another on the faith of which the hearer acts, and thereby incurs damage, if the party making did not know it do be untrue; *Freeman v. Baker*, 5 Bar. & Adol. 797. See declaration and law, *Byewater v. Richardson*, 1 Adol. &

El. 508; 5 Bar. & Adol. 797.

(e) It is proper to say *warrantizando vendidit*, in order that it may appear that the warranty was at the time of the sale; *Com. Dig.* Action on the Case for Deceit, F. 2. See also 12 East, 632.

For that whereas the plaintiffs, heretofore, to wit, on &c. at the request of the defendants, bargained with the defendants to buy of them the defendants a certain cable, at and for a certain price or sum of money, to wit, the sum of &c.; and the defendants then by falsely and fraudulently warranting the said cable to be a new British-made cable, then sold the said cable to the plaintiffs, for the said sum of £— then paid by the plaintiffs to the defendants for the same; whereas in truth and in fact the said cable, at the time of the said warranty and sale, was not a new British-made cable, but then was a cable made of the materials of an old rotten unlaid Russian cable, and of half clean hemp, and other toppings, and hemp from which the staple part thereof had been taken away by the manufacturer, contrary to the statute in such case made and provided. And the plaintiffs in fact say, that the defendants, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived them the plaintiffs on the sale of the said cable as aforesaid. By means whereof the plaintiffs, confiding in the said warranty, used and employed the said first-mentioned cable as a cable in and for a certain ship or vessel of the plaintiffs called the Shakespeare; and afterwards, to wit, on &c. whilst the said ship or vessel was anchored by the said last-mentioned cable in a certain place called Yarmouth Roads, the said last-mentioned cable, from its being so made as aforesaid, then broke, and the said ship or vessel was in imminent peril of being wrecked, and the lives of the crew thereof were greatly endangered; and also thereby the plaintiffs were forced and obliged to and necessarily did lay out and expend a large sum of money, to wit, the sum of £—, in and about purchasing and getting on board the said ship or vessel a certain other cable for the said ship or vessel, in the place of the said first-mentioned cable, and also thereby the said ship or vessel was greatly delayed in a certain voyage in which she was then engaged, and the plaintiffs lost and were deprived of divers large profits and gain, which they otherwise would have made from the earnings of the said ship or vessel.

DISCIT. —
For falsely warranting a cable to be made of sound and good materials, whereas it was made of an old rotten unlaid Russian cable, whereby plaintiff sustained special damage.
(f)

(f) See a form of declaration for falsely representing a vessel to be copper fastened when she was not so; *Freeman v. Baker*, 5 Bar. & Adol. 797. If an article be bespoke to answer a particular purpose, a warranty is implied that it will answer such purpose; *Jones v. Bright*, 5 Bing. 533; and see *infra*, *Brown v. Edgington*, 2 M. & Gr. 279; and if an order be given for an *undescribed and unascertained* thing, and stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it do answer the purpose for which it was supplied; per Parke Baron in *Chanter v. Hopkins*, 4 M. & W. 406; but the law implies no warranty where the parties have not expressly contracted as to the nature and quality of the thing to be sold; and therefore in the case last referred to, where the order was, "send me your patent copper apparatus to fit up my brewing copper with your smoke consuming furnace," it was held that the defendant, who had sent one of his patent machines in compliance with the order, did not impliedly warrant that it would suit the brewery. In a late case, where A. a wine merchant, ordered a crane-rope of B., a

dealer in, and who represented himself as a manufacturer of ropes, and B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and being told that it was wanted to raise pipes of wine from the cellar, said that a rope must be made on purpose. B. did not make the rope himself, but sent the order to his manufacturer, who employed a third party to make the rope; and it was held, in an action on the case by A. against B., to recover damages resulting from the insufficiency of the rope, that B., as between him and A., was to be considered the manufacturer of the rope, and that an implied warranty arose out of the contract that the rope was a fit and proper one for the purpose for which it was ordered. See *Brown v. Edgington*, 2 M. & Gr. 279, and from which case it seems that to raise an implied warranty, it is not necessary that the vendor should also be, or should represent himself as, the manufacturer, where he is told of the purpose for which the goods are required, and the purchaser does not select them himself, but relies on the skill and judgment of the vendor.

DECEIT.

For deceitfully delivering a smaller quantity of coals than pretended.

In the 5th edit. vol. ii. 685 to 687, there are forms of counts in case for delivering a less quantity of coals than those contracted for; but semble, the declaration under such facts had better be in assumpsit for not delivering the quantity of coals, &c. bargained for. See, however, as to the form of declaration, 3 Stark. Rep. 23.

For deceitfully selling land as and for a greater quantity than it really was.(g)

For that whereas the plaintiff, on &c. bargained with the defendant to buy of him a certain close of land of the defendant, and the defendant then, well knowing the said close to contain a much less quantity than [three acres] of land, to wit, the quantity of [two acres and a half] of land by then false and fraudulently warranting the said close to contain [three acres] of land, then falsely, fraudulently, and deceitfully sold the said close to the plaintiff at and for a certain sum of money, to wit, the sum of £—— of lawful money, to be therefore paid by the plaintiff to the defendant, and which was then accordingly paid for the same; whereas in truth and in fact the said close, so as aforesaid sold by the defendant to the plaintiff, did not contain [three acres] of land, but, on the contrary, contained a much less quantity, to wit, [two acres and a half]; by means of which premises the plaintiff lost the just and due advantage and profits which he otherwise would have made and derived from the purchase of the said close, and was put to great charge and expense; and so the plaintiff in fact saith, that the defendant, on &c. aforesaid, falsely and fraudulently deceived him in manner aforesaid.

Declaration in case for misrepresenting the value and quantity of business, &c. done at a public-house which plaintiff purchased of defendant.(h)

Commencement, ante, 13.] For that whereas, before and at the time of committing of the grievances by the defendant as hereinafter mentioned, the defendant was possessed of a certain public-house, called and known by the sign of the ["Sun,"] and carried on therein the trades and businesses of a publican and victualler, and dealer in wines and spirits. And the defendant then represented to the plaintiff, that he was possessed of a certain lease of and in the said premises, to wit, for the term of ——, &c. [according to the fact]; and the defendant being desirous of selling and disposing of the said lease and the good-will of the said premises and trades and businesses, heretofore, to wit, on &c. wrongfully and injuriously contriving and intending to deceive, defraud and injure the plaintiff in this behalf, falsely, fraudulently and deceitfully represented and asserted to the plaintiff, that

(g) See the form, *ante*, 209, and note, against vendor, for not making out a good title, &c. and as to when party may recover back deposit.

(h) This form was adopted in a case wherein the plaintiff succeeded. It may be readily altered to meet any similar case. Where the vendor of a public-house made, pending the treaty, certain deceitful misrepresentations respecting the amount of the business done in the house, and the rent received for a part of the premises, whereby the plaintiff was induced to give a large sum for the premises, it was held, that the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance of the premises, or in a memorandum of the bargain, which was drawn up after these representa-

tions were made; 3 B. & C. 623; 5 D. & R. 490, S. C. Where, in an action on the case for a deceit, the plaintiff declared that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented to him that a premium of £150 was to be paid for it, whereas only £100 were to be paid, by means of which fraudulent representation the defendant obtained from him the sum of £50, and converted it to his own use, it was held that these allegations were sufficient, without further stating that the £50 so obtained was over and above the £100 to be paid for the lease; 2 Marsh. 217; 6 Taunt. 522, S. C.; and see 2 Lord Raym. 1118, quoted in 2 B. & C. 625, as to evidence in reduction of damages, in respect of the value of the premises, see R. & M. C. N. P. 303.

[let the misrepresentations here stated agree as nearly as possible with the actual misrepresentations made use of, and which in the case upon which this form was drawn were as follows: the said public-house was then doing between seven and eight butts a month, and about £30 or £40 in spirits.] And whereupon, heretofore, to wit, on the day and year last aforesaid, the plaintiff, confiding in the said representations and assertions of the defendant, at the request of the defendant, bargained with him to buy of him the defendant's interest in the said unexpired lease of his said premises and the said good-will, at and for a certain sum, to wit, the sum of £300, and the household furniture, fixtures, utensils and effects, then upon the said premises, at and for a large sum of money, to wit, the sum of £225. And the defendant, by then falsely, fraudulently and deceitfully pretending and representing to the plaintiff, that the said false, fraudulent and deceitful representation of the defendant was true, then sold the said lease and premises and good-will to the plaintiff at and for the said sum of money, to wit, the said sum of £300. And the plaintiff, afterwards, to wit, on the day and year aforesaid, paid to the defendant the said sum of money for the same; whereas in truth and in fact the said trades and businesses of the said public-house had not been, nor were they before or at the time of the making of the said false representation and assertion, between seven and eight butts a month, but had been and then were much less, to wit, three butts a month; and whereas in truth and in fact there had not then been sold or disposed of at the said public-house to the amount of from £30 to £40 in spirits, but on the contrary, much less spirits than at the rate of from £30 to £40 a month had been sold and disposed of in and from the said public-house, to wit, to the amount of about £10 in spirits per month, as the defendant, at the time of his making his said false and deceitful representation well knew; and the plaintiff further saith, that the defendant, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff on the said sale, and thereby the said lease, trades and businesses have become and are of no use or value to the plaintiff; and the plaintiff hath sustained great trouble, expense and loss, to wit, an expense and loss of £600, in and about the carrying on the said trades and businesses in the said house and premises, and endeavouring to dispose of the said lease, trades and businesses.

DECEIT.

For that whereas, before and at the time of the committing of the grievances by the defendant as hereinafter next mentioned, the defendant kept a circulating library, and carried on the trades and business of a bookseller, stationer, jeweller, toyman and hardwareman, at a certain messuage and premises in Mare-street, Hackney, in the county of Middlesex, and was possessed of a lease of the said messuage and premises, to wit, for the term of — years, commencing from the — day of —, in the year of our Lord —. And thereupon heretofore, to wit, on &c., the plaintiff, at the request of the defendant, bargained with him to buy of him his interest in the unexpired lease of his said premises and the said library, with the books and shelves, as also the good-will of the said trades, at and for a certain price or sum of money, to wit, the sum of £—; and the defendant by then falsely, fraudulently and deceitfully pretending and representing to the

For misrepresenting the value of a trade and business, sold by plaintiff to defendant. (i)

(i) See the note to the preceding form; and see next precedent.

DECEIT.

plaintiff that the profits of the said circulating library had been and then were at the rate of near £—— per annum, and that the said house and the said trades carried on therein produced profits more than £—— per annum besides, and that the number of the readers and subscribers to the said library were altogether about 150 or 160, and that the books in the said library amounted to 4000 volumes, then bargained for and sold to the plaintiff the said lease, library, books and shelves, and the said good-will, at and for the said sum of £——; and the plaintiff afterwards, to wit, on &c. paid the defendant for the same; whereas in truth and in fact the profits of the said circulating library had not been nor were at the rate of near £—— per annum, but had been and were much less, to wit, at the rate of £—— per annum; and whereas in truth and in fact the said house, and the said trades carried on therein, had not produced nor did produce profits more than £—— per annum, but on the contrary thereof, had produced and did produce much less, to wit, the sum of £—— per annum; and whereas in truth and in fact, the number of readers and subscribers to the said library were much less than about 150 or 160, to wit, 30; and whereas in truth and in fact, at the time of the making of the said false representation, the said books in the said library did not amount to 4000 volumes, as the defendant, at the time of his making his said false and deceitful representation, well knew. And the plaintiff further saith, that the defendant, by means of the premises, on &c. aforesaid, falsely and fraudulently deceived the plaintiff on the said sale, and thereby the said lease, trades and businesses have become and are of no use or value to the plaintiff, and plaintiff hath sustained great trouble and expense, to wit, an expense of £——, in and about the carrying on the said trades and businesses in the said messuage and premises, and endeavouring to dispose of the said lease, trades and businesses.

For fraudulently representing to a third party the receipts of a business more than they really were, such third party having to the knowledge of the defendant communicated the representation to the plaintiff who became the purchaser instead of such third party. (j)

For that whereas before the committing of the grievances by the defendant as hereinafter mentioned, by a certain indenture of lease, bearing date &c., made between &c., for the considerations therein mentioned, A. B. demised to R. S., his executors, administrators and assigns, all that messuage or tenement, situate &c., and then used or occupied as a public house or liquor shop, together with all appurtenances thereto belonging; to hold the same unto the said R. S., his executors, administrators and assigns, from the 25th day of March then last past, for the term of twenty-nine years, at the yearly rent of £500, payable quarterly, and subject to the covenants and agreements therein contained. And the plaintiff avers that by divers mesne assignments the said indenture of lease and the premises thereby demised, afterwards became legally and absolutely vested in the defendant for the rest, residue and remainder of the term; and the defendant then carried on the trade and business of a publican and licensed victualler at the said messuage and premises. And the plaintiff further saith that afterwards, to wit, on &c., one R. B. had contracted and agreed with the defendant for the absolute purchase of the said lease, with the good-will, and

(j) See form, *Pilmors v. Hood*, 5 Bing. N. C. 97. Where there is fraud, and damage the result of that fraud, not from an act remote and consequential but one contemplated by the defendant at the time as one of its re-

sults, the party guilty of the fraud is responsible to the party injured; *Langridge v. Levy*, 2 M. & W. 538; 4 M. & W. 337; but see *Winterbottom v. Wright*, 10 M. & W. 109.

possession of the dwelling-house and premises thereby demised, and at and for a certain price or sum of money, to wit, the sum of £—, but no assignment had been made to him. And the plaintiff further saith, that the defendant, at and before the making of the agreement with R. B., falsely, fraudulently and deceitfully pretended and represented to R. B. that the trade of the said public-house had been and then was £180 per month, all retail over the counter. And the plaintiff further saith, that R. B. not being able to complete the purchase, it was afterwards, to wit, on &c., agreed by and between the plaintiff R. B. and the defendant, that the plaintiff should become the purchaser of the premises in the room and stead of the said R. B.; and that at and before the making of the last-mentioned agreement, R. B. communicated to the plaintiff that the defendant had, at and before the making of the first-mentioned agreement with him, represented that the trade of the said public-house had been and then was £— per month, all retail over the counter; of all which premises the defendant at and before the making of the agreement secondly mentioned had notice, and the plaintiff avers that he, confiding in the representations so made by the defendant, afterwards, to wit, on &c., agreed to become the purchaser of the premises at and for a certain price or sum of money, to wit, £—, in the room and stead of the said R. B., and that he the said plaintiff afterwards, to wit, on &c., paid the said sum of £— to the defendant for the same; but that the trade of the said public-house had not been nor was £— per month, all retail over the counter, as the defendant at the time of his making his false and deceitful representation, and also at the time of his entering into the last-mentioned agreement, well knew: and the plaintiff further saith, that the defendant by means of the premises falsely and fraudulently deceived the plaintiff in the said sale, and thereby the premises have become and are of no use or value to the plaintiff: and he has sustained great trouble and expense, to wit, an expense of £—, in and about the carrying on the business of a publican and licensed victualler in the messuage and premises, and has sustained great loss in disposing of the premises. To the plaintiff's damage, &c.

DECEIT.

See Polhill v. Walter, 3 Bar. & Adol. 114. It is not necessary in such action to show fraud in fact, because the making of a representation which a party knows to be untrue, and which is intended, or is calculated, from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law, and defendant must be considered as having intended to make such representation to all who received the bill in its circulation, id. ibid. It was also held in the above case, that the defendant could not be charged as acceptor of the bill; because no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour.

For fraudulently representing that defendant had authority to accept bills for a third party by procuration, *per quod*, plaintiff sued such third person as the acceptor of a bill, and was nonsuited, and had to pay costs, &c.

For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant hereinafter next mentioned, was and from thence hitherto hath been and still is a wharfinger, and the business and employment of a wharfinger exercised and carried on, and still doth exercise and carry on, at and upon a certain wharf called "Three Cranes Wharf," situate and being at &c.; and whereas also, before and at the said several and respective times hereinafter mentioned, the defendant also was a wharf-

For falsely representing to third person, that he defendant was authorized to receive goods directed to plaintiff's wharf, whereby plaintiff was

DECEIT.

plaintiff that the profits of the said circulating library had been and then were at the rate of near £— per annum, and that the said house and the said trades carried on therein produced profits more than £— per annum besides, and that the number of the readers and subscribers to the said library were altogether about 150 or 160, and that the books in the said library amounted to 4000 volumes, then bargained for and sold to the plaintiff the said lease, library, books and shelves, and the said good-will, at and for the said sum of £—; and the plaintiff afterwards, to wit, on &c. paid the defendant for the same; whereas in truth and in fact the profits of the said circulating library had not been nor were at the rate of near £— per annum, but had been and were much less, to wit, at the rate of £— per annum; and whereas in truth and in fact the said house, and the said trades carried on therein, had not produced nor did produce profits more than £— per annum, but on the contrary thereof, had produced and did produce much less, to wit, the sum of £— per annum; and whereas in truth and in fact, the number of readers and subscribers to the said library were much less than about 150 or 160, to wit, 30; and whereas in truth and in fact, at the time of the making of the said false representation, the said books in the said library did not amount to 4000 volumes, as the defendant, at the time of his making his said false and deceitful representation, well knew. And the plaintiff further saith, that the defendant, by means of the premises, on &c. aforesaid, falsely and fraudulently deceived the plaintiff on the said sale, and thereby the said lease, trades and businesses have become and are of no use or value to the plaintiff, and plaintiff hath sustained great trouble and expense, to wit, an expense of £—, in and about the carrying on the said trades and businesses in the said messuage and premises, and endeavouring to dispose of the said lease, trades and businesses.

For fraudulently representing to a third party the receipts of a business more than they really were, such third party having to the knowledge of the defendant communicated the representation to the plaintiff who became the purchaser instead of such third party. (j)

For that whereas before the committing of the grievances by the defendant as hereinafter mentioned, by a certain indenture of lease, bearing date &c., made between &c., for the considerations therein mentioned, A. B. demised to R. S., his executors, administrators and assigns, all that messuage or tenement, situate &c., and then used or occupied as a public house or liquor shop, together with all appurtenances thereto belonging; to hold the same unto the said R. S., his executors, administrators and assigns, from the 25th day of March then last past, for the term of twenty-nine years, at the yearly rent of £500, payable quarterly, and subject to the covenants and agreements therein contained. And the plaintiff avers that by divers mesne assignments the said indenture of lease and the premises thereby demised, afterwards became legally and absolutely vested in the defendant for the rest, residue and remainder of the term; and the defendant then carried on the trade and business of a publican and licensed victualler at the said messuage and premises. And the plaintiff further saith that afterwards, to wit, on &c., one R. B. had contracted and agreed with the defendant for the absolute purchase of the said lease, with the good-will, and

(j) See form, *Pilmors v. Hood*, 5 Bing. N. C. 97. Where there is fraud, and damage the result of that fraud, not from an act remote and consequential but one contemplated by the defendant at the time as one of its re-

sults, the party guilty of the fraud is responsible to the party injured; *Langridge v. Levy*, 2 M. & W. 532; 4 M. & W. 337; but see *Winterbottom v. Wright*, 10 M. & W. 109.

possession of the dwelling-house and premises thereby demised, and at and for a certain price or sum of money, to wit, the sum of £—, but no assignment had been made to him. And the plaintiff further saith, that the defendant, at and before the making of the agreement with R. B., falsely, fraudulently and deceitfully pretended and represented to R. B. that the trade of the said public-house had been and then was £180 per month, all retail over the counter. And the plaintiff further saith, that R. B. not being able to complete the purchase, it was afterwards, to wit, on &c., agreed by and between the plaintiff R. B. and the defendant, that the plaintiff should become the purchaser of the premises in the room and stead of the said R. B.; and that at and before the making of the last-mentioned agreement, R. B. communicated to the plaintiff that the defendant had, at and before the making of the first-mentioned agreement with him, represented that the trade of the said public-house had been and then was £— per month, all retail over the counter; of all which premises the defendant at and before the making of the agreement secondly mentioned had notice, and the plaintiff avers that he, confiding in the representations so made by the defendant, afterwards, to wit, on &c., agreed to become the purchaser of the premises at and for a certain price or sum of money, to wit, £—, in the room and stead of the said R. B., and that he the said plaintiff afterwards, to wit, on &c., paid the said sum of £— to the defendant for the same; but that the trade of the said public-house had not been nor was £— per month, all retail over the counter, as the defendant at the time of his making his false and deceitful representation, and also at the time of his entering into the last-mentioned agreement, well knew: and the plaintiff further saith, that the defendant by means of the premises falsely and fraudulently deceived the plaintiff in the said sale, and thereby the premises have become and are of no use or value to the plaintiff: and he has sustained great trouble and expense, to wit, an expense of £—, in and about the carrying on the business of a publican and licensed victualler in the messuage and premises, and has sustained great loss in disposing of the premises. To the plaintiff's damage, &c.

DECEIT.

See Polhill v. Walter, 3 Bar. & Adol. 114. It is not necessary in such action to show fraud in fact, because the making of a representation which a party knows to be untrue, and which is intended, or is calculated, from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law, and defendant must be considered as having intended to make such representation to all who received the bill in its circulation, id. ibid. It was also held in the above case, that the defendant could not be charged as acceptor of the bill; because no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour.

For fraudulently representing that defendant had authority to accept bills for a third party by procuration, *per quod*, plaintiff sued such third person as the acceptor of a bill, and was nonsuited, and had to pay costs, &c.

For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant hereinafter next mentioned, was and from thence hitherto hath been and still is a wharfinger, and the business and employment of a wharfinger exercised and carried on, and still doth exercise and carry on, at and upon a certain wharf called "Three Cranes Wharf," situate and being at &c.; and whereas also, before and at the said several and respective times hereinafter mentioned, the defendant also was a wharf-

For falsely representing to third person, that he defendant was authorized to receive goods directed to plaintiff's wharf, whereby plaintiff was

DECEIT.

deprived of the profits of stowage, wharfage, &c. (k)

Defendant's misconduct.

inger, and the business and employment of a wharfinger exercised and carried on, and still exercises and carries on, at and upon a certain other wharf called the — wharf, situate and being at &c. aforesaid; and whereas also just before and at the time of the committing of the grievance hereinafter next mentioned, one E. F. master of a certain ship or vessel, had been and was directed and authorized by G. H. and I. K. to deliver to the plaintiff, as such wharfinger as aforesaid, at his said wharf, divers, to wit, 47 packages of goods and merchandizes for the said G. H., and divers, to wit, 19 packages of goods and merchandizes for the said I. K., to be by the plaintiff, as such wharfinger as aforesaid, taken care of in and upon the said wharf, and from thence forwarded for the said G. H. and I. K. respectively, for wharfage and reward to the plaintiff in that behalf, and which said packages the plaintiff was then ready and willing to accept and receive and take care of at and upon his said wharf, and forward as aforesaid. And thereupon, just before the committing of the grievance in this count hereinafter mentioned, the said E. F. was about to cause to be delivered the said packages to the plaintiff: Yet the defendant, well knowing the premises, but contriving and intending wrongfully and unjustly to injure and damnify the plaintiff, so being such wharfinger as aforesaid, in the said business and employment, and to deprive him of the reward he would otherwise have received and derived from the wharfage and care of the said packages, did heretofore, to wit, on &c. falsely, fraudulently, deceitfully and maliciously represent and pretend to a certain person, then being the mate of the said ship or vessel, that the defendant was authorized by the said G. H. and I. K. to receive the said packages; and the said mate being then deceived by the said false representation of the defendant, did then suffer and permit the defendant to take and receive the said parcels and packages, and the defendant did then take away the said packages, and the said packages were never delivered by the said E. F. at the said wharf of the plaintiff; by means of which said several premises the plaintiff then was put to great trouble and expense in sending a lighter to the said ship or vessel for the said packages, and lost and was deprived of the hire and reward, profits, benefit and advantage which he otherwise would have derived and acquired from the wharfage, stowage and keeping and forwarding such packages as aforesaid.

For representing that plaintiff's waggon set out from defendant's inn, when in fact it set out from another inn; and thereby plaintiff lost the carriage of packages, &c.

For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant hereinafter mentioned, was and from thence hitherto hath been and still is a carrier, in and by a certain waggon of the plaintiff, of goods, wares and merchandizes, to wit, from a certain inn called the White Hart Inn, St. John Street, in the county of Middlesex, to Bedford, in the county of Bedford, and for hire and reward during all that time used, exercised and carried on, and still doth use, exercise and carry on the business and occupation of such carrier as aforesaid; and thereupon, just before and at the time of the committing of the grievances hereinafter next mentioned, a servant of certain persons, trading under the name, style and firm of Messrs. E. and Co., was directed and authorized by them to send divers, to wit, two parcels, by the said waggon of the plaintiff, from &c.

(k) This cause was tried, and plaintiff obtained a verdict.

aforesaid, to &c. aforesaid, that is to say, one of the said parcels to Mr. T. P. at &c. aforesaid, and the other thereof to Mr. D. of the same place, and which said parcels the plaintiff was ready and willing to accept for the purpose aforesaid, and to carry and convey the same, in and by his said waggon, from &c. aforesaid, to &c. aforesaid; and thereupon, just before the committing of the grievance in this count after mentioned, the said servant inquired of the defendant, at a certain inn in St. John Street aforesaid, called the Cross Keys, whether the Bedford waggon (meaning, as the defendant then well knew, the said waggon of the plaintiff) then went from the said last-mentioned inn to Bedford aforesaid; whereupon the defendant then well knowing the premises, but contriving and falsely and fraudulently intending to injure the plaintiff, so being such common carrier as aforesaid, and to deprive him of the hire and reward he would otherwise have received and derived from the carriage of the said parcels in and by his said waggon, knowingly, falsely, fraudulently, deceitfully and maliciously then represented to the said servant that the Bedford waggon (then meaning the said waggon of the plaintiff) did then go from the said inn called the Cross Keys; whereas, in truth and in fact, the defendant then well knew, as the fact then was, that the said waggon of the plaintiff did not then go from the said last-mentioned inn. By means and in consequence of which false representation of the defendant, the said servant was then induced to deliver, and did then deliver the said parcels to the defendant, who further contriving and intending as aforesaid, afterwards, to wit, on &c. aforesaid, sent the same to Bedford aforesaid, by another and different waggon than the said waggon of the plaintiff, and the said parcels were never delivered to the plaintiff, or carried or conveyed by his said waggon to Bedford aforesaid, or elsewhere. By means and in consequence of which said several premises the plaintiff then lost and was deprived of the hire and reward, profit, benefit and advantages which might and would otherwise have been paid and arisen, and accrued to him from the carriage of such parcels in and by his said waggon as aforesaid.

DECEIT.

For that whereas the plaintiff for divers, to wit, two years and upwards now last past, hath been and still is a [fishmonger,] and for and during all the time aforesaid hath used, exercised and carried on the said trade or business of a [fishmonger,] and the defendant hath during all that time there also used, exercised and carried on, and still doth use, exercise and carry on the same trade and business of a [fishmonger;] and whereas during all the time aforesaid the plaintiff hath been of great repute in the way of his said trade or business of a [fishmonger,] and divers and very many persons during all the time aforesaid have been used and accustomed to buy [fish] of the plaintiff, and the plaintiff, by means of such premises, was daily acquiring great gains and profits in the way of his said trade or business; and whereas, whilst the plaintiff and the defendant so respectively followed and exercised the said trade or business of a [fishmonger,] one E. F. being the customer of the plaintiff in his said trade or business of a [fishmonger,] as the defendant then well knew, did then want to buy certain fish, and was then desirous of buying the same of the plaintiff, whereof the defendant then had notice; nevertheless the defendant, well knowing the premises, but contriving and maliciously intending to injure

By a fishmonger against another of the same trade for personating him to customers.

DECEIT.

the plaintiff in his said trade or business, then wrongfully and unjustly offered and exposed to sale to one G. H. then being the servant of the said E. F. as the defendant then well knew, certain [fish,] to wit, [three pair of soles,] of the defendant, as and for the fish of the plaintiff, and did then falsely pretend to the said G. H. that the same then were the [fish] of the plaintiff, when the defendant then well knew that the same were not the [fish] of the plaintiff, whereby the said E. F. who would otherwise have then bought [fish] of the plaintiff, was then wholly prevented from buying such [fish] of the plaintiff, and the plaintiff thereby wholly lost the sale of the said [fish,] which he otherwise would have sold to the said F. F. and the profit and benefit of such sale.

By proprietor of patent snuff against a person for selling snuff, as and for, and falsely representing it to be prepared by plaintiff, which was prepared by defendant. (1)

For that whereas the plaintiff, for divers years before and at the time of the committing of the grievances hereafter next mentioned, did prepare, vend and sell, and continue to prepare vend and sell, and still doth continue to prepare, vend and sell for profit, divers large quantities of a certain snuff called cordial cephalic snuff, which said snuff the plaintiff was then and still is used and accustomed to sell in bottles, respectively wrapped up in paper, having the following, amongst other words, printed thereon, that is to say, "Sold by Fran^s. Newberry, joint proprietor, having purchased of Mr. Collins half the right and benefit of the patent, at his new medicinal warehouse, No. 45, in St. Paul's Church-yard, on the coach-way, five doors from Cheapside towards Watling Street, London, used by B. C. Collins, at the printing office, New Canal, Salisbury;" and whereas the plaintiff, before and at the time of the committing the grievances hereinafter next mentioned, had gained and acquired great fame and reputation with the public, on account of the excellent quality of the said cordial cephalic snuff, so by him prepared, vended and sold, and continued to be prepared, vended and sold as aforesaid, whereby the plaintiff daily acquired and obtained great gain and profit, to the comfortable support of himself and family; Yet the defendant, well knowing the premises, but wickedly and wrongfully, subtly and unjustly intending to injure the plaintiff in his said sale of the said cordial cephalic snuff, and to deprive him of the great gain and profits which he the plaintiff would otherwise have acquired by preparing, vending and selling the said cordial cephalic snuff as aforesaid, to wit, on &c. and on divers other days and times between that day and the day of the commencement of this suit, did wrongfully, knowingly, injuriously,

(1) See other precedents, 1 Nev. & Man. 533; 4 B. & Adol. 410; 1 Chitty's Gen. Prac. 721. Where a manufacturer had adopted a particular mark for his goods, in order to denote that they were manufactured by him, it was held, that an action on the case was maintainable by him against another person who adopted the same mark for the purpose of denoting that his goods were manufactured by the plaintiff, and who sold the goods so marked as and for goods manufactured by the plaintiff. The declaration stated that the defendant sold the goods as and for goods manufactured by the plaintiff; it appeared in evidence that the persons who bought the goods of the defendant knew by whom they were manufactured, but that the defendant

used the plaintiff's mark, and sold the goods so marked in order that his customers might, and in fact they did, re-sell them as and for goods manufactured by the plaintiff, it was held that this evidence supported the declaration, 3 B. & C. 541; 5 D. & R. 292, S. C. See a form of declaration for selling goods manufactured by defendant as and for goods manufactured by plaintiff, and for wrapping them up in envelopes similar to those used by plaintiff, *Blifield v. Payne*, 1 Nev. & Man. 353; 4 Bar. & Adol. 410, S. C.; *Morison v. Salmon*, 2 M. & Gr. 385; and an action lies for the deceit, although the defendant's commodity were not inferior to that of plaintiff; 1 Nev. & Man. 353; 4 Bar. & Adol. 410.

deceitfully and fraudulently, against the will, and without the licence or consent of the plaintiff, prepare and make, and cause to be prepared and made, divers, to wit, 15,000 bottles of certain articles, represented and termed by him to be snuff, in imitation of the said cordial cephalic snuff, so prepared, vended and sold by the plaintiff as aforesaid, and did wrap up, and caused to be wrapped up, the said last-mentioned bottles of snuff, in paper, having the following amongst other words printed thereon, that is to say, "Sold by Fran^s. Newberry, &c." [*as in the original label*] in order to denote that such snuff was the genuine cordial cephalic snuff, prepared, vended and sold by the plaintiff; and did knowingly, wrongfully, injuriously, deceitfully and fraudulently vend and sell, for his own lucre and gain, the said last-mentioned bottles of such articles represented and termed by him to be snuff, by the name and description of a cordial cephalic snuff, which had been prepared, vended and sold by the plaintiff, whereas in truth and fact the plaintiff had never been the preparer, vendor or seller thereof, or any part thereof; by reason of which premises the plaintiff hath been fraudulently, deceitfully, wrongfully and injuriously hindered and prevented by the defendant from selling, vending and disposing of divers large quantities, to wit, 15,000 bottles of the said cordial cephalic snuff, which he the plaintiff would otherwise have sold, vended, and disposed of, and the plaintiff hath also been deprived of divers great gains and profits, which would otherwise have accrued to him the plaintiff from the sale thereof, and has been otherwise greatly injured in the selling and vending of the said cordial cephalic snuff.

For that whereas, before and at the time of committing the grievance by the now defendant as hereafter mentioned, the plaintiff was occupier of a certain [messuage, &c.] and a certain action of ejectment had been commenced against the now plaintiff, and then was depending, for the recovery of the said tenements with the appurtenances, in the Court of &c., wherein John Doe on the demise of F. S. was the then plaintiff. And whereas the now plaintiff had been served with a copy of the declaration in the said action of ejectment; Yet the defendant contriving, and wrongfully and unjustly intending to injure the plaintiff, and to subject him to the payment of the costs of the said action, heretofore, to wit, in — term, in the — year of &c., that is to say, on &c., wrongfully and injuriously, and without the leave or license and against the will of the plaintiff, caused and procured an appearance to be entered in the same Court in the said action for and on behalf of the now plaintiff, and then also, without the leave or license and against the will of the now plaintiff, caused and procured a certain plea to be pleaded therein, to wit, that he the now plaintiff was not guilty of the trespass and ejectment complained of in the said action; and such proceedings were thereupon had, without the license or consent or knowledge of the now plaintiff, that afterwards, to wit, in — term, in and concerning the said action, it was considered and adjudged in and by the said Court that the said John Doe should recover against the plaintiff his term then to come of and in the said tenements, with the appurtenances, and his damages of

For defending an action of ejectment in plaintiff's name without his authority, whereby he was imprisoned for costs of judgment recovered against him. (m)

(m) This cause was tried, and plaintiff obtained a verdict for £50 damages.

DECRET.

£—— by the jury in the said action assessed, and also £—— for his costs and charges, by the said Court of our said lady the queen adjudged to the said J. D. of increase, and with his assent, as by the record and proceedings thereof in the said Court of our said lady the queen, before the queen herself, more fully appears. And the now plaintiff further saith, that afterwards, to wit, on &c., a certain writ of our said lady the queen was duly issued upon the said judgment out of the said Court of our said lady the queen, before the queen herself, directed to the sheriff of——, whereby our said lady the queen commanded the said sheriff that he should take the now plaintiff, if he should be found in his bailiwick, and him safely keep, so that he the said sheriff should have the body of the now plaintiff before our said lady the queen, on &c., wheresoever our said lady the queen should then be in England, to satisfy the said J. D. the said sum of £——, which by the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, were adjudged to the said J. D. for his damages which he had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the now plaintiff was also convicted as aforesaid, as appeared to our said lady the queen of record, and that the said sheriff should then have there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff of—— to be executed as hereinafter mentioned, was duly indorsed with a direction to the said sheriff, requiring him to levy £—— besides poundage, officers' fees, and all other incidental expenses: which said writ, so indorsed as aforesaid, afterwards, and before the said return thereof, to wit, on &c., was delivered to E. F. and G. H. then being sheriffs of the said county of—— to be executed in due form of law, by virtue of which said writ the said E. F. and G. H. so being sheriffs as aforesaid, afterwards, and before the said return of the said writ, to wit, on &c., and within the bailiwick of the said sheriff, took and arrested the now plaintiff by his body, and then, by virtue of the said writ, had and detained him in his custody in execution for the said sum of £——, and the plaintiff was kept and detained in execution upon the said judgment for a long space of time, to wit, for the space of—— days. By means of which said several premises the plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed in his credit and circumstances, and was hindered and prevented from performing and transacting his necessary affairs and business, but was forced and obliged to and did necessarily pay, lay out and expend a large sum of money, to wit, the sum of £——, in and about supporting himself whilst he was so imprisoned as aforesaid, and also in and about the obtaining his release from the said arrest and imprisonment, and in and about other the premises, and hath been and is by means of the premises otherwise greatly injured.

For falsely representing a third person fit to be trusted.(n)

Commencement as ante, 13.] For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter next mentioned, was and from thence hitherto hath been and

(n) By the 9 Geo. 4, c. 14, s. 6, in order to render a party liable to this action, he must have made the representation in writing signed by him. As to when an action of this na-

ture may be supported, see Selw. N. P. 10th edit. 650; 3 Chit. Com. Law, 338, and cases there collected; 2 East, 107; 3 B. & P. 867; 2 New Rep. 241; 1 Taunt. 558.

still is a —, and the trade and business of a — hath, for and during all that time, used, exercised and carried on, and still doth use, exercise and carry on. And whereas also the plaintiff, so being a —, and so using, exercising and carrying on the said trade and business as aforesaid, one E. F. before the committing of the grievance by the defendant as hereinafter next mentioned, to wit, on &c., applied to the plaintiff, and then requested the plaintiff to sell goods on credit to the said E. F. in the way of the plaintiff's said trade and business of a —. And the plaintiff being then unacquainted with the character and circumstances of the said E. F. was then referred by him to the defendant for information respecting the same, whereof the defendant afterwards, and before the sale of any goods by the plaintiff to the said E. F. to wit, on &c., had notice, to wit, from one G. H. the servant of the plaintiff, and the defendant was then interrogated by the said G. H. on the part of the plaintiff, respecting the character and circumstances of the said E. F. Nevertheless the defendant well knowing the premises, and that the said E. F. was then in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but contriving and fraudulently intending, craftily and subtly to deceive and injure the plaintiff in this behalf, on the day and year aforesaid, falsely, fraudulently and deceitfully, (o) in writing, (p) to wit, in the words and manner hereinafter stated, signed by the defendant, in answer to certain questions then put to the defendant by the said G. H. on the part of the plaintiff, respecting the character and circumstances of the said E. F. represented and affirmed that [*here set forth the misrepresentations as they appear from the defendant's writing, as thus*, he the defendant then well knew the said E. F. and had done a deal of business with him, and taken a deal of his (the said E. F.'s) money, and that the defendant then did business with the said E. F., and that upon the whole the defendant believed the said E. F. to be a good man (thereby then meaning that the defendant believed the said E. F. to be a man in good circumstances and fit to be trusted with goods on credit.)] By means and in consequence (q) of which representation and affirmation so

From 2 Moore, 713; 8 Taunt, 637, S. C. it should seem that to support this action there must have been some *fraud or intention on the part of the defendant to deceive*. In a later case, in 6 Bing. 396, it was held that where a party recommends an agent by making statements, which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shown that the representation was given from malice, or with a view to the pecuniary interest of the party recommending: and see the form of declaration in that case, *post*, 524; see the precedents in 3 T. R. 51; 1 East, 318; 2 East, 92; 3 B. & P. 367, where also the principles upon which this action is founded are stated. See also *Lyde v. Barnard*, 1 M. & W. 101; *Haslock v. Ferguson*, 7 A. & E. 86; *Swann v. Phillips*, 8 A. & E. 467. As to declarations for deceit in general, see the notes to the precedents, *ante*, 511, "*False Warranties, &c.*" and 8 Wentw. Ind. 28, 29; Com. Dig. Action for Deceit, F. 2; Bac. Ab. Action on Case, E.; deceit on a sale,

12 East, 632; see also 7 Price, 544. A representation made by defendant as to the credit of a firm in which he was a partner, has been held to be a representation as to credit of "another person" within the meaning of 9 Geo. 4, c. 14, s. 6. *Devaux v. Steinkeller*, 6 Bing. N. C. 84; 8 Dowl. 33, S. C.

(o) As the improper motive is the gist of the action, the allegation of the *scienter* is in this case material, though we have seen in the case of warranty it is otherwise, *ante*, 511, *in notis*; and Com. Dig. Action on Case for Deceit, F. 2; 6 Bing. 396. The term "falsely," or "fraudulently," would, however, be sufficient, *id.*; 1 Saund. 242 a, note 2; 1 East, 563.

(p) Though the 9 Geo. 4, c. 14, s. 6, requires the representation to be in writing, signed by the defendant, yet it should seem this averment is unnecessary; 1 Saund. 276, note 1; 6 Bing. 629.

(q) Some loss or damage must be averred and proved; 2 Marsh. 219.

DECEIT.

made and given by the defendant to the said G. H. as aforesaid, the plaintiff, not knowing to the contrary, but believing therefrom that the said E. F. was a man in good circumstances, and fit to be trusted as aforesaid, afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the — day of —, then next following, was induced to give credit to the said E. F. and did then sell and deliver to him divers goods on credit to a large amount, to wit, to the amount of £—; whereas in truth and in fact [*here negative the truth of defendant's representations, as thus*, that the said E. F. at the time of the defendant so making and giving the said representation and affirmation to the said G. H. as aforesaid, was in bad and insolvent circumstances, and not fit to be trusted with goods on credit; and whereas in truth and in fact the defendant did not at that time do business with the said E. F.; and whereas in truth and in fact the defendant did not believe the said E. F. to be a good man, but on the contrary thereof at that time well knew the said E. F. then was in bad and insolvent circumstances, and not fit to be trusted with goods on credit.] And the plaintiff further says that the said several sums of money are still wholly due and unpaid to the plaintiff, and by means of the defendant's said false and deceitful representation he the plaintiff is likely wholly to lose the same.

For misrepresenting the character of a person whom plaintiff in consequence employed as his agent. (r)

For that whereas the plaintiffs, before and at the time of the committing of the grievances hereinafter mentioned, carried on, and from thenceforth hitherto had carried on, trade and business as dealers in tea and other goods, whereupon the defendant, heretofore, to wit, on &c., contriving, and fraudulently intending craftily and subtly to deceive and injure the plaintiffs, and to induce them to employ a certain person, to wit, one J. J. as their agent in the said business at Manchester, in the county of Lancaster, to obtain and receive orders for goods to be supplied by them, and to receive and collect money on their account, in the way of their said business, for commission and reward in that behalf, falsely, fraudulently and deceitfully represented and asserted to the plaintiffs, that the said J. J. had then an excellent connection in that line at Manchester and the neighbourhood, and that the house for which he had done business there was no longer able to execute his extensive orders. By means and in consequence of which representation, the plaintiffs, not knowing to the contrary, but believing therefrom that the said J. J. had, at the time of such representation, an excellent connection in the line of such agency as aforesaid, at Manchester aforesaid, and had obtained extensive orders there for some house, were induced to hire and engage, and did afterwards, to wit, on the — day of —, in the year aforesaid, hire and engage the said J. J. as such agent in their said business at Manchester aforesaid, for commission and reward to him payable in that behalf, and did instruct and authorize him in that capacity to obtain and take orders for the sale and supply of goods by the plaintiffs in the said business, and to collect and receive money for and on account of the plaintiffs in the way of their said business. And the said J. J.

(r) This was the form adopted in 6 Bing. 396; 7 Bing. 105, S. C., and in which action the plaintiff succeeded; see the note, *ante*, 522, n. (n).

under and by virtue of that employment, did afterwards, to wit, on the day and year aforesaid, obtain and take orders for the sale and supply of goods by the plaintiffs in the said business, to divers persons, to a large amount and value, and to collect and receive for and on account of the plaintiffs, in the way of the said business, from divers persons, divers sums of money; whereas in truth and in fact, at the time the defendant so represented and asserted as aforesaid, the said J. J. had not an excellent or any connection in the line of such agency at Manchester aforesaid or its neighbourhood, as the defendant then well knew. And whereas in truth and in fact, at the time last aforesaid, the said J. J. had not obtained extensive orders, or any orders, at Manchester aforesaid, for any house whatsoever, as the defendant then well knew. And the plaintiffs in fact say, that the said J. J. for want of a good and sufficient connection in the line of such agency at Manchester aforesaid and its neighbourhood, did, under and by virtue of his said employment, obtain orders for the sale and supply of goods or credit by the plaintiffs in the said business, to divers customers of worse and less respectable characters and circumstances than he otherwise would have done, and did thereby induce the plaintiffs, who were ignorant of the character and circumstances of such customers, to sell to them on credit, and supply them with goods pursuant to such orders, such goods being in the whole of large value, to wit, of the value of £2000, and although the prices for which those goods were sold ought long since to have been paid and satisfied to the plaintiffs, yet those customers, by reason of such their characters and circumstances, have hitherto refused and neglected to pay for the same, and the said last-mentioned goods were wholly lost to the plaintiffs. And the plaintiffs further say, that the said J. J. contrary to his duty as such agent, has made away with and converted to his own use, and has not paid or accounted for to the plaintiffs divers large sums of money, collected and received by him as such agent as aforesaid, amounting in the whole to a large sum, to wit, £2000, which was thereby wholly lost to the plaintiffs. And the plaintiffs further say, that the said J. J. contrary to his duty as such agent, has neglected and refused to render due and sufficient accounts to the plaintiffs of divers large quantities of their goods sold by him, and of the prices of other of their goods which came to his possession as such agent as aforesaid, the value thereof amounting in the whole to a large sum, to wit, £2000, which goods were thereby wholly lost to the plaintiffs. [*The second and third counts in the original declaration differed from the first in stating more generally the representation made by the defendant to the plaintiffs, and their consequent employment of J. J. The gravamen in the fourth count was, that the defendant, at the time he recommended J. J. as a desirable agent, knew that he had £800 to pay without any means of doing so, and that J. J. being employed by the plaintiffs, failed to account to them. The fifth count stated, that defendant requested plaintiffs to employ J. J. as an agent; it then set forth in detail certain embarrassments which J. J. was labouring under at the time, of which it was material they should have been informed, and which the defendant, although it was his duty to inform them, wrongfully, deceitfully, wilfully and fraudulently withheld and concealed from them, per quod they employed and were injured by J. J. (nearly as in the first count.) There were four other counts, alleging this concealment in various ways.*]

DECEIT. *Commencement, ante, 13.]* For that whereas heretofore and before the committing of the grievances by the defendant hereinafter mentioned, to wit, on &c., a certain publication had been printed and published, purporting to be a copy of a certain deed, bearing date the day and year aforesaid, and purporting to contain, amongst other things, a recital of the said deed, that the public having derived great benefit from the establishment of a society known by the name or style of the Norwich Union Society, formed for the purpose of the insurance of houses, buildings, goods, merchandizes and effects from loss or damage by fire; and that it appeared from mature consideration, that many advantages and great benefits might arise and be secured to great numbers of persons in particular situations in life and circumstances of fortune, from the establishment of a society to be composed of such persons as should be qualified and willing to become mutual contributors for equitable insurances on lives and survivorships, upon premiums proportionable to the chance of death attending the age of the life to be insured, and to the time for which such insurance was to be continued: and for granting and selling annuities for life or lives to any person or persons for a gross sum in hand paid; that it was then further stated by the said indenture, that they, the said parties, whose names and seals were thereunto subscribed and affixed, being willing and desirous to procure every of them to themselves respectively, or to their several and respective executors, administrators or assigns, and to insure to others who should unite themselves with them, the advantages and benefits that might arise and be had from establishing themselves into a society for effecting equitable insurances on lives and survivorships, &c., did thereby consent, promise, agree, undertake and covenant, every of them for themselves respectively, to and with all and every the others of them, to become by mutual contributions insurers on lives and survivorships, and grantors of annuities, and to become members of, and to enter and erect themselves into a society by the name of the Norwich Union Society or Union Office, for insurances on lives, &c. upon such terms, premiums and conditions, and with and under such constitutions, laws, rules and regulations as should be thereafter in the said indenture expressed, declared and provided for, and for such time and term to continue members thereof as should be signified in the policies of insurance to be made out and delivered to every of them respectively at the time, and in the manner thereafter for that purpose mentioned; and that for the better forming, fixing and establishing the said society, and governing and regulating the same, and the proceedings thereof, and the more effectually to make provision for producing and securing to them the several good and beneficial ends and purposes thereby intended, that they, the subscribers to the said indenture consented, and severally covenanted, promised, agreed and undertook, every of them for themselves respectively, to and with all and every of the others of them, to observe, perform, abide by, conform to, fulfil and keep all and singular the articles, clauses, provisions, agreements, &c. thereafter mentioned and contained, and amongst others the following, that is to say, [*Here several provisions and rules were set out,*

Against a secretary of an insurance company for misrepresentation. (s)

(s) See the form, *Pontifax v. Bignold*, 9 Dowl. 860.

the material parts of which may be sufficiently collected from the breaches.]

And the plaintiff further saith that afterwards, to wit, on the day and year first aforesaid, a certain society was constituted for the purpose aforesaid, and falsely pretended and assumed to be constituted and conducted according to the deed so recited and set forth in the said publication; and before the committing of the grievances hereinafter mentioned, to wit, on &c., he the said defendant, then being and acting as secretary of the said society, did issue, circulate and distribute for and in the name of the society so falsely pretending, &c. and then called and known by the name of the Norwich Union Life Insurance Society, a certain prospectus or printed statement of the funds and regulations of the said society, and of the bonuses that had been declared, the amount of premium deposited by the members at various periods since the formation of the said society up to the year 1829, which said prospectus, &c. contained, among other things, the statements following; that is to say, that the first addition to the sums insured in the said society was made on the 28th June, 1816, when a bonus of twenty per cent. was declared on the amount of premiums deposited by the members insured previous to July, 1815; that the second addition, assigned on the 28th July, 1823, was twenty-four per cent. upon all premiums deposited prior to July, 1822; and that the third addition was declared on the 29th August last, and was twenty-five per cent. on all premiums deposited prior to July, 1829, making a total addition of £69 per cent. on all insurances effected prior to 1815, and of £49 per cent. prior to 1822. And the plaintiff says that afterwards, and before the committing of the several grievances by the defendant hereinafter mentioned, to wit, on the 9th of July, 1831, he the said plaintiff, then being desirous of effecting an insurance with the said company, &c. did apply to the defendant so being secretary, &c., for information about the same, and did inquire of the defendant, and request him the defendant to inform him the plaintiff, whether the above recited articles, provisoes, powers, conditions, laws, constitutions, ordinances, regulations and agreements contained in the said deed of settlement, as set forth in the said publication, had been duly performed, complied with, observed, kept and fulfilled, and whether the above recited statements concerning the funds and pecuniary affairs and prosperity and bonuses of the said society, so contained in the said prospectus or printed statement of the funds and regulations of the said society as aforesaid, were true and correct; nevertheless the defendant well knowing the premises, and that the above recited articles, &c. had not nor had any of them been duly complied with, &c. and that the said recited statements, &c. were not, nor were any or either of them strictly true and correct, but contriving, and fraudulently intending craftily and subtly to deceive and injure the plaintiff in this behalf, on the day and year last aforesaid, falsely, fraudulently and deceitfully, in answer to the said inquiries so put to him by the plaintiff as aforesaid, did represent and affirm that the above recited articles, &c. had and each and every of them had been duly performed, &c. and that the above recited statements, &c. were, and each and every of them was strictly true and correct; by means and in consequence of which representation, &c. so made and given by the defendant to the said plaintiff as aforesaid, the plaintiff not knowing to the contrary, but believing thereupon that the said society was in the

DECEIT.

condition and in the circumstances and state so described, &c. by the defendant, and that its affairs were duly, lawfully and regularly administered and conducted, according to and in conformity with the several above recited articles, &c., afterwards, to wit, on the 11th July, 1831, made and entered into a certain policy of insurance with the said society, on his the plaintiff's life, upon the terms therein mentioned [*profert*], and paid thereon, according to the terms of the said policy, to the said society when the same became due, divers sums of money, to wit, &c.; whereas in truth and in fact the said defendant well knew at the time of making the said representations and affirmations, that the said recited articles, &c. had not been nor were any of them performed, &c. in this, to wit, that the said trustees had not nor did choose new trustees to supply such vacancies in their number as had from time to time occurred by death, resignation or otherwise, but on the contrary thereof, &c. [*Breaches of the other rules were then alleged, with regard to the holding of meetings by the directors for the various purposes of the society.*] And it was further stated, that the securities taken by the society were not taken in the names of the trustees or any four of them, but that securities to a large amount were taken in the name of the defendant as secretary; that the defendant so being secretary had omitted to see that the orders of the directors, with regard to the funds of the society, had been carried out, and that he did not once in two years, between the months of June and September, prepare an account of the state of the society's funds, &c.; that no general meeting of the members of the society was called, as by the deed was required; but on the contrary thereof, although no such meeting was called, and although the funds of the society were not more than sufficient to pay the claims made, or liable to be made, upon the society, yet afterwards, and before the committing of the grievances, &c., to wit, on the 29th August, 1830, a certain dividend of supposed surplus was declared, &c. without reserving one-fifth part of such surplus to be funded for the purpose of accumulating, and forming a permanent capital to answer the demands that might be made upon the society, in case of any extraordinary mortality amongst the members, &c. And whereas in truth and in fact the said above recited statements concerning the funds and pecuniary affairs and prosperity of the said society, so contained in the said prospectus, &c. were not each or any of them strictly true, and in this, to wit, that the third addition to the sums insured, which was declared on the 29th of August, 1830, of £25 per cent. on all premiums, &c. was in truth a false and fraudulent addition, &c.; by means whereof, and of the said false and fraudulent misrepresentation and deceit of the defendant, the plaintiff says that he has been defrauded and deceived in making and effecting the said policy, and in making the said payments of the said premiums from time to time, and the said policy of insurance is of much less value to the said plaintiff, than if the said representations of the defendant had been true in substance and in fact, to wit, £1000 of less value, and by means whereof the said plaintiff is likely to lose the whole benefit of his said policy of insurance, and of the said sums of money so from time to time paid by him as aforesaid to the said society as premiums for the same, to the damage of the plaintiff of £3000, &c.

FOR NEGLIGENCE IN DRIVING CARRIAGES.

FOR
NEGLECT
IN DRIVING
CARRIAGES.

Commencement, ante, 13.] For that whereas the plaintiff heretofore, to wit, on &c., was lawfully possessed (x) of a certain carriage, to wit, [a chaise] to wit, of the value of £—, and of a certain horse, [or “divers, to wit, — horses,”] then drawing the same, and in which said carriage the plaintiff was then riding in and along a certain public and common highway; and the defendant was also then possessed of a certain other carriage, and of a certain other horse, [or “divers, to wit, — horses,”] drawing the same, and which said carriage and horses of the defendant were then under the care, government and direction of a certain then servant of the defendant, who was then driving the same in and along the said highway. Nevertheless the defendant then by his said servant so carelessly and improperly drove, governed and directed his said carriage and horses, that by and through the carelessness, negligence and improper conduct of the defendant by his said servant in that behalf, [one of the hind wheels of] the said carriage of the defendant then ran and struck with great force and violence upon and against the said carriage of the plaintiff, and thereby then crushed, broke to pieces, damaged and destroyed the same, [and one of the wheels, and the splinter bar, and the shafts thereof,] and the said carriage of the plaintiff thereby then became and was rendered of no use or value to the plaintiff, and thereby the plaintiff was then cast out and thrown with great force and violence from

Against the owner of a coach for the negligence of his servant in driving the same against plaintiff's chaise. (u)

(u) See forms, 8 Went. Index, 47; 2 New Rep. 117, 446; 6 Car. & P. 501; and see the forms, *ante*, 486, of declarations against coach proprietors for overloading and improper driving; see also *ante*, vol. i. 141 to 144. The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; *Davies v. Mann*, 10 M. & W. 546. The law or usage of the road is not always the criterion of negligence; therefore, where the defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damage, it was held a question for the jury, to decide whether there was negligence, without regard to the law of the road; 2 D. & R. 255; 5 Esp. 273, 35, 44. But though the rule of the road is not uniformly to be adhered to, if by departing from it an injury can be avoided, yet in cases where parties meet on a sudden, and an injury result, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right side had ample means and opportunity to avoid it; 3 Car. & P. 544. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass his horse was killed, Lord Kenyon, C. J., held, that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a

verdict for the plaintiff, which the Court of King's Bench refused to disturb; 2 Esp. Rep. 685. As to the rule where ships meet, see 3 Car. & P. 528. As to the right of the party to bring trespass or case where the act for which he sues, although committed with immediate force, is negligent, not wilful, see *Moreton v. Hardern*, 4 B. & C. 224; *Williams v. Holland*, 10 Bing. 113. The plaintiff may, if he please, bring trespass whenever the injury is immediate though not wilful; but where the injury is wilful and immediate, he must sue in trespass; 6 T. R. 125; 5 T. R. 648. When the action is against a master for the negligent driving of his servant, the action should be case; 1 East, 106, 109, 110; 2 Hen. Bla. 442; 4 B. & A. 590. But where the defendant was sitting by his servant, who was driving him in a gig, the horse ran away, and an immediate injury was done to the plaintiff's property, it was held that the action was properly brought in trespass; *Chandler v. Broughton*, 1 C. & M. 29. The declaration against the master for the act of his servant should not state it to have been committed wilfully, or forcibly, or furiously, but should show that it was committed negligently; see 1 East, 106; and 3 East, 593; 6 T. R. 125; 5 T. R. 648; 4 B. & A. 590. See the form, 2 H. Bl. 442; 6 T. R. 659. The negligence may be stated to be that of the master, without noticing the servant, but the above form is most explicit, and therefore most approved; 6 T. R. 659; 1 East, 110.

(x) This is sufficient, though the plaintiff only hired the carriage, and furnished the horses; 4 B. & A. 590. See also *Wheatley v. Patrick*, 2 M. & W. 650.

**NEGLIGENT
DRIVING.**

and off his said carriage to and upon the ground there, and by means of the several premises the plaintiff was then greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted; and also by means of the premises was forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of [£10.] in and about the endeavouring to be healed and cured of his said wounds, hurt and bruises occasioned as aforesaid; and also by means of the premises the plaintiff hath paid, laid out and expended divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about the repairing of the said chaise so damaged as aforesaid. [*In the original declaration, in 2 Chitty on Pleading, 5th edit. 711, there was a second count more general; but since the pleading rules, Hil. T. 4 W. 4, reg. 5, more than one count on the same transaction is not admissible.*]

Against the owner of a ship for negligence in the navigation of it, whereby plaintiff's barge was damaged.
(y)

Commencement, ante, 13.] For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter next mentioned, was lawfully possessed of a certain [barge or vessel,] to wit, of the value of £—, then lawfully being in the river [Thames,] and the defendant was also then possessed of a certain other [barge or vessel] in the river aforesaid, and then had the care, direction and management of the same; Yet the defendant not regarding his duty in that behalf, whilst the said [barge or vessel] of the plaintiff so was in the said river, to wit, on &c., took so little and such bad care of his said [barge or vessel] in the direction and management of the same, that the same, by and through the carelessness, misdirection and mismanagement of the defendant and his mariners and servants in that behalf, then with great force and violence ran foul of and struck against the said [barge or vessel] of the plaintiff, and thereby then greatly broke, damaged and injured the same, and thereby divers goods and chattels, to wit, &c. [*specify them, either according to the exact description or as in trover,*] of the plaintiff, to wit, of the value of £—, then being on board of the said [barge or vessel] of the plaintiff, then be-

(y) See the forms, 8 Wentw. Index, 46, 47; 5 T. R. 649; 2 New Rep. 446; 1 B. & P. 472; 8 T. R. 188; Morg. 432, 434; 1 Rich. C. P. 478; Lil. Ent. 38, 180. In an action against the party himself, who has occasioned an injury by improperly driving a carriage, the remedy is *trespass*, or *case*; see last note, and the cases there cited; and the same observation applies to negligence in the navigation of a ship; see the cases referred to on this subject, *ante*, vol. i. p. 141 to 144. The injury may be stated to have been occasioned by the negligence of the defendant himself, though in fact he were not present. This action will not in general lie against the owners or master, if a pilot was on board who had the management of the vessel; see 6 Geo. 4, c. 125,

s. 63; 3 Stark. 12; 7 Taunt. 258; 1 Moore, 4; Holt, C. N. P. 359, S. C.; *Lucy v. Ingram*, 6 M. & W. 302; see the cases in 6 B. & C. 657; 5 B. & C. 156; 2 Bingh. 219; and those collected in 2 Chitty's Commercial Law, 69; as to the evidence of such management, see 7 Taunt. 258, 309. A pilot steering a vessel is liable for an injury occasioned by his own misconduct, though a superior officer be on board; Peake's Rep. 107; 15 East, 384. What owner is liable, 2 New Rep. 182; 1 East, 110; 6 T. R. 659. What remedy in Court of Admiralty, 5 Rob. Rep. 345; 2 Chitty's Gen. Prac. 515; see the rule as to the mode of navigation where ships meet, 3 C. & P. 528.

came and were greatly wetted, damaged and spoiled; and also by reason of the premises, the plaintiff hath been forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended a large sum of money, to wit, the sum of £—, in and about the repairing the said damage so done to the said [barge or vessel] as aforesaid, and also by means of the premises the plaintiff lost and was deprived of the use of his said [barge or vessel] for a long space of time, to wit, for the space of —, and thereby lost and was deprived of all the profits and advantages which during that time he might, and also otherwise would have derived and acquired from the use of his said [barge or vessel]. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, it was usual to add other counts, see 2 Chitty on Pleading, 5th edit. 713, but now only one count is admissible.*]

NEGLIGENT
DRIVING.

FOR NEGLIGENTLY STEERING VESSELS.

FOR
NEGLIGENTLY
STEERING
VESSELS.

Middlesex, to wit. Be it remembered, that Sir William Garrow, Knight, attorney-general of our present sovereign lord the king, who prosecutes for our lord the king in this behalf, comes in his own proper person before the barons of this Exchequer, at Westminster, on the — day of — in this same term, and for our said lord the king, gives the Court to understand and be informed, that our said lord the king, before and at the time of the committing of the grievance hereinafter next mentioned, to wit, on &c., was lawfully possessed of a certain ship or vessel called the *Semiramis*, and of the tackle, apparel and furniture thereof, of great value, to wit, of the value of £—, as of his own proper ship, goods and chattels, which said ship or vessel, then and at the time of the committing of the grievance hereinafter next mentioned, was navigating and sailing on the high seas near to the island of St. Helena; and the said attorney-general of our said lord the king, for our said lord the king, further gives the Court here to understand and be informed, that at the time of committing the grievance hereinafter next mentioned, one J. M., one R. M. and one H. R. were the owners of a certain ship or vessel called the *Vansittart*, which said last-mentioned ship or vessel, a little before and at the time of committing the grievance hereinafter next mentioned, was also navigating and sailing on the high seas aforesaid, near to the said ship or vessel of our said lord the king, called the *Semiramis*, and was then under the care, direction and management of the said H. R. and of certain servants of them the said J. M., R. M. and H. R.: and the said attorney-general of our said lord the king, for our said lord the king, further gives the Court here to understand and be informed, that the said J. M., R. M. and H. R., then by the said H. R. and their said servants, so incautiously, negligently, unskilfully and carelessly managed, conducted, navigated, steered and directed their said ship or vessel, and took such bad care in the management, conducting, navigating, steering and directing thereof, that the said ship or vessel of them the said J. M., R. M. and H. R. so navigating and sailing as aforesaid, then by and through the

Information by
the attorney-
general against
the owners of a
ship for running
foul of one of
the king's
ships. (z)

(z) See form and note, *supra*; 8 Wentw. 425, 428; 15 East, 384. This information was against the proprietor, who is in general liable for the acts of those whom he employs,

except, as we have before seen, in the case where there is a pilot on board; *supra*, note (y).

NEGLIGENT
STEERING.

Second count.

mere default, and by the negligence, carelessness and unskilfulness of the said H. R. and the said servants of them the said J. M., R. M. and H. R. did then with great force and violence run foul of, upon and against the said ship or vessel of and belonging to our said lord the king, and struck against the same, by means whereof the said ship or vessel of and belonging to our said lord the king was then broken, split, fractured and very much damaged and spoiled in the hull, rigging and other parts thereof, and in great danger of sinking; and the said attorney-general of our said lord the king, for our said lord the king, further gives the Court here to understand and be informed, that by reason of the premises aforesaid, our said lord the king was forced and obliged to lay out and expend, and actually did lay out and expend, a large sum of money, to wit, the sum of £—, in and about the repairing and amending the said ship or vessel of and belonging to our said lord the king. And the attorney-general of our said lord the king, for our said lord the king, further gives the Court here to understand and be informed, that our said lord the king, before and at the time of the committing of the grievance hereinafter next mentioned, to wit, on &c., was lawfully possessed of a certain other ship or vessel called &c., and of the tackle, apparel and furniture thereof, of great value, to wit, of the value of £—, as of his own proper ship, goods and chattels, which said last mentioned ship or vessel, then and at the time of committing the grievance hereinafter next mentioned, was navigating and sailing on the high seas near to the island of St. Helena. And the said attorney-general of our said lord the king, for our said lord the king, further gives the Court here to understand, &c. [*stating the injury to have been occasioned by the defendants themselves. Third count, stating the injury to have been occasioned by the defendant's servants, and whilst the vessel was in their custody. The information concludes as follows:*] To the damage of our said lord the king of £—, wherefore the said attorney-general of our said lord the king prays the advice of the Court here in the premises, and due process of law to be made against the said J. M., R. M. and H. R. in this behalf, to answer our said lord the king of and in the premises aforesaid.

W. GARROW.

ILLEGAL
DISTRESSES.

ILLEGAL DISTRESSES.

At common law, though a distress for rent or damage feasant were legal in its inception, yet if there were any subsequent irregularity, the parties became trespassers *ab initio*, Bac. Ab. Trespass, B.; 8 Co. 146. And in the case of a distress for damage feasant this is still the law, *Wilder v. Skeen*, 8 A. & E. 547; but the 11 Geo. 2, c. 19, s. 19, alters the common law with respect to distress for *rent*, and enacts, that “where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distressing, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she or they shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff

or plaintiffs: Provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she or they shall be paid his, her or their full costs of suit, and have all the like remedies for the same as in other cases of costs." Therefore since this act, trover will not lie where the distress has been merely irregularly sold, 1 Hen. Bla. 13; nor trespass, unless for some act which of itself might be the subject-matter of that form of action; 2 Campb. 115. If, however, the distress were illegal in its inception, see *Ireland v. Johnson*, 1 Bing. N. C. 162, or if the person making the distress turned the tenant out of possession, or continued an unreasonable time more than five days in possession, or distrained after a tender of rent, trespass may be supported; 1 East, 139; 11 East, 396; 2 Campb. 115, S. C.; 4 B. & A. 208; 3 Stark. 171; but the tenant may waive the trespass and declare in case; 4 B. & A. 208; 2 D. & R. 256; 1 B. & C. 145; 3 Stark. Rep. 171, S. C. When trover lies, see 6 Car. & P. 484. A tenant whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action on the case under the 2 W. & M. sess. 1, c. 5, against the landlord or his bailiffs for selling the same before five days had elapsed after the seizure, as such sale was altogether void; 3 B. & A. 470. The sale of goods under a distress, after service of an irregular notice of replevy, without removing the goods off the premises, is not a sufficient conversion to enable the tenant to maintain trover; 2 M. & R. 313. A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies; 2 C. & P. 374. A right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction for the wrong done; therefore, in the case of an excessive distress for rent, a tenant does not waive his right of action, though he afterwards enters into a written agreement with his landlord concerning the sale of the effects seized; 4 D. & R. 539; 2 B. & C. 821, S. C.; and see 1 Bing. 405. In declaring specially for an irregularity, it is not necessary to state a demise, or that the goods were distrained for rent in arrear, and it is sufficient to allege that the goods were taken *nomine districtionis*; 4 Mod. 231. By section 20 of the above act, no tenant shall recover in an action on the case if tender of amends have been made before action brought. If the judge certify under 43 Eliz. c. 6, it will deprive plaintiff of costs; 5 B. & A. 796. See further as to the law on this subject, Selw. N. P. 10th edit. tit. *Distress*.

It has been held that the plaintiff ought not to join appraisers or servants with the landlord, merely with a view to exclude their evidence; *Child v. Chamberlain*, 6 Car. & P. 213, and 6 Car. & P. 484; and Parke, J. said, "The fair way is to bring the action against the landlord, or at most against the landlord and the broker only, and not to include the appraisers or the man in possession."

Since the pleading rules Hil. T. 4 W. reg. 5, only *one count* on the *same cause of action* is admissible, though *several breaches* are allowed. The rule expressly orders, that "in actions of *tort* for *misfeasance*, several counts for the *same injury*, varying the description of it, are not to be allowed;" and in the like actions for *nonfeasance*, several counts founded on varied statements of the *same duty* are not to be allowed. It is to be observed that the following forms relating to distresses are for injuries separate and distinct in

As to the number of counts in actions relating to distresses.

ILLEGAL
DISTRESSES.

law, and not mere *variations* in the description of the *same* injury, though frequently arising out of the same distress; that consequently, if such combination of injuries should in fact have been committed, then all or many of the counts might be introduced without any infraction of the above rule. Still, however, in observance of the *conciseness* obviously intended to be encouraged, and in some cases so imperatively enjoined, it will be advisable, when practicable, to describe all or most of such injuries in one count, in the order of time as they occurred, so as to avoid a repetition of the same allegations; see a suggested form of such a count, *post*, 545, at the conclusion of the following forms.

On 2 W. & M.
sess. 1, c. 5, s. 5,
for double value
of goods dis-
trained and sold,
where no rent
was due.(a)

Commencement ante, 13.] For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter next mentioned, held and enjoyed certain premises, with the appurtenances, (b) as tenant thereof to the defendant [or E. F. (c)] at and under a certain rent therefore payable by the plaintiff, to wit, the rent or sum of £—— per annum. Yet the defendant, not regarding the statute in such case made and provided, but contriving and wrongfully and injuriously intending to harass, oppress, and injure the plaintiff in this behalf, heretofore, to wit, on &c. [the day of distress or about it,] wrongfully and injuriously seized, took and distrained, in and upon the said premises, with the appurtenances, divers goods and chattels, to wit, &c. [here specify the goods as in *trover*, *post*. If they have been already set forth in a prior count, then say "goods and chattels of the like number, quantity, quality, description and value, as those in the —— count mentioned," and then omit any other statement of value,] of the plaintiff, of great value, to wit, of the value of £——, and afterwards, to wit, on the day and year aforesaid, sold (d) the said goods and chattels as such distress as aforesaid, for certain rent, to wit, the sum of £——, then pretended by the defendant to be in arrear and due to him [or E. F.] for the said demised premises, with the appurtenances; whereas in truth and in fact, at the time of the making of the said distress and the said sale as aforesaid, *no rent was in arrear or due* to the defendant [or E. F.] for or in respect of the said premises, with the appurtenances, contrary to the form of the statute in that case made and provided. [If the above count be framed in case, a count in *trover* might be added, and if in *trespass*, a count *de bonis asportatis*, and conclude, if in case, as *ante*, 430.

No rent in
arrear.

(a) When *no rent whatever* was due at the time of the distress, then the owner of the goods distrained might, in an action of *trespass* or *case*, recover double the value of the goods, and full costs, under the 2 W. & M. sess. 1, c. 5, s. 5. See the form 8 Wentw. 429; 9 *Id.* 84; and *id.* Index, viii.; but the terms of the tenancy appear to be there stated more fully than is necessary; *Bristow v. Wright*, Dougl. 665; 5 T. R. 497; 5 Esp. Rep. 33. See *Salter v. Brunson*, 4 Mod. 231, in which the declaration was more concise than that above, and it was held unnecessary to state a demise in form, and sufficient to say, that the goods were taken "*nomine districtionis*;" Com. Dig. Distress, D. 9. The tenancy must be accurately stated, and a misstatement of who

was the landlord would be fatal. The landlord and tenancy must, if described at all, be accurately stated; *Ireland v. Johnson*, 1 Bing. N. C. 166.

(b) There is no occasion to state the situation of the premises, but if stated, a variance in the description would be fatal, 2 Moore, 587; so if the landlord or tenancy be misdescribed it is fatal; *Ireland v. Johnson*, 1 Bing. N. C. 166.

(c) If the tenancy is disputed, omit these words, "as tenant, &c."

(d) From the statute 2 W. & M. sess. 1, c. 5, s. 5, it should seem a *sale* would be necessary in order to support an action on the case.

Commencement ante, 13.] For that whereas the defendant, heretofore, to wit, on &c. took and distrained the beasts of the plough and sheep of the plaintiff, to wit, &c. [*specify them as in trover*] of great value, to wit, of the value of £—, then being in and upon certain land and premises, with the appurtenances, of the plaintiff; (f) and whereby and wherewith he the plaintiff then tilled his said land, not for damage feasant, but for certain rent, to wit, the sum of £—, then alleged to be due and owing from the plaintiff to the defendant [or E. F.] for and in respect of the said land and premises, with the appurtenances, although there were then other (g) goods and chattels of the plaintiff in and upon the said land and premises, with the appurtenances, not being beasts of the plough or sheep, sufficient for a reasonable distress for the rent aforesaid, and the defendant afterwards, to wit, on the day and year aforesaid, sold the said beasts of the plough and the said sheep, and converted and disposed of the money arising from the sale thereof to the use of the defendant, contrary to the form of the statute in such case made and provided. [*Add a count in trover, and conclude as ante*, 430.

ILLEGAL
DISTRESSES.

On Stat. Marl. 51 H. 3, c. 4, for distraining beasts of the plough and sheep, there being other goods sufficient to distress. (e)

For that whereas, before and at the time of committing of the grievances by the defendant as hereinafter mentioned, the plaintiff was a [working carpenter,] and the trade and business of such [working carpenter,] then exercised and carried on in and upon certain premises, with the appurtenances, and which the plaintiff then held as tenant thereof to the defendant [or E. F. (i)] at and under a certain rent, whereof, at the time of committing the grievance hereinafter mentioned, a small sum, viz. the sum of £—, was alleged to be due and in arrear to the defendant [or E. F.]; and whereas also before and at the time of the committing of the said grievance hereinafter next mentioned, the plaintiff was lawfully possessed of certain [carpenter's] tools and utensils in the way of his trade and business, duly and from time to time to be used by the plaintiff in the way of his said trade and business, viz. 500 carpenter's tools, ten work benches [*here enumerate the tools and utensils, according to the exact description, or as in trover.*] of great value, to wit, of the value of £—, and which said tools and utensils were, at the time of the committing of the said grievance hereinafter next mentioned, in and upon the said premises, with the appurtenances; and whereas also, at the time of committing the grievance hereinafter next mentioned, there were divers other goods and chattels of the plaintiff upon the said last-mentioned premises, with the appurtenances, of great value, to wit, of the

For distraining tools of trade when sufficient other goods on premises to be answerable. (h)

(e) See form, 8 Wentw. 430, 443, 444, and Bradby, 262. The first was in trespass, and both the forms conclude against the peace. As to the law, see Com. Dig. Trespass, C. 4; 4 T. R. 565, 569; 2 Moore, 491; 3 Id. 96; 8 Taunt, 431, 742; 1 Bott, 244; Gilb. Dist. by Hunt, 36, &c.; Co. Lit. 47 a, n. 117; 1 Burn, J. 26th edit. 978. The tenant cannot support this action if there was reasonable ground for supposing that there was not a sufficient quantity to distress without taking beasts, &c.; 6 Price, 3; 2 Chit. Rep. 167; and the distrainer would not in such case be

bound to sell other goods first; 6 Price, 3. The declaration need not show that there was a sufficient distress of other goods; Dyer, 312; Sid. 348. An action is not maintainable for distraining beasts of the plough when there is no other sufficient subject of distress on the premises besides growing crops; *Piggott v. Birtles*, 1 M. & W. 441.

(f) See the preceding page, n. (b).

(g) This is not necessary; see Dyer, 312; Sid. 346; but *quære*, see 1 M. & W. 441.

(h) See the notes to the preceding form.

(i) See *ante*, 534, n. (b).

ILLEGAL
DISTRESSES.

value of £——, and sufficient for a reasonable distress for the said rent, and to pay and satisfy the same and all the costs and charges of such a distress and expense incidental thereto, and which the defendant at the time of the committing of the said grievance hereinafter next mentioned, could and might have taken as a distress for such last-mentioned arrears of rent. Yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in the way of his said trade and business, heretofore, to wit, on &c. [*day of distress or about it*] wrongfully and unjustly took and distrained the said tools and utensils of the plaintiff in the way of his said trade and business, as a distress for the said arrears of rent aforesaid, and afterwards, to wit, on the day and year aforesaid, sold and disposed of the said tools and utensils for a much less sum of money than the same were reasonably worth, by means whereof the plaintiff wholly lost and was deprived of the use of the said tools and utensils in the way of his said trade and business, and sustained great loss and inconvenience from the want of the same.

For distraining
for more rent
than was due.
(k)

Commencement as ante, 13.] For that whereas the plaintiff, before and at the time of the committing the grievance hereinafter next mentioned, held and occupied certain premises, with the appurtenances, (l) as tenant thereof to the defendant [*or "E. F."*] (m) at and under a certain rent therefore payable by the plaintiff for and in respect of the same. Yet the defendant contriving and maliciously intending wrongfully and unjustly to injure the plaintiff in this behalf, heretofore, to wit, on &c., falsely and maliciously pretending that a certain large sum of money, to wit, the sum of £——, (n) was then due and in arrear from the plaintiff to the defendant [*or "E. F."*] for rent of the said premises, with the appurtenances, wrongfully and unjustly seized and took certain goods and chattels, to wit, &c. [*here specify them as in trover. If they have been already specified in a former count then say, "goods and chattels of the like number, quantity, quality, description*

(k) This action is at common law, and is not founded upon the statute 52 Hen. 3, c. 4, for an excessive distress, as in the next form, nor on the statute 2 W. & M. c. 5, s. 5; Stra. 851. See the notes to the next form. Where a tenant, shortly after he had paid half a year's rent to his landlord, due at Lady-day preceding, was called upon by the agent of the ground-landlord for ground-rent due previously to Lady-day, and which the landlord had refused to pay: it was held that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of the ground-landlord gave him time for that purpose, as the tenant was liable to be distrained on for such rent: held also, that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground-rent was paid; and the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear:

held, that the tenant was entitled to recover in an action on the case for a wrongful distress; and that a count stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was sufficient; 2 M. & P. 732; 5 Bing. 406, S. C. Where a landlord distrains for more than is due for rent, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due, and it is no defence that after distress and notice thereof, and before the sale, the landlord served a second notice on the tenant stating the amount really due, and that the distress was taken for that amount only, and would be sold unless that amount was paid; *Taylor v. Henniker*, 12 A. & E. 488; 4 P. & D. 242, S. C.

(l) *Ante*, 534, note (b).

(m) If the plaintiff disputes the tenancy, omit these words, "to the defendant [*or E. F.*]"

(n) The plaintiff need not prove the precise sum stated; see 1 Bing. 401.

and value as those in the said — count mentioned," and omit the statement of value afterwards,] of the plaintiff, then found and being in and upon the said premises, with the appurtenances, of great value, to wit, of the value of £——, as a distress for the said sum of money so pretended to be due and in arrear as aforesaid, and under that pretence, afterwards, to wit, on the day and year aforesaid, sold and disposed of the said goods and chattels for and towards paying and satisfying the said alleged arrears of rent and the costs and charges of the said distress, [or if the goods were not sold, but the plaintiff paid money to redeem them, then say, "kept and detained the said goods and chattels of the plaintiff from the plaintiff, for a long space of time, to wit, for the space of — days then next following, and until the plaintiff, in order to regain the possession of the said goods and chattels, was forced and obliged to pay and did then pay to the defendant the said pretended arrears of rent, and a large sum of money, to wit, the sum of £——, for the costs and charges of the said distress and expenses incident thereto."'] Whereas in truth and in fact, at the time of the making of the said distress as aforesaid, and during all the time aforesaid, a small part only, to wit, the sum of £——, (n) of the said sum of money so pretended to be due and in arrear as aforesaid, was due and in arrear from the plaintiff to the defendant for the rent of the said premises with the appurtenances. [A count for an excessive distress for the rent really due, as in the next form, may be added.

ILLEGAL
DISTRESSES.

Commencement as ante, 13.] For that whereas the plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, held and enjoyed certain premises, with the appurtenances, (p) as tenant thereof to the defendant [or "E. F."] (q) at and under a certain rent therefor payable by the plaintiff to the defendant for the same, of which said rent, at the time of the committing of the grievance hereinafter next men-

For taking an
excessive dis-
tress for rent on
stat. Marl. 52
Hen. 3, c. 4. (o)

(n) Ante, 536, note (n).

(o) See also 51 Hen. 3, c. 4; Gilb. Dist. by Hunt, 63 to 68; the remedy must be on the above statute, 2 Stra. 851; 3 Lev. 48; 2 Ken. 204; and not by trespass or trover, *id. ibid.*; but see the exceptions, 1 Burr. 582; 1 Hen. Bla. 13; 9 East, 298. Case is maintainable, even though the tenant had tendered the rent due to his landlord before the distress was levied; 2 D. & R. 256; 1 B. & C. 145; 3 Stark. 171, S. C. In such an action express malice need not be proved, but the excess taken must be considerable; 6 Esp. 71; 7 C. & P. 69; and though the warrant be for more than is due, the plaintiff is not entitled to a verdict, unless the goods seized are excessive in regard to the sum really due; *Crowder v. Self*, 2 M. & Rob. 190, Lord Abinger, C. B. It is no bar to this action, that between distress and sale of the goods distrained, the parties came to an arrangement respecting the sale; 1 Bing. 401; 4 D. & R. 539; 2 B. & C. 821, S. C. A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies; 2 C. & P. 374. See a declaration for excessive distress for poor-

rate, *Sturch v. Clarke*, 4 B. & Adol. 113. Overseers acting in disobedience of a regular distress warrant, are not entitled to a demand of a copy of the warrant pursuant to 24 G. 2, c. 44, s. 6; *id. ibid.* A landlord is liable to some damages in an action on the case for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been in replevying the crops; *Pigott v. Birtles*, 1 M. & W. 441. Where a joint tenant is under covenant not to carry off the premises hay and straw made on the farm, the landlord who has seized the hay and straw under a distress may sell it subject to a condition that the purchaser shall consume it on the premises; *Abbey v. Petch*, 8 M. & W. 419.

(p) Ante, 534, note (b).

(q) If the plaintiff dispute the tenancy, omit the words, "to the defendant."

**ILLEGAL
DISTRESSES.**

tioned a certain small sum of money, to wit, the sum of £—, (r) and no more, was due and in arrear from the plaintiff. Yet the defendant, not regarding the statute in such case made and provided, but wrongfully and maliciously contriving and intending to injure and oppress the plaintiff in this behalf, heretofore, to wit, on &c., wrongfully and maliciously took and distrained for the said arrears of rent certain goods and chattels, to wit, &c. [*here specify the goods as in trover. If they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, and description as those in the said — count mentioned,"*] of the plaintiff, of much greater value than the amount of the said arrears of rent, to wit, of the value of £—, and thereby took a great and unreasonable distress for the said arrears of rent, when, at the time of the taking of the said distress as aforesaid, a certain part of the said goods and chattels so distrained as aforesaid, to wit, [one half] thereof, then was of sufficient value to have satisfied the said arrears of rent, and the charges of the said distress, and of the appraisement and sale thereof, contrary to the form of the statute in such case made and provided.

For distraining a second time on the same goods for same rent. (s)

For that whereas, before the committing of the grievances hereinafter next mentioned, to wit, on &c. [*day of distress or about it*], the defendant took and distrained certain goods and chattels of the plaintiff, to wit, &c. [*here set them out as in trover, or if already set forth in a prior count, say, "goods and chattels of the like number, quantity, quality, description and value as the said goods and chattels in the said — count mentioned,"*] under colour and as and for and in the name of a distress for certain rent then alleged to be due and payable to the defendant [*or "E. F."*] for and in respect of certain premises in the possession of the plaintiff; and which said [*last-mentioned*] goods and chattels then and afterwards were of more than sufficient value to have satisfied the said alleged rent, and the costs and charges of and attending such distress, and the sale of the said [*last-mentioned*] goods and chattels under such distress, and incidental thereto; and whereas also, the defendant, having so taken and distrained the said [*last-mentioned*] goods and chattels as aforesaid, then had and retained possession of the same under such distress for a long space of time, to wit, for the space of [four] days then following and afterwards, and at the expiration of that time, to wit, on &c. [*day of quitting possession or about it*] the defendant

(r) The plaintiff need not allege or prove the precise sum due; 1 Bing. 401.

(s) See a form 6 Car. & P. 484. It should seem that this cause of action might be supported under a count in trover. That a party cannot in general distrain twice for the same rent, see *Bradby on Distr.* 130; 1 Burn's J. 26th edit. 988; 17 Car. 2, c. 7, s. 4. But in *Wilson v. Bird*, K. B. Easter Term, 1830, for a fresh arrear of rent, the same goods previously replevied may be distrained. And he may again distrain the same goods for rent subsequently accrued, previously to his executing his *retorno habendo*, without waiving his action against the sureties in the bond, *Hefford v. Alger*, 1 Taunt. 219. Where in case for an irregular distress one of the counts

of the declaration charged that the defendants took and distrained the goods of the plaintiff for rent of more than sufficient value to satisfy the rent and costs and then voluntarily abandoned the same, and afterwards wrongfully, injuriously and vexatiously, again took and distrained the same goods for the same rent, and refused to return the same, and converted &c., it was held on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of the goods was a trespass, yet the plaintiff might bring *case* for the conversion, and that the count was an informal one in case and sufficient after verdict; *Smith v. Goodwin*, 4 Bar. & Adol. 413. See also *Lean v. Caldecot*, 12 L. J. R., N.S., Q. B. 169.

quitted and abandoned the possession of the said [last-mentioned] goods and chattels, and the said distress thereupon; and although the defendant under the said distress, and by virtue thereof, could and might have satisfied the said alleged arrears of rent, and all reasonable and lawful charges in that behalf; Nevertheless the defendant, well knowing the premises, but contriving, and wrongfully intending to injure the plaintiff, afterwards, to wit, on &c. [*day of second distress or about it*], wrongfully, injuriously and vexatiously made a second and another distress upon the said [last-mentioned] goods and chattels of the plaintiff, for the same identical arrears of rent, for and in respect whereof the said distress in this count first mentioned was so made as aforesaid, and then again took and distrained the said [last-mentioned] goods and chattels, and other goods and chattels of the plaintiff, of great value, to wit, of the value of £——, as and for the same rent so pretended to have been due and payable as aforesaid, and not for any more or other or different rent or cause whatever, and then wrongfully and injuriously refused to return the same goods and chattels to, and withheld them from the plaintiff, under the said second distress, for a long time, to wit, for [seven] days then following, and then wrongfully converted and disposed thereof to his own use, although the plaintiff then requested the defendant to deliver the said [last-mentioned] goods and chattels to him the plaintiff.

ILLEGAL
DISTRESSES.

For that whereas the defendant heretofore, to wit, on &c. in the hundred of —, in the county of —, took and distrained divers cattle, to wit, [*here specify the cattle, as in trover; if they have been already specified in a former count, then say, "cattle of the like number, quantity, quality, description and value as those in the — count mentioned," and omit any further statement of value.*] of the plaintiff, of great value, to wit, of the value of £——, as and for and in the name of a distress for certain rent; and the defendant, not regarding the statute in such case made and provided, and contriving to injure and aggrieve the plaintiff, afterwards, to wit, on the same day and year last aforesaid, drove the said last-mentioned distress out of the said hundred in which the said distress was so taken as aforesaid, into a certain other hundred, to wit, the hundred of —, in the county aforesaid, and to a place above three miles, to wit, [twelve] miles distant from the place where the same was so taken as aforesaid, that is to say, to —, in contempt of our said lady the queen and her laws, and against the form of the statute in such case made and provided.

For driving a distress above three miles out of the hundred, 1 & 2 P. & M. c. 12. (t)

Commencement as ante, 13.] For that whereas the defendant heretofore, to wit, on &c., seized and took divers goods and chattels, to wit, &c. [*here*

For impounding goods distrained

(t) See the precedent, Co. Ent. 43 b; Rast. 164; and 2 Taunt. 252. Driving to the next pound in another shire does not make the party a trespasser, although it subjects him to the penalty of the statute; 2 Stra. 1272. By 52 Hen. 3, c. 4, it is punishable to convey the distress out of the county; see 1 Burn's J. 26th edit. 990. Where the distress was taken damage feasant, the party might also proceed on 52 Hen. 3, c. 4. The statute entitles the party aggrieved to £5,

and treble damages; see the statute and notes, 1 Chit. Col. Stat. 660. As to the venue, see 2 Taunt. 252; 2 Campb. 266. No costs on this statute, Hullock, 476; 2 Inst. 284. By the 5 & 6 Will. 4, c. 59, s. 4, parties impounding cattle are required to provide sufficient food for them; and an action of trespass is maintainable for putting animals distrained damage feasant in an improper pound; 8 A. & E. 547.

ILLEGAL
DISTRESSES.
off the premises,
and not giving
the tenant no-
tice. (u)

specify the goods as in trover ; or if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description and value, as those in the — count mentioned," and omit any further statement of value,] of the plaintiff, of great value, to wit, of the value of £—, then found and being on certain premises, with the appurtenances, (x) as and for and in the name of a distress for certain supposed arrears of rent, to wit, for the sum of £—, pretended to be due and in arrear from the plaintiff, for and in respect of the said premises, with the appurtenances, and then carried away and removed the said goods and chattels, and impounded the same off the said premises, with the appurtenances. Nevertheless the defendant, contriving and wrongfully and unjustly intending to injure the plaintiff, and not regarding the statute in such case made and provided, did not nor would give due and proper notice (y) of the said distress, and of the cause of taking the same, or of the place to which the said goods and chattels were removed, to the plaintiff, or leave the same at the said premises, but wholly neglected so to do, and therein failed and made default, contrary to the form of the statute in such case made and provided ; and to the damage, &c.

For refusing to
restore goods
distrained for
rent, on tender
of the rent and
costs. (z)

Commencement as ante, 13.] For that whereas the defendant heretofore, to wit, on &c., had taken and distrained divers goods and chattels, to wit, [*here specify the goods as in trover ; or if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description and value as those in the — count mentioned," and then omit any further statement of value,]* of the plaintiff, of great value, to wit, of the value of £—, there then found and being, as and for and in the name of a distress for certain rent, to wit, the sum of £—, then claimed by the defendant to be due and in arrear from the plaintiff to the defendant, for and in respect of certain premises, with the appurtenances, before then held and occupied by the plaintiff as tenant thereof to the defendant [*or E. F.*];

(u) 2 W. & M. c. 5, s. 2 ; 11 Geo. 2, c. 19, s. 10. As to what notice is necessary, and how to be given, see *Moss v. Gallimore*, Dougl. 279 ; Lord Raym. 54 ; 1 Hen. Bla. 13 ; Gilbert's Distr. by Hunt, 76 ; 9 East, 298. Query, if not in all cases necessary that some notice of the distress should be given, whether there be a sale or removal or not ; Com. Dig. "Distress," D. 7. By the 2 W. & M. c. 5, it must be given before a sale.

(x) *Ante*, 534, n. (h).

(y) Where the distress is on growing corn, &c. as allowed by the 11 Geo. 2, c. 19, s. 8, the tenant must, in pursuance of the 9th section of that act, have notice of the place where such corn, &c. is lodged within a week after such lodging.

(z) The law on this subject is thus laid down by Lord Coke in the Six Carpenters' case, 8 Rep. 146 : Tender upon the land before the distress makes the distress tortious ; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful ; tender after the impounding makes neither the one nor the other wrongful ; for then it comes too late, because the case is put

to the trial of the law, to be there determined. But this statement of the law was, until recently, considered to apply only to distresses at common law, and it was therefore thought that an action was maintainable upon the equity of the statute 2 W. & M. c. 5, for selling goods seized under a distress where a tender of the rent and expenses was made before the sale. However, by the case of *Thomas v. Harries*, 1 M. & Gr. 695 ; *Ladd v. Thomas*, 4 P. & D. 9 ; and *Ellis v. Taylor*, 8 M. & W. 415, it has been settled that the law above referred to, as laid down by Lord Coke, is not confined to distresses at common law, but applies also to distresses for rent ; and therefore, in framing a declaration for refusing to restore goods distrained on tender of the rent, &c., it should be alleged that the tender was made before the goods were impounded, or it should be shown that the landlord maliciously persevered in a sale after tender of the rent, costs, and expenses, in which case perhaps the action may be maintainable, though the tender were made after the impounding. See the judgment of Lord Abinger in the case of *Ellis v. Taylor*, above referred to.

and thereupon afterwards, and whilst the defendant was in possession of the said goods and chattels under such distress as aforesaid, to wit, on the day and year aforesaid, the plaintiff tendered and offered to the defendant, in satisfaction and discharge of the said arrears of rent and the costs and charges of the said distress, a certain large sum of money, to wit the sum of £——, the same being then a sufficient sum to satisfy and discharge the said arrears of rent, together with all the costs and charges of the said distress, and then requested the defendant to re-deliver and restore the said goods and chattels to the plaintiff, and although the defendant then ought to have accepted and received the said sum of money from the plaintiff in discharge of such arrears of rent and the costs and charges of the said distress, and to have re-delivered and restored the said goods and chattels to the plaintiff; Yet the defendant, contriving and wrongfully and unjustly intending to harass, oppress, and aggrieve the plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any other time, accept or receive the said sum of money from the plaintiff, in satisfaction and discharge of the said arrears of rent, and the costs and charges of the said distress, or re-deliver or restore the said goods and chattels, or any part thereof, to the plaintiff, but then wholly neglected and refused so to do, and hath hitherto wrongfully and injuriously kept and withheld the said goods and chattels from the plaintiff, and hath converted and disposed thereof to his own use.

For that whereas the defendant heretofore, to wit, on &c., seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover; or if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description and value as those in the — count mentioned," and then omit any subsequent statement of value,*] of the plaintiff, of great value, to wit, of the value of £——, then found and being in and upon certain premises, (b) in the name of a distress for certain arrears of rent pretended to be due and payable for the same to the defendant, and then gave notice thereof to the plaintiff; (c) Yet the defendant, not regarding the statute in such case made and provided, and contriving and wrongfully and unjustly intending to injure the plaintiff in this behalf, and to deprive him of his said goods and chattels, and of the use, benefit and advantage thereof, and to prevent him from replevying the same, afterwards, and before the expiration of five days next after such distress so taken and made, and such notice thereof so given as aforesaid, to wit, within the space of five days then next following, to wit, on the day and year aforesaid, wrongfully, unlawfully and unjustly did sell and dispose of the said goods and chattels, without the leave or license, and against the will of the plaintiff, whereby the plaintiff was not only hindered and prevented from replevying the said goods and chattels so distrained as aforesaid, but was also deprived of such reasonable and sufficient time as in that respect is allowed

For selling a distress within five days, on the equity of 2 W. & M. c. 5, s. 2. (a)

(a) What a violation of this section, see 4 B. & A. 208; 1 Hen. Bla. 16; 1 Burn, J. 26th ed. 994; *Harper v. Tarwell*, 6 Car. & P. 166. This count will not support a claim in respect of the defendant having sold corn

before it was ripe, &c.; see 3 B. & Ald. 470.

(b) *Ante*, 534, n. (b).

(c) When this is not necessary, see *Lutw.* 214.

**ILLEGAL
DISTRESSES.**

by law for the raising, obtaining and procuring money to pay and discharge the rent so pretended to be due and in arrear as aforesaid, and the costs of the said distress; and the plaintiff hath also thereby wholly lost and been deprived of the said goods and chattels, and of the use, benefit and advantage thereof.

For not removing goods distrained within a reasonable time after the lapse of the five days. (d)

Commencement as ante, 13.] For that whereas the defendant heretofore, to wit, on &c., seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover, or if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description and value as those in the — count mentioned," and omit any subsequent statement of the value,*] of the plaintiff, of great value, to wit, of the value of £——, then found and being in and upon certain premises of the plaintiff, (e) in the name of a distress for certain arrears of rent pretended to be due and payable for the same to the defendant [*or E. F.*] and then gave notice thereof to the plaintiff. Yet the defendant, not regarding the statute in such case made and provided, but contriving and wrongfully and unjustly intending to injure the plaintiff in this behalf, did not nor would remove the said goods and chattels from the said premises within a reasonable time after the expiration of five days next after the making of the said distress and giving the said notice thereof as aforesaid, but wholly neglected and refused so to do, and wrongfully and unjustly, without the license or consent and against the will of the plaintiff, kept and detained the said goods and chattels in and upon the said premises for a great and unreasonable space of time after the expiration of the said five days as aforesaid, to wit, for the space of — then next following, contrary to the form of the statute in such case made and provided.

For selling under a distress, without having the goods appraised by two sworn appraisers. (f)

For that whereas heretofore, to wit, on &c., the defendant seized and distrained certain goods and chattels, to wit, &c. [*here specify them as in trover, or if the goods have been already set out in a prior count, say, "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and omit any subsequent statement of value,*] of the plaintiff, of great value, to wit, of the value of £——, then found and being

(d) This count, founded on the equity of the 2 W. & M. c. 5, s. 2, and 11 Geo. 2, c. 19, §. 10, has frequently been adopted, but trespass is the proper form of action where the party distraining continues too long in possession; *Stra.* 717; 1 *Hen. Bla.* 15; *Gilb.* 77; 11 *East*, 395; 2 *Campb.* 115, *Ladd v. Thomas*, 4 P. & D. 9. As to the time allowed for the removal, see 1 *Burn, J.* 26th ed. 991. A reasonable time after the five days is allowed; 4 B. & Ald. 208. Where the defendant wrongfully seized the plaintiff's goods, and placed a man in possession of them for some days, it was held that the owner might recover damages, although he had the use of the goods all the time; 7 *Bing.* 153. A party may waive the trespass and declare in case; 1 B. & C. 145; 2 D. & R. 256, S. C.

(e) *Ante*, 534, n. (b).

(f) The 2 W. & M. sess. 1, c. 5, s. 1,

requires such an appraisement previous to the sale; see 2 *Chit. Col. Stat.* 662; 1 *Burn, J.* 26th ed. 991. And see *law and precedent*, 6 *Car. & P.* 484, 747. The person distraining must not be one of the appraisers; *Bul. N. P.* 81; 1 *Stark.* 172; 2 *Bing.* 337. The appraiser must not be sworn before the constable of another parish; 1 *Moody & Malkin, C. N. P.* 172; 1 *Hen. Bla.* 13. Where the premises lay partly in the hundred of A. and partly in the hundred of K., the constable of K. was held the proper officer to administer the oath for the appraisement of the distress; 1 *Ld. Raym.* 53. The statute 57 Geo. 3, c. 93, regulating the costs of distresses for rent not exceeding £20, has not repealed the provisions of 2 W. & M. sess. 1, c. 5, so as to make an appraisement by one broker sufficient upon such distress; *Allen v. Flicker*, 10 A. & E. 640.

in and upon certain premises, with the appurtenances, of the plaintiff, as for and in the name of a distress for certain arrears of rent then alleged to be due to the defendant [*or E. F.*] for the use and occupation of the said premises, with the appurtenances. Yet the defendant, not regarding the statute in such case made and provided, but contriving and fraudulently intending to injure the plaintiff in that behalf, did not nor would cause the said goods and chattels so distrained as aforesaid to be appraised by two sworn appraisers, according to the statute in that case made and provided, previously to a sale of the said goods and chattels, but on the contrary thereof, the defendant afterwards, and before the said goods and chattels had been appraised by two sworn appraisers, according to the form of the statute in such case made and provided, to wit, on the day and year aforesaid, wrongfully sold the said goods and chattels without having had the same previously appraised by two sworn appraisers, contrary to the form of the statute in such case made and provided.

ILLEGAL
DISTRESSES.

As to the law, see Child v. Chamberlain and others, 6 Car. & P. 213.

On stat. 13 Eliz.
c. 37, for dis-
training by other persons than by bailiffs sworn in.

For that whereas heretofore, to wit, on &c. [*day of seizure or about it*], the defendant seized and distrained a certain crop of [potatoes] of the plaintiff, of great value, to wit, of the value of £100, then growing on and upon certain land before then demised, as for and in the name of a distress for certain arrears of rent alleged to be due to the defendant [*or E. F.*] for the use and occupation of the said land; nevertheless the defendant, not regarding the statute in such case made and provided, nor his duty in selling and disposing of the said distress, but contriving and wrongfully and unjustly intending to injure the plaintiff in that behalf, heretofore, to wit, on the day and year aforesaid, wrongfully and injuriously sold and disposed of the said crop before the same had been gathered and appraised, according to the form of the statute in such case made and provided, by means whereof the said crop of potatoes were then sold for much less than the best price, that is to say, for the sum of £50 less than the best price, which could and might and ought to have been gotten and received for the same, had the same been gathered, appraised, and sold in a due and proper manner, according to the statute in such case made and provided, and contrary to the said statute.

For selling
a growing crop
(under a dis-
tress) before the
same had been
gathered and
appraised, con-
trary to the 11
Geo. 2, c. 19,
s. 8. (g)

Commencement as ante, 13.] For that whereas heretofore, to wit, on &c., the defendant seized and distrained divers goods and chattels, to wit, &c. [*here specify the goods as in trover, or if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and then omit any further statement of value*], of the plaintiff, of great value, to wit, of the value of £—, then found and being in and upon certain premises, with the appurtenances, (i) as and for and in the name of a distress

For not selling
for the best
price, on the
equity of stat.
2 W. & M. c. 5,
s. 2. (h)

(g) See this enactment and the decisions thereon, 2 Chit. Col. Stat. 662. See also *Owen v. Legh*, 3 B. & Ald. 470.

(h) The price at which the goods were appraised will be presumed to be the best that

could be obtained till the contrary be proved; 4 Mod. 390; Com. Dig. Distress, D. 8. See 1 Burn, J. 26th edit. 994.

(i) *Ante*, 534, n. (b).

**ILLEGAL
DISTRESSSES.**

for certain arrears of rent alleged to be due to the defendant [*or E. F.*] for the use and occupation of the said premises, with the appurtenances. And whereas also the defendant, afterwards, to wit, on the day and year aforesaid, sold the said goods and chattels for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress, Yet the defendant, not regarding his duty in making and selling the said distress, nor the statute in such case made and provided, but contriving and fraudulently intending craftily and subtly to injure the plaintiff in that behalf, did not nor would sell the said goods and chattels under the said distress for the best price that could and might have been gotten for the same, but on the contrary thereof, the defendant then, to wit, on the day and year aforesaid, wrongfully and injuriously sold the said goods and chattels for much less than the best price, (that is to say) for £—— less than the best price that could and might and ought to have been gotten and received for the same, had the same been sold in a due and proper manner by the defendant.

For selling
more goods than
necessary,
under a distress
for rent.

And whereas also, heretofore, to wit, on the day and year aforesaid, the defendant distrained divers goods and chattels of the plaintiff, to wit, goods and chattels of the like number, quantity, quality, description, and value as those in the said [first] count mentioned, for certain pretended arrears of rent, to wit, the sum of [£——] alleged to be due from the plaintiff, for the use and occupation of certain premises, with the appurtenances; and whereas also the defendant, afterwards, to wit, on the day and year aforesaid, sold a part of the said goods and chattels for divers sums of money, amounting to a certain sum, to wit, £——, being more than was sufficient to pay and satisfy the said supposed arrears of rent, and all costs and charges of the said distress and the appraisalment and sale thereof, whereof the defendant then had notice. Yet the defendant, contriving and intending to injure the plaintiff, afterwards, to wit, on the day and year aforesaid, wrongfully proceeded to sell and did sell the rest and remainder of the said goods and chattels so distrained as aforesaid when it was wholly unnecessary so to do.

On equity of
stat. 2 W. & M.
c. 5, s. 1, for not
leaving the over-
plus arising
from the sale of
a distress with
the sheriff,
&c. (k)

Commencement as ante, 13.] For that whereas heretofore, to wit, on &c., the defendant seized and distrained divers goods and chattels, to wit, &c. [*here specify the goods as in trover; or if they have been specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and then omit any further statement of value*] of the plaintiff, of great value, to wit, of the value of £——, then found and being in and upon certain premises, with the appurtenances, as and for and in the name of a distress for certain arrears of rent alleged to be due to the defendant, [*or E. F.*] for and in respect of the said premises. And whereas also the defendant afterwards, to wit, on the day and year aforesaid, having caused the said goods and chattels to be appraised, then sold the said goods and chattels so by him seized and distrained as aforesaid, for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress, appraise-

(k) See the enactment, 2 Chit. Col. Stat. 663. The overplus means the overplus after payment of the rent and of the reasonable charges; *Lyon v. Tomkies*, 1 M. & W. 603.

ment and sale, for divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £—, being a much larger sum of money than was sufficient to satisfy and discharge all the rent then due for the said premises, with the appurtenances, and all the charges of the said distress, appraisement and sale. And the plaintiff further saith, that although the defendant afterwards, to wit, on &c., last aforesaid, out of and with a part of the produce of the said goods and chattels so by him sold as aforesaid, satisfied the said rent, for which the said goods and chattels were so distrained as aforesaid, and the charges of the said distress, appraisement and sale, leaving a great and considerable overplus of the money produced by the said sale; Yet the defendant, not regarding his duty in that behalf, nor the statute in such case made and provided, but contriving and fraudulently intending to deceive and defraud the plaintiff in this behalf, did not, after satisfaction of the rent for which the said goods and chattels were so distrained as aforesaid, and of the charges of the said distress, appraisement and sale, out of the produce of the said goods and chattels so sold as aforesaid, leave the surplus thereof in the hands of the sheriff, or under-sheriff, of the said county of —, or either of them, or of the constable of the parish, hundred, or place, where the said distress was so taken as aforesaid, for the use of the plaintiff, so being the owner of the said goods and chattels as aforesaid, although a reasonable time for that purpose hath long since elapsed, but the defendant hath hitherto wholly neglected and refused so to do, and therein wholly failed and made default, and the plaintiff hath not yet received nor been in any way satisfied for such overplus as aforesaid, and the defendant hath converted and disposed thereof to his own use, contrary to the form of the statute in such case made and provided.

ILLEGAL
DISTRESSES.

And whereas also the defendant, heretofore, and after the passing of a certain act of parliament, passed in the 57th year of the reign of his late Majesty King George the Third, intituled, "An Act to regulate the Costs of Distresses levied for Payment of small Rents;" and before the committing of the grievances hereinafter next mentioned, to wit, on &c. [*day of distress, or about it,*] had made and levied a distress upon divers goods and chattels of the plaintiff, of great value, to wit, of the value of £—, for certain rent, alleged to be in arrear and due and owing from the plaintiff; and although the defendant was then requested by the plaintiff so to do, Yet the defendant, not regarding his duty in that behalf, nor the statute in such case made and provided, but contriving and fraudulently intending to injure the plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any other time, according to the form of the statute in such case made and provided, give a copy of his charges, and of all the costs and charges of the said distress, signed by him, to the plaintiff, but wholly neglected and refused so to do, contrary to the form of the statute in such case made and provided.

Against a broker, on the 57 Geo. 3, c. 93, for not giving a copy of the charges of a distress. (1)

For that whereas, at the several times in this count mentioned, the plain-

For several injuries in one

(1) It should seem from the act that this action will not lie unless the goods have been levied under the distress; see 5 Bing.

39. A landlord who does not personally interfere is not liable to this action; *Hart v. Leach*, 1 M. & W. 560.

ILLEGAL
DISTRESSES.

count, as for making a distress for more rent than was due, and taking an excessive distress, and for selling for less prices than might have been obtained and not leaving the overplus in hands of sheriff for use of plaintiff. (m)

tiff held and occupied a certain messuage, buildings, farm, lands and premises, [*describe the premises according to the facts,*] with the appurtenances, situate in the county of —, as tenant thereof to the defendant C. D. at a certain rent, whereof a certain sum, to wit, the sum of £—, at the time of the making of the distress hereinafter mentioned, was due and in arrear. Nevertheless, the defendant heretofore, to wit, on &c. contriving and wrongfully and unjustly intending to oppress, harass, and injure the plaintiff, wrongfully, unjustly, and unlawfully asserted and pretended that much more was due and unpaid for such rent from the plaintiff to the said C. D. than was so really due, to wit, £—; whereas, in truth and in fact, a much less sum than £—, to wit, £—, was then due for such rent; and under colour of that assertion and pretence, the defendant then wrongfully and unjustly seized and took divers goods and chattels of the plaintiff, to wit, [*here enumerate concisely as in trover,*] then on the same premises, of great value, to wit, of the value of £—, as a distress for the said alleged and supposed arrear of rent, and then also being an excessive and unreasonable distress for the rent then due and in arrear from the plaintiff to the said C. D., and when at the time of the making such distress a part, to wit, one half of the said goods and chattels then was of sufficient value to have satisfied the rent then really due and in arrear, and the charges of the said distress and of the appraisement and sale thereof, contrary to the form of the statute in such case made and provided. And the defendants further contriving and intending as aforesaid, and disregarding the statute in such case made and provided, afterwards, to wit, on the day and year aforesaid, wrongfully and injuriously sold the said goods and chattels under the said distress for much less, to wit, £— less than could and might and ought to have been obtained and produced from the sale thereof, if due care had been observed and taken in and about the sale thereof. And the plaintiff further saith, that although the defendants, afterwards, to wit, on the day and year last aforesaid, out of and with a part of the proceeds of the said goods and chattels so by them sold as aforesaid, paid and satisfied to the defendant C. D. the said actual arrear of rent, and the charges of the said distress, appraisement, and sale, leaving a great and considerable overplus of the money produced by the said sale, to wit, the sum of £—; Yet the defendants, not regarding their duty in that behalf, nor the statute in that case made and provided, did not, after satisfaction of the said just and true arrear of rent, and of the charges of the said distress, appraisement and sale, leave the overplus, &c. [*Conclude as ante, 545, to the end.*]

Against plaintiff's landlord, for not indemnifying him against a distress made on his goods by the ground landlord.

See the precedent with two counts in 5th edit. vol. ii. 727 to 727 c. In general assumpsit on an express or implied contract to indemnify will be the preferable form of action, and see ante, 230.

ILLEGAL
LEVIES, &c.

For levying plaintiff's goods for a sum of money as due

ILLEGAL LEVIES, &c.

For that whereas before the committing of the grievance by the defendant hereinafter next mentioned, the now plaintiff had executed, and as his act and deed delivered, to and in favour of the now defendant, a certain warrant

(m) See observations, ante, 533, 534.

of attorney, bearing date &c. thereby authorizing certain attornies therein mentioned, (n) jointly and severally, or any other attorney of her majesty's Court of Common Pleas at Westminster, to appear for him the now plaintiff as of the then last [Trinity] Term, the then next [Michaelmas] Term, or any subsequent term, to receive a declaration for him the now plaintiff in an action of debt for money due and owing at the suit of the defendant, for the sum of £——, and thereupon to confess the same action, or else to suffer a judgment as therein mentioned, and to be thereupon forthwith entered up against him of record of the said Court for the said sum of £—— besides costs of suit as between attorney and client, which said warrant of attorney was then made and executed by the now plaintiff to the now defendant, for securing the payment of a certain sum of money, to wit, the sum of £——, by divers, to wit, [two] instalments. And whereas, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, a great part of the said sum of money, to wit, the sum of £——, had been paid and satisfied, and the residue thereof, to wit, £——, at the time of the committing of the said grievances had not accrued due from the plaintiff to the defendant, under and by virtue of the said warrant of attorney; Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff in that behalf, heretofore, to wit, on &c. (p) wrongfully and unjustly caused and procured a certain writ of *feri facias* to be issued out of the said Court of our said lady the queen [of the Bench], founded on a judgment entered up under colour and pretence of the said warrant of attorney, and whereby the sheriff of the county aforesaid was directed to levy of the goods and chattels of the plaintiff a certain sum of £—— debt and 40s. costs; and that the said sheriff should have those monies before [her majesty's justices] at Westminster immediately after the execution thereof, and then wrongfully and injuriously caused and procured the said writ of *feri facias* to be indorsed (q) for the said sheriff to levy £—— as due upon the said warrant of attorney and judgment, besides sheriff's poundage, officer's fees, and other incidental expenses, &c.; and afterwards, to wit, on &c. wrongfully and unjustly caused and procured the said writ, so indorsed as aforesaid, to be delivered to E. F. Esquire, then sheriff of the said county, and then caused and procured certain goods and chattels of the plaintiff, in the bailiwick of the said sheriff, to be seized and taken in execution, under colour and pretence of the said writ, for the said sum of £—— besides sheriff's poundage, officer's fees, and other incidental expenses, &c. so directed to be levied as aforesaid, and caused and procured the said goods and chattels to be kept and detained in execution in and upon certain premises of the plaintiff, in the county aforesaid, under the said writ, for a long time, to wit, until the —— day of ——

ILLEGAL
LEVIES.

on a judgment entered up in pursuance of a warrant of attorney, when part of the money had been paid, and the rest was not then payable.(o)

(n) Examine with the warrant.

(o) By a *cognovit* A. confessed the action, and that B. had sustained damage to the amount of £3000, and that in case A. should make default in payment of £259 on the 7th May, B. should be at liberty to enter up judgment for £3000, and sue out execution for £259 and costs, which would have left a principal sum of £1650 due to B. A. not having paid the £259 on the 7th May, B. entered up judgment and sued out execution

for £3011, indorsed with a direction to the sheriff, requiring him to levy £1967, and A. was arrested and detained in prison for that sum. It was held, that A. might maintain an action against B. for having caused him to be arrested and imprisoned for a larger sum than he ought; 9 B. & C. 840; and where see a form of declaration.

(p) Day of issuing the writ, or about it.

(q) See the indorsement on the writ.

ILLEGAL
LEVIES.

aforesaid, in the year aforesaid, when he the plaintiff, in order to obtain possession of his said goods and chattels, was forced and obliged to pay (r) a large sum of money, to wit, the sum of £—, and the plaintiff hath been and is, by means of the premises, greatly injured and damnified in his credit and circumstances and otherwise. [See the original declaration in 2 Chitty on Pleading, 5 ed. 728 a to 730, containing two other counts, viz. a second count for issuing a *fi. fa.* when nothing was due, and a third count for procuring a *fi. fa.* to be issued and executed for a larger sum than judgment had authorized.

Against a sheriff for levying on a *fi. fa.* more than sufficient to satisfy debt and costs, and for disposing of them for less than their value and converting same to his own use.(s)

For that whereas, before the committing of the grievance hereinafter next mentioned, to wit, on &c. a certain writ of our lady the queen, called a *fi. facias*, was issued out of the Court of our said lady the queen, [before the queen herself,] at Westminster, in the county of Middlesex, directed to the sheriff of the county of —, and whereby our said lady the queen commanded the said sheriff, (t) that he should cause to be levied of the goods and chattels of the now plaintiff, as well a certain debt of £—, before then recovered by one E. F. against the now plaintiff, in the said Court of our said lady the queen, before the queen herself, at Westminster aforesaid, as also &c. (t) which had been adjudged to the said E. F. and with his assent, and that the said sheriff should have that money before [our said lady the queen,] at Westminster aforesaid, immediately after the execution thereof, to render unto the said E. F. for his debt and damages aforesaid, whereof the now plaintiff was convicted, as appeared to our said lady the queen of record, and that the said sheriff should have there then that writ, which said writ afterwards and before the delivery thereof to the said sheriff of — to be executed as hereinafter mentioned, was indorsed (u) with a direction for the said sheriff to levy £— besides sheriff's poundage, and all other expenses attending the said levy; and which said writ, so indorsed, afterwards and before the return thereof, to wit, on &c. was delivered to the defendant, who then and from thence until and at and after the return of the said writ was sheriff of the said county of —, to be executed in due form of law; (x) by virtue of which said writ the defendant, so being sheriff of the said county of — as aforesaid, afterwards, and before the said return of the said writ, to wit, on the day and year last aforesaid, within his bailiwick, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the now plaintiff, of much greater value than sufficient to pay and satisfy the said sum of £— besides sheriff's poundage and the other expenses attending the said levy, so indorsed to be levied as aforesaid, to wit, of the value of £—. And although the now defendant, so being sheriff as aforesaid, then well knew that the money arising from the sale of

(r) If the goods were actually sold, then state that fact accordingly.

(s) See form, 9 East, 298. An action on the case lies against the sheriff for wilfully, and without any reasonable or probable cause, delaying to sell goods of the plaintiff which the sheriff seized by virtue of a writ of *levari facias*; and see a form of such action, 3 Stark. 163.

The sheriff having taken goods under an

execution is not justified in selling them to the highest bidder much under their value; he should return that they remain unsold for want of buyers; 3 Campl. 521; Tidd. 9th edit. 1013; but see 1 Stark. 43; 3 Stark. 163.

(t) Examine carefully with the writ.

(u) See the indorsement, and let this correspond.

(x) See 9 East, 299.

a part of the said goods and chattels so seized and taken in execution as aforesaid, would be sufficient to satisfy and pay the said sum of £—— so indorsed to be levied as aforesaid, besides sheriff's poundage, and the other expenses attending the said levy; Yet the now defendant, so being sheriff of the said county of —— as aforesaid, contriving and wrongfully and unjustly intending to injure, oppress, impoverish, and wholly ruin the now plaintiff, afterwards, to wit, on the day and year last aforesaid, under colour and pretence of the said writ, wrongfully and injuriously did sell and dispose of much more of such goods and chattels than was necessary and sufficient to pay and satisfy the said sum of £—— so indorsed to be levied as aforesaid, besides sheriff's poundage, and other expenses attending the said levy, to wit, the whole of the said goods and chattels so levied as aforesaid, and thereout levied a much greater sum than was sufficient to pay and satisfy the said sum of £——, besides sheriff's poundage, and other expenses attending the said levy, to wit, the sum of £——; and also then wrongfully and injuriously sold and disposed of the same goods and chattels for a much less sum of money, to wit, the sum of £——, less than the same were really worth, and for which the defendant could and might and ought to have sold the same, and converted and disposed of the monies arising from the said sale to his own use; by means whereof the plaintiff was then wholly deprived of the use of the said goods and chattels and of the produce thereof, and hath been and is by means of the premises otherwise greatly injured and damnified.

ILLEGAL
LEVIES.

FOR RESCUE AND POUND BREACH.

FOR RESCUE
AND
POUND BREACH.

Commencement as ante, 13.] For that whereas the defendant [*or E. F.*] for a long time, to wit, for the space of —— next before and ending on &c., [*day rent fell due*] and from thence until and at the time of committing the several grievances hereinafter mentioned, held and enjoyed certain premises, with the appurtenances, situate in the county of S., (*z*) that is to say, as tenant thereof to the plaintiff, under and by virtue of a certain demise thereof theretofore made to the defendant, [*or E. F.*] at and under a certain yearly rent, to wit, the yearly rent of £——, therefore payable by the defendant [*or E. F.*] to the plaintiff, on &c., [*stating days of payment*] by even and equal portions, (*a*) of which said rent a certain sum of money, to wit, the

For rescue of
distress for rent
on a common
appurtenant,
under statutes 2
W. & M. c. 5, s.
4, and 11 Geo. 2,
c. 19, s. 10. (*y*)

(*y*) See the forms, 8 Wentw. Index, xxiv.; 3 Lord Raym. 177; 1 Lord Raym. 170; Lutw. 213. The stat. 2 W. & M. sess. 1, c. 5, s. 4, enacts, "that upon any pound breach or rescue of any goods or chattels distrained for rent, the person thereby aggrieved shall, in a special action on the case, for the wrong thereby sustained, recover treble damages and costs against the wrong-doer, or the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession;" but see 5 & 6 Vict. c. 97, as to the present law of costs in such a case. The 11 Geo. 2, c. 19, enlarges the powers of distress, and extends the above provision; see sect. 10. Trespass may be supported at common law; Com. Dig. "Rescous," D. 1. Query, however, if trespass or trover in the usual form could be supported; see Selw. N. P. "Trover;" and as

to the property in goods distrained, see 1 M'Clel. & You. 107. As to what is a *rescous*, see Harrison's Landl. & Ten. 371; 1 Burn's Justice, 26th edit. 1001, 2; 5 Bing. 499.

(*z*) *Semble*, that this local description is unnecessary, and should be erased.

(*a*) As the statute 2 W. & M. c. 5, gives the action only to the party grieved, it seems necessary, in a declaration for treble damages on this statute, to state the right to distrain, though in an action for a pound breach of a distress taken damage feasant the title need not be stated; 1 Lord Raym. 104; 1 Salk. 247. The forms in Lutw. 218; 3 Ld. Raym. 177; Mod. Ent. 210; state the demise fully; and it is stated that the days of payment of the rent ought to be alleged, Kitt, 227 a.; Com. Dig. Pleader, c. 19; Bul. N. P. 61; 8 T. R. 130; but to avoid a variance, no

RESCUE.

sum of £——, on the day and year first aforesaid, became due and payable, and from thence until and at the time of committing the several grievances hereafter mentioned, was in arrear and unpaid from the defendant [or E. F.] to the plaintiff. And whereas also the plaintiff heretofore, to wit, on &c., [day of distress or about it,] by one E. F. his bailiff in that behalf, had, according to the form of the statute (b) in such case made and provided, seized and taken divers, to wit, [two cows, then feeding and depasturing in and upon a certain common field or piece or parcel of land, situate in the county aforesaid, the same being then common appurtenant to and belonging to the said demised premises,] as for and in the name of a distress for the said sum of £—— of the rent aforesaid so in arrear and unpaid as aforesaid. And the plaintiff and his said bailiff were then driving the said [cows] to a certain common pound, situate and being within three miles from the place where the same were so taken as aforesaid, and would then have impounded the same therein with intent to appraise and sell and dispose of the said [cows] according to the form of the statute in such case made and provided. Whereupon the defendant, on the day and year last aforesaid, with force and arms, (c) &c. rescued, seized, took, and drove away the said [cows] contrary to the form of the statutes in such case made and provided, whereby the plaintiff hath been and is greatly delayed in the recovery of the said rent so in arrear as aforesaid, and deprived of the means of obtaining satisfaction thereof and of the costs and charges of the said distress, and is likely to lose the same.

Second count,
for a pound
breach. (d)

And whereas also the plaintiff, on the day and year last aforesaid, had seized and taken divers goods and chattels, to wit, &c., [here specify them as in *trover*,] in a certain [barn,] parcel of the said farm, with the appurtenances, as and for and in the name of a distress for the said sum of £——, of the rent aforesaid, so in arrear and unpaid as aforesaid, and had impounded and secured the said goods and chattels in the said [barn] (being the most fit and convenient part of the said demised premises for that purpose) with intent to appraise and sell and dispose of the said goods and chattels according to the form and effect of the statute in such case made and provided, (e) whereupon the defendant, on the same day and year last aforesaid, with force and arms, &c. broke the said pound, and rescued the said last-mentioned goods and chattels, contrary to the form of the statute in such case made and provided. Whereby, &c. [State the damage as in the first count, and sometimes add a count in *trover*, and conclude, To the plaintiff's damage, &c.

For rescuing
cattle taken
damage *feasant*.
(f)

Commencement as ante, 13.] For that whereas heretofore, to wit, on &c., the plaintiff [by E. F. his bailiff in that behalf] had taken in a certain close

terms of the tenancy should be unnecessarily stated, Dougl. 665. And in general it is advisable to omit any statement of the days of payment.

(b) By the 11 Geo. 2, c. 19, s. 8, a distress may be made of live stock upon common appendant or appurtenant.

(c) Though the action given by the statute is *case*, yet the injury is stated *vi et armis*; Lutw. 213; Ld. Raym. 177.

(d) See the notes to the last form, and 5 T. R. 432, from which it appears that it is no

answer to this action that the rent and costs were tendered after the distress and impounding. As to pound breach being indictable, see 2 Hawk. c. 10, s. 56; 4 Leon. 12; Gilb. 75; Cro. Cir. Ass. 9th edit.; Com. Dig. "Rescous," D. 3; 1 Burn, J. 26th edit. 1001.

(e) 11 G. 2, c. 19, s. 16. It is not necessary to state that notice of the distress was given; Ld. Raym. 170; Lutw. 214.

(f) See Com. Dig. Distress, D. 2, 3, and the precedents, 8 Went. Index, xxiv.; Lat.

of the plaintiff, situate in the county of —, certain cattle, to wit, &c. [here specify the cattle taken,] doing damage to the plaintiff there, and was then [by his said bailiff in that behalf] about to impound the said cattle for the cause aforesaid; Yet the defendant, well knowing the premises, but wrongfully and injuriously contriving and intending to injure the plaintiff, and to deprive him of the benefit of the said distress, afterwards, to wit, on the day and year aforesaid, unlawfully, and against the will of the plaintiff, with force and arms rescued the said cattle and took the same from the plaintiff [or E. F.] and thereby prevented the plaintiff [or E. F.] from impounding the same, as he otherwise lawfully might and would have done; by means of which premises the plaintiff hath been and is greatly injured and deprived of the said means of obtaining compensation for the damage so done and doing by the said cattle as aforesaid.

RESCUE.

Commencement as ante, 13.] For that whereas heretofore, to wit, on &c., when the plaintiff had then taken and distrained certain cattle, to wit, —, in a certain close of the plaintiff, situate in the county of —, treading down, trampling upon, spoiling and consuming the grass growing in his said close, and doing damage therein to the plaintiff, and had impounded the said cattle in a certain common and open pound, in the county aforesaid, as a distress for the said damage, according to the law and custom of England, the defendant, with force and arms, &c. afterwards, to wit, on the day and year aforesaid, broke and entered the said common and open pound, and rescued and took away from and out of the said pound the said cattle so impounded as aforesaid. Whereby, &c. [State the damage as in the preceding form, and sometimes add other counts as there directed.]

For a pound
breach of cattle
taken damage
feasant. (g)

Proceed as in the declaration for an escape, post, 552, to the end of the statement of the delivery of the writ to the sheriff, add then state the sheriff's warrant and arrest and rescue as follows:] And thereupon the said G. H. so being such sheriff as aforesaid, afterwards, and whilst the said writ was in full force, to wit, on the day and year last aforesaid, made his certain warrant in writing, under his seal (i) of office of sheriff of the said county of —,

For a rescue of
a person arrest-
ed on mesne
process. (h)

1259. Rescue and pound breach may be joined; Lord Raym. 83. As to the venue, F. N. B. 101, E. n. (c); Bul. N. P. 63. The remedy for the rescue of a distress damage feasant is, at common law, either by writ of *rescous*, (Com. Dig. "*Rescous*," D. 1,) or by action on the case for the consequential damage, which is laid, nevertheless, *vi et armis*, and may be joined with any other demand either in case or trespass; Lutw. 1259; Lord Raym. 83, 104; Tidd's Prac. 9th ed. 98. In an action for a rescue, as well as for a pound breach, it is usual to show the cause of the distress; but in the latter case, as the distress is but inducement to the action, and the breach of the pound is the gist of it, it is not necessary to show the cause of the distress; Lord Raym. 105; Rast. Ent. 444.

(g) See the notes to the above form, 8 Wentw. Index, xxiv.; Lutw. 1259; Lord Raym. 104. It is most usual to join this count with a count in trespass for damage feasant, when the action is against the owner of the cattle.

(h) See forms, 8 Wentw. Index, xxiv.; 8 T. R. 127; Com. Dig. "*Rescous*," D. 2; Bac. Ab. "*Rescue*." See also Chitty's Arch. Pr. 7th edit. p. 545. If it be doubtful whether an actual arrest can be proved, a count should be added for obstructing the sheriff in making the arrest; F. N. B. 102, F.; Com. Dig. "*Rescous*," B. If the rescue be upon final process, the declaration should state the judgment, the *ca. sa.*, and the delivery thereof to the sheriff, as *post*, 558, 559; and then the warrant, the arrest, and the rescue may be stated nearly as in the above form. See the forms on final process, 8 Wentw. Index, xxiv. It does not seem necessary in a declaration for a rescue either on mesne or final process, to state the warrant to the bailiff; it may be stated that the sheriff arrested the party, and that the rescue was from his custody, and this seems preferable; Cro. Jac. 242, 485; Com. Dig. "*Rescous*," D. 2.

(i) It is not necessary to state that the warrant was under seal; Cro. Eliz. 53; Palm. 357; 2 Saund. 305 b.

RESCUE.

and directed to certain persons, to wit, J. K. and L. M., the said sheriff's bailiffs; (k) and thereby commanded (l) them jointly and severally, that they should take the said E. F., if he should be found in his the said sheriff's bailiwick, and him safely keep until he should have given the said sheriff bail, or made deposit with him according to law, in an action on promises, [or "of debt," as in the warrant,] at the suit of the said —, or until the said — should, by other lawful means, be discharged from his the said sheriff's custody; (m) which said warrant, afterwards and whilst the said writ and warrant were in full force, to wit, on the said — day of —, in the year aforesaid, was delivered to the said J. K. and L. M. to be executed according to due form of law. By virtue of which said writ and warrant the said J. K. and L. M., whilst the said writ and warrant were in full force, to wit, on the day and year last aforesaid, and within the bailiwick of the said sheriff, took and arrested the said E. F. by his body, and had him in their custody for the cause in the said writ and warrant mentioned. Nevertheless, the defendant, well knowing the premises, but contriving to injure the plaintiff, and to deprive him of the means of recovering his said debt, afterwards, and whilst the said E. F. was so in custody of the said J. K. and L. M. as aforesaid, and before the return of the said writ, to wit, on the day and year last aforesaid, rescued the said E. F. from and out of the custody of the said J. K. and L. M., and caused the said E. F. to escape and go at large, and the said E. F. did thereby then escape and go at large out of the custody of the said J. K. and L. M., wheresoever he would, the plaintiff not then nor yet having been paid or satisfied his said debt; and by means of the premises the said sheriff could not further obey the said writ, nor did the said E. F. cause special bail to be put in for him in the said Court to the said action, according to the exigency of the said writ, but therein wholly failed and made default, (n) whereby the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also the plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, expended and incurred in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of —.

FOR
ESCAPES, &c.
For an escape
on mesne pro-
cess. (p)

FOR ESCAPES, &c.

Commencement as ante, 13.] Essex, to wit, (o) For that whereas one E. F. heretofore, to wit, on &c., [the date of the writ,] was indebted to the

(k) Examine with the directions.

(l) Examine and let this correspond with the warrant.

(m) This statement must be carefully examined with the original warrant; see the usual form of warrant, Chitty's Arch. Forms.

(n) This allegation of the non-appearance of the defendant does not appear to be necessary; 8 T. R. 127; *post*, 554, note (x).

(o) The venue is transitory; 1 Wils. 336; Plowd. 35; Dyer, 278 b; Bnc. Ab. Escape, F.

(p) No action can be maintained for an escape on mesne process unless the plaintiff has sustained some damage; *Williams v. Mos-*

tyn, 4 M. & W. 145. See also *Wylie v. Birch*, 12 L. J. R., N. S., Q. B. 260. A sheriff is bound to keep prisoners in his custody after the return of mesne process, and before they are charged in execution, *arctâ custodiâ*, and therefore when a party, being in custody, went in charge of a sheriff's officer to the court of a revising barrister, it was held that the sheriff was liable for an escape, if the plaintiff could prove any damage; *Williams v. Mostyn*, 7 Dowl. 38; 4 M. & W. 145, S. C. As to the late or present sheriff's liability, see *Harrison v. Paynter*, 6 M. & W. 387. If it were doubtful whether there was an actual caption, it was usual to have

plaintiff in a large sum of money, (g) to wit, the sum of £—, upon and in respect of (r) certain causes of actions before then accrued to the plaintiff against the said E. F.; and the said E. F. being so indebted, the plaintiff on &c. [*Here state the issuing of the capias (s) and the indorsement for bail, the delivery to the sheriff,* and the arrest, precisely as in a declaration on a bail bond, ante, 321, observing the notes; and after stating the arrest, proceed as follows:*] Yet the now defendant, so being sheriff of the said county of — as aforesaid, not regarding the duty of his office as such sheriff, but wrongfully and unjustly contriving and intending to injure the plaintiff, and to delay and hinder him in and from the recovery of his said debt, afterwards, to wit, on the day and year last aforesaid, without the leave or license, and against the will of the plaintiff, voluntarily (t) suffered and permitted the said E. F. to escape and go at large wheresoever he would out of the custody of the now defendant, so being such sheriff as

three counts; first, for an escape; secondly, for not taking the defendant when there was an opportunity; and thirdly, for not assigning the bail bond, as *post*; see 5 Taunt. 325. And as each of those counts is substantially for a different cause of action, all may still be retained. As to when this action lies, see Tidd's Prac. 9th edit. Index, Escape; Chitty's Arch. Prac. 7th edit. 544. See as to an action for an escape, where the defendant was in custody on an attachment for non-payment of money awarded to plaintiff, 8 B. & C. 124; 2 M. & R. 88, S. C. The sheriff formerly was not liable, provided he had defendant at the return of the writ; 3 T. R. 172; 2 B. & P. 35; and see 2 Saund. 61 c. 4; 2 B. & Ald. 56. But as to his present liability, see Chitty's Arch. Pr. 7th edit. 544. If a proper bail bond has been taken, this action does not lie; 5 Taunt. 325. In this action it is enough, without producing the warrant or giving direct evidence of the arrest or escape, to prove the sheriff's return of *cepi corpus*, and to show that the party did not get in bail, and was not in the sheriff's custody at the return of the writ; 3 Campb. 397; 2 Y. & J. 399; Tidd, 9th edition, 236. And for the evidence necessary to charge the defendant with the act of his bailiff, see the cases cited in Tidd, 9th ed. 236, note; Roscoe on Evid. 406; 7 B. & C. 535; and as to the inability of the plaintiff's attorney to discharge a defendant out of custody, and the non-liability of the sheriff, where the plaintiff's attorney appoints a special bailiff, see *Savoury v. Chapman*, 8 Dowl. 656; *Doe v. Tye*, 5 Bing. N. C. 673.

(g) As to this averment, see 10 B. & C. 215.

(r) Where the arrest is for a debt, it will be advisable to insert this allegation, since before the 1 & 2 Vict. c. 110, it was held to be necessary to state and prove, that the plaintiff had a cause of action against the party arrested, and the amount of damages depended upon, or at least would be limited by, the amount of the debt proved; 4 T. R. 611; 2 Lev. 85; 2 Saund. 151, n. 1; 1 Saund. 38; 2 Campb. 188. Formerly it was usual to state the subject-matter of the

debt and the promise to pay it; (see a form where the original debt was on bond, 2 Saund. 160). If the debt be stated, it must be proved as stated; 2 Esp. Rep. 476, in notes; though indeed the precise sum stated need not be proved; Bul. N. P. 66; 5 Esp. Rep. 102. According to Lutw. 110, Com. Dig. Pleader, 2 P. 1, and E. 18, this statement of the subject-matter of the debt is unnecessary; and see the form, 8 T. R. 127; 1 Wils. 255; *ante*, 187, note (t); and as this latter mode gives the plaintiff more latitude in evidence, it is preferable in most cases. But is not so, if it is expected that the sheriff will suffer judgment by default; in which case, by stating the debt fully, some proof may be saved. In an inferior Court it should be stated that the debt accrued within the jurisdiction, though the omission would be aided after verdict; 8 T. R. 127; 2 Saund. 109, n. 2; 1 Saund. 74, n. 1; Bac. Abr. Escape, A. 1; *Read v. Pope*, 1 Cr. M. & Ros. 302; 4 Tyr. 403. The old method of describing the debt and promise was as follows: — "*was indebted to the plaintiff in a large sum of money, to wit, the sum of £—, of lawful, &c. for so much money by the said E. F. before that time had and received to and for the use of the plaintiff; and being so indebted, the said E. F. in consideration thereof, afterwards, to wit, on &c., aforesaid, undertook and faithfully promised the plaintiff to pay him the said sum of £— when he the said E. F. should be thereunto afterwards requested; but the said sum of £— being wholly unpaid to the plaintiff, and the said promise of the said E. F. being wholly unperformed, the plaintiff, for the recovery of his damages by him sustained on occasion of the not performing of the said promise and undertaking of the said E. F. afterwards, to wit, on &c. sued and prosecuted,*" &c.

(s) Stating the words, "*in the damage of the plaintiff of £30,*" to have been in the writ, when they were not so, held no variance; Ry. & Moo. C. N. P. 291.

(t) Under this allegation a negligent escape may be given in evidence; 2 T. R. 126; 5 Burr. 2814; 1 Saund. 35, n. 1.

ESCAPES.

aforesaid, the said debt for which the said E. F. was so arrested as aforesaid, and every part thereof, then and still being wholly unpaid to the plaintiff.* And the plaintiff in fact saith, that the said E. F. did not cause special bail to be put in for him in the said Court to the said action, or otherwise obey the said writ (x) according to the exigency thereof, but therein wholly failed and made default, whereby the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also the plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out and expended in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of £——.

Second count,
for not arresting
the debtor when
the defendant
had an oppor-
tunity. (y)

Proceed as in the first count, to the end of the statement of the delivery of the writ to the sheriff, and then proceed as follows. It is suggested that a count for not arresting, when there was an opportunity, might properly precede, and afterwards a second count stating an arrest and escape for the same writ might follow. There can be no doubt that notwithstanding Reg. Gen. Hil. T. 4 W. 4, reg. 5, counts for both causes of action, which are separate and distinct, may be joined:] And the plaintiff saith, that the said E. F. at the time of the delivery of the said last-mentioned writ to the defendant, so being such sheriff as aforesaid, and from thence, to wit, for one calendar month then next following, was within the said sheriff's bailiwick, and the defendant as such sheriff, at any time during that period could, and might, and ought to have taken and arrested the said E. F. by virtue of the said last-mentioned writ at the suit of the plaintiff, if he would so have done, whereof the now defendant during all that time had notice; (z) Yet the now defendant, not regarding the duty of his said office, but contriving and intending wrongfully and unjustly to injure the plaintiff, and to delay and hinder him in and from the recovery of his debt last aforesaid, did not nor would at any time whilst the said last-mentioned writ was in full force (although often requested so to do) take or cause to be taken, the said E. F. as by the said last-mentioned writ [or "precept"] he was commanded, but therein wholly failed and made default, and the said E. F. did not cause special bail to be put in for him in the said action, in the said Court of our said lady the queen, according to the exigency thereof, or otherwise observe the requisition of the said writ, but therein wholly failed and made default, whereby the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also the plaintiff hath lost and been deprived of the means of recovering his costs

(x) As to this allegation before the 2 W. 4, c. 39, see Vin. Abr. Escape, K. pl. 4; Noy, 72; Cro. Eliz. 289; 8 T. R. 130; it is not necessary; 2 B. & P. 561.

(y) See forms, 8 Wentw. 487, 501. It is advisable to add this count whenever there is any doubt of the proof of an actual arrest; see Loft's Rep. 63; 8 Wentw. 487, note b. It was holden no defence to such an action that the debtor was arrested the day after the return-day of the writ, when writs of capias were returnable on a particular day; 2

Bingh. 317. It is no answer to this action, that the plaintiff never furnished the sheriff with any description of the defendant, and after the delivery of the writ countermanded the arrest; Dyke v. Duke, 4 Blag. N. C. 197.

(z) This averment is not requisite, and the omission would not be bad on special demurrer; 5 D. & R. 95. What is not sufficient evidence of notice to sheriff, 2 Campb. 189; 2 Esp. Rep. 476; Roscoe, 413.

and charges by him paid, laid out, and expended and incurred in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of £——. [A count, as post, for not assigning a supposed bail-bond, if it be apprehended that one was taken, might be added; see 5 Taunt. 325.]

ESCAPES.

Same as the first count, ante, 553, to the end of the statement of the escape, as far as the asterisk, 554, and then proceed as follows:] And the now defendant, so being sheriff of —— as aforesaid, afterwards, to wit, on &c., falsely and deceitfully returned upon the said writ to the Court of our said lady the queen, before the queen herself, that the said E. F. was not found in the bailiwick of the defendant, so being such sheriff as aforesaid, and the said E. F. did not cause special bail to be put in for him in the said Court to the said action, or otherwise observe the said writ, (b) according to the exigency thereof, but therein wholly failed and made default, whereby the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also the plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out and expended in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of £——.

The like, and for false return on mesne process of non est inventus. (a)

State the debt and delivery of the process to the sheriff, as ante, 553.] By virtue of which said writ the defendant afterwards, and whilst the said writ was in full force, to wit, on &c., was taken and arrested by the said sheriff, and kept and detained by him, according to the exigency of the said writ, and by virtue thereof, for want of bail; and the said C. D. being and remaining in the custody of the said E. F., so being sheriff of the county of —— as aforesaid, for the cause aforesaid, afterwards, to wit, on &c., was brought before [Sir ——, Knight,] then and now one of the justices of our said lady the queen, assigned to hold pleas in the Court of our said lady the queen, before the queen herself, at his chambers in Serjeants' Inn, Chancery Lane, London, in his own person, in the custody of the said E. F., so being sheriff of the county of —— as aforesaid, by virtue of a certain writ of our said lady the queen of *habeas corpus*, issued out of the Court of our said

Against the keeper of the Queen's Prison for the escape of a party taken on mesne process and removed to the Queen's Prison by *habeas corpus*. (c)

(a) See the form, 2 Saund. 150, 155; and other forms, 1 Rich. C. P. 474; Morg. 368; Plead. Ass. 207; Lil. Ent. 40. The statement of the false return may be introduced as well in the count for an escape, as in the count for not taking; but it seems unnecessary in either case, as the gist of the action is the escape; 2 Saund. 155, note 3.

(b) See *supra*, note (x).

(c) See other forms, 5 East, 440; see a form against the marshal for an escape of a debtor sued in an inferior Court and removed to the King's Bench by *habeas corpus*, 7 B. & C. 86; 9 D. & R. 878, S. C.; see a form against the marshal for an escape of a person against whom an attachment had issued for non-performance of an award, who was by *habeas corpus* committed to the custody of the

warden and afterwards committed by *habeas corpus* to the custody of the marshal, 8 B. & C. 124; 2 M. & R. 88, S. C. In that case it was made a question whether the commitment by a judge at chambers was legal.

By the 5 Vict. c. 22, the Queen's Bench Prison is to be called the Queen's Prison, and the Queen's Bench, Fleet, and Marshalsea Prisons are abolished; and by the same statute the offices of the marshal of the Marshalsea and warden of the Fleet are also abolished, and the principal officer of the Queen's Prison is to be called the keeper of the Queen's Prison. By sect. 11, the liberty of the rules is abolished, and it is to be deemed an escape if any prisoner be suffered to go beyond the walls of the prison, except as by the said statute is provided.

ESCAPES.

lady the queen, before the queen herself, and directed to the sheriff of the said county of — ; and the said C. D. was thereupon then committed by the said [Sir —, Knight,] so being such justice of our said lady the queen as aforesaid, to the custody of the keeper of the Queen's Prison, at the suit of the now plaintiff, in the plea aforesaid, and for the cause aforesaid, there to remain until &c. By which said commitment the now defendant being then and continually from thenceforth hitherto keeper of the Queen's Prison took the said C. D. into his custody, and had and detained him in his custody in the prison of our said lady the queen, called the Queen's Prison, in the borough of Southwark, in the county of Surrey, for the cause aforesaid. Nevertheless the said C. D. being so in the custody of the now defendant for the cause aforesaid, the now defendant, not regarding the duty of his office of keeper of the Queen's Prison, but contriving and wrongfully intending to injure the plaintiff, and to deprive him of his remedy for the recovery of the said sum of money so due and owing from the said C. D. to him the plaintiff as aforesaid, whilst the now defendant had the said C. D. in his custody for the cause aforesaid, and whilst he ought to have kept and detained him in such his custody as such keeper as aforesaid, to wit, on &c. [*day of escape, or about it,*] without the licence and consent and against the will of the plaintiff, and without any legal cause, warrant or authority whatsoever, voluntarily permitted and suffered the said C. D. to escape out of his custody and out of the said prison, and to go at large; and the said C. D. did then escape and go at large wherever he would, contrary to the duty of the now defendant in his said office of keeper of the Queen's Prison aforesaid, the said sum of money so due and owing from the said C. D. being and remaining wholly unpaid to the plaintiff. By means of which said several premises, the now plaintiff hath been and is greatly injured and delayed in the means of recovering the said sum of money so due and owing to him from the said C. D. as aforesaid, and is likely wholly to lose the same, together with the costs, charges and expenses of commencing and prosecuting the said action against the said C. D. amounting to a large sum of money, to wit, the sum of £— : To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

A general count
against the
keeper of the
Queen's Prison
for escape, where
defendant in
custody on a
surrender in dis-
charge of bail.

For that whereas M. W. before and at the time of the escape herein-
after mentioned, was in custody of the defendant as keeper of the Queen's
Prison, under a surrender of the said M. W. before then made into
the custody of the defendant, as such keeper as aforesaid, whilst he was
such keeper, in discharge of G. H. and I. J. who before then had become
bail for the said M. W. in a certain action before then brought, and then
pending in the Court of our said lady the queen, before the queen herself,
wherein the said P. was plaintiff, and the said M. W. defendant, for the
recovery of certain damages, to wit, damages to the amount of £—, which
the plaintiff had before then sustained by reason of the non-performance by
the defendant of certain promises and undertakings by him made to the
plaintiff for securing the payment and satisfaction to the plaintiff of the said
damages and the costs and charges in the said action, which should be ad-
judged to the plaintiff, and in discharge of the said G. H. and I. J. as such
bail; and the said M. W. so being in the custody of the now defendant as
such keeper as aforesaid, under and by virtue of the said last-mentioned

surrender, he the now defendant, not regarding the duty of his said office of keeper of the Queen's Prison aforesaid, but contriving and wrongfully intending &c. [*Here state the escape, and conclude as usual, as in the preceding form.*]

ESCAPES.

For that whereas the plaintiff heretofore, to wit, on the — day of —, A. D. —, in the Court of our lady the queen, before the queen herself, [*or if the judgment were in C. P. say, "in the Court of our said lady the queen of the bench at Westminster, before the Right Honourable —, Knight, and his companions, then her said majesty's justices of the bench," or if the judgment were in the Exchequer, say, "before her majesty's barons of her Exchequer,"*] at Westminster, in the county of Middlesex, (k) by the consideration and

Against the sheriff for an escape on final process. (l)

(k) Stating a judgment in Q. B. to have been recovered "in the Court of the bench," would be bad; 1 J. B. Moore, 19; 7 Taunt. 271, S. C.

(l) See forms referred to in 1 Saund. 37, note 1; Com. Dig. Escape, Pleader, 2 W. 11; 7 Wentw. 503 to 507; 1 Rich. C. P. 463; Herne, 89; and see a form for an escape on an attachment for not performing an award, 8 B. & C. 124; also one for an escape in execution, on a judgment revived by *scire facias*, 4 B. & C. 380; 6 D. & R. 500, S. C. And see a form of declaration for an escape against the serjeant at mace for borough of Liverpool and law, *Morris v. Parkinson*, 1 Crom. M. & Ros. 163.

When action lies.—The sheriff is liable for the escape of a prisoner taken on an *erroneous* judgment; Carth. 148. If a Court, not having jurisdiction, orders an officer to discharge a prisoner, and the officer obeys the order, he is liable to an action for an escape; 8 T. R. 424. The sheriff cannot take advantage of any defects in the proceedings against the prisoner, Cro Jac. 288; but unless a party be lawfully in custody, no action lies for his escape, 7 B. & C. 80; 8 B. & C. 129; and it seems the officer is not liable if the judgment was void, B. N. P. 65, 66; Watson on Sheriffs, 54; or if the writ of execution was absolutely void, Cro. Jac. 3, 288; B. N. P. 66. An escape effected by the act of God, or the king's enemies, or by the prison taking fire, is excused; 4 Co. 84; B. N. P. 66; Sel. N. P. 10th ed. 607. The sheriff is liable though he arrest in a liberty; 3 B. & Ald. 502. Letting a man that was arrested go to the next house, situate in another jurisdiction, was held an escape; *Sheriff of Hampshire v. Godfrey*, 12 G. 2, B. R.; 12 Mod. 116, note (b); 1 B. & P. 24. Touching the party, and endeavouring ineffectually to hold him, but not securing him, is an escape, 2 Younge & Jer. 399; and see further as to what is an arrest, Roa. Evid. 376; *Granger v. Hill*, 4 Bing. N. C. 212. If the sheriff allow the party to go at large on his paying him (the sheriff) the money, he will be liable for an escape; 14 East, 468; and see 4 B. & C. 96; Ry. & Moo. C. N. P. 26, 321. *Quære*, whether this action can now be supported without proof of damage, see *ante*, 552, note (p).

Who may sue.—The proper party to sue is

the plaintiff in the original action. It has been decided that the nominal plaintiff in an action for *meane profits* may sue for an escape from a *ca. sa.* upon a judgment therein, 2 M. & Sel. 473; and that the hundred may sue for an escape on a judgment obtained by them, Fitz. 296. An executor may sue as such for an escape in his testator's life-time, on a judgment obtained by the testator; Lord Raym. 973; 6 Mod. 125, S. C. The executor may sue in his own right on a judgment obtained by him, whether in his representative character or not; 2 T. R. 126. If while the defendant be in the custody of the sheriff, in an action at the suit of A., a writ be lodged in the office of the sheriff at the suit of B., and the defendant escape, A. as well as B. may sue for the escape; 1 Bos. & Pul. 24; Selk. 273.

Who may be sued.—The action should be brought against the superior officer, and not the inferior officer, who permitted the escape; Watson on Sheriffs, 144, 145. Where there are two sheriffs who suffer an escape, and one dies, the action lies against the survivor, or if pending the action one dies, the action may be continued against the survivor; Cro. Eliz. 625. If the old sheriff, at the expiration of his office, omit to turn over a prisoner by assignment to the new sheriff, he is liable for an escape; 3 Coke's Rep. 71 b; and see Watson on Sheriffs, 145; see also *Harrison v. Paynter*, 6 M. & W. 387, as to when the late or present sheriff is liable. The heir or executor of the sheriff is not liable; Dyer, 271, 322; Lord Raym. 299. See further Selw. N. P. 10th edit. 614.

Form of remedy.—At common law case was the only remedy against a sheriff for an escape of a prisoner in execution on final process; but the stats. Westm. 2, 13 Edw. 1, c. 11, and 1 Rich. 2, c. 12, gave the action of debt against the sheriff, or gaoler, for an escape, to recover the sum for which a prisoner was charged in execution, and therefore, before the 5 & 6 Vict. c. 98, s. 31, which has taken away the action of debt for an escape on final process, it was most advisable to declare in that form of action, because the jury were obliged to give the entire debt; 2 T. R. 129.

The form of remedy by a sheriff against the party escaping, through the sheriff's negli-

ESCAPES.

Issuing of *capias ad satisfaciendum*.

Indorsement to levy.

judgment of the same Court, recovered (m) against E. F. a certain debt [or if the judgment were in *assumpsit*, state it as in the next form,] of £—, and also £— costs, which in and by the same Court were adjudged to the plaintiff and with his assent for his damages, which he had sustained as well by occasion of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted. (n) And the plaintiff further saith, that he the plaintiff, for having execution of the said judgment, afterwards, to wit, on &c. (o) sued and prosecuted out of the said Court at Westminster aforesaid, a certain writ of our said lady the queen called a *capias ad satisfaciendum*, [or "a *testatum capias ad satisfaciendum*," according to the fact] upon the said judgment against the said E. F. directed to the sheriff of Essex, (p) by which said writ our said lady the queen commanded the said sheriff that he should take the said E. F. if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before our said lady the queen at Westminster, on &c., [or if in C. P. say, "before her said majesty's justices at Westminster, on &c. then next following,"] to satisfy the plaintiff the debt and damages (q) aforesaid, [or if in *assumpsit*, say, "the damages aforesaid,"] in form aforesaid recovered, and that the said sheriff should have there that writ. Which said writ afterwards, and before the delivery thereof to the said sheriff, to be executed as is hereafter mentioned, to wit, on &c., was duly indorsed with a direction to the said sheriff, requiring him

gence, is by action on the case; *Watson on Sheriffs*, 142. If the escape was voluntary, the sheriff is without remedy. It is no defence to an action that the prisoner escaped without the defendant's knowledge to places unknown and afterwards voluntarily returned, *Davis v. Chapman*, 2 Dowl. 429. See also *Jackson v. Hill*, 2 P. & D. 455.

Form of Declaration.—The observations as to the form of the declaration will be found under the following notes to each precedent. Great attention should be paid to setting out the proceedings accurately. The declaration must aver not only the escape of the prisoner, but show that he was lawfully in custody, and how.

An amendment of any mistake may, it seems, be allowed; 2 J. B. Moore, 561; 8 Taunt. 515, S. C.; 6 B. & C. 196; 9 Geo. 4, c. 15; 3 & 4 Wil. 4, c. 42, sect. 23.

Plea.—The plea of not guilty operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. Before the statute 8 & 9 Wil. 3, c. 27, fresh pursuit might be given in evidence under it, 1 Mod. 116; but that statute renders it necessary to plead the fact specially, s. 6. If the escape were voluntary, it will not avail the sheriff to plead a fresh pursuit; 2 Roll. 283; Com. Dig. tit. Escape, E. See the forms of pleas and notes, post, vol. iii.

(m) The judgment must be stated, 1 Saund. 37; 8 B. & C. 128; but this concise mode of stating the recovery is sufficient, 1 Saund. 39, n. 4; and though the judgment was revived by *scire facias*, there is no occasion to state the judgment on the *scire facias*, 4 B. & C. 380; 6 D. & R. 500, S. C. It suffices if the judgment be substantially proved as al-

leged. Where the judgment was stated to have been recovered as of Trinity Term, and the proof was of a judgment of Easter Term, it was held immaterial, and this although the declaration referred to the record of the judgment; for such reference was surplusage; 3 B. & C. 2; 4 D. & R. 624, S. C.; 9 East, 157; 4 B. & Ald. 435; 5 B. & Ald. 964. So where the declaration stated that the plaintiff recovered a judgment against H. W., and that in Trinity Term afterwards, such proceedings were had in the said Court, that it was considered that the plaintiff should have execution against H. W. for the damages aforesaid, as appeared by the record thereof; and that thereupon a *ca. sa.* was issued, and H. W. committed to the marshal's custody in execution, it was considered unnecessary to prove the judgment on the *scire facias*, and that any variance in the statement of it was not material; 4 B. & C. 380; 6 D. & R. 500, S. C. Stating a judgment of the Court of Queen's Bench to have been recovered "in the Court of the bench," would be bad; 1 J. B. Moore, 19; 7 Taunt. 271, S. C.

(n) There is no occasion to refer to the record of the judgment by a *prout patet per recordum*; 3 B. & C. 2; 4 D. & R. 624, S. C.; Willes, 127; 2 Salk. 565.

(o) The *teste* of the *capias ad satisfaciendum*. The writ, whether a *testatum* or *non omittas ca. sa.* is to be set out *verbatim*, or according to the substance.

(p) It may be described as issued to the sheriff, naming him; 2 Campb. 525.

(q) If the writ be correctly described in substance, it will suffice. The word "*damages*," when the writ is for damages and costs, is not a variance; 9 East, 298.

to levy £—— and interest thereon at the rate of £4 per cent. per annum from the —— day of —— until paid, besides officer's fees, and all other incidental expenses. (r) And which said writ so indorsed as aforesaid, afterwards, and before the said return thereof, to wit, on &c. (s) was delivered to the now defendant, who then and from thenceforth until and at and after the return of the said writ (t) was sheriff of [Essex] aforesaid, to be executed in due form of law. By virtue of which said writ the now defendant, so being sheriff as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, and within the bailiwick of the said sheriff, took and arrested the said E. F. by his body, and then by virtue of the said writ, and of the said indorsement so made thereon as aforesaid, had and detained him in his custody, in execution for the said sum of money and interest (u) so indorsed on the said writ as aforesaid [besides officer's fees and all other incidental expenses], and kept and detained him in his custody from thence until the defendant, so being sheriff as aforesaid, afterwards, to wit, on the day and year last aforesaid, without the leave or license and against the will of the plaintiff, suffered and permitted (x) the said E. F. to escape and go at large, and the said E. F. did then escape and go at large wheresoever he would out of the custody of the now defendant, he the now defendant so then being sheriff as aforesaid; and the said sum of money so indorsed on the said writ as aforesaid being then and still wholly unpaid and unsatisfied to the now plaintiff. [*A count for a false return may be added, and the conclusion may be as follows:*] whereby and by reason of the committing of the said several grievances hereinbefore mentioned, the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, damages and interest, so directed to be levied as aforesaid, and is likely to lose the same; To the damage of the plaintiff of £——, and thereupon he brings suit, &c.

ESCAPES.

Delivery of writ to defendant as sheriff.

Caption of the original defendant.

The escape.

Commencement as ante, 13.] For that whereas the plaintiff, heretofore, to wit, on &c., in the Court of our lady the queen, before the queen herself, at Westminster, in the county of Middlesex, by the consideration and judgment (z) of the same Court, recovered against one E. F. £——, which were adjudged to the plaintiff in and by the said Court for his damages, [*or, if in debt, state the judgment, as in form, ante, 558*], by him

Declaration against the keeper of the Queen's Prison for the escape of a prisoner committed to his custody in execution. (y)

(r) Let this correspond with the indorsement on the writ. No poundage can now be taken under a ca. sa.; 5 & 6 Vict. c. 98.

(s) Any day about the time when the writ was delivered to the sheriff.

(t) It should seem that this would be no variance, though the defendant's shrievalty expired before the return of the writ, see 3 D. & R. 483.

(u) Or "for the debt and damages aforesaid."

(z) Under a count for a voluntary escape, a negligent escape may be proved; 2 T. R. 126.

(y) By the 5 Vict. c. 22, the Queen's Bench Prison is to be called the Queen's Prison, and the Queen's Bench, Fleet and Marshalsea Prisons are abolished; and by the same statute the offices of the marshal of the Mar-

shalsea and warden of the Fleet are also abolished, and the principal officer of the Queen's Prison is to be called the keeper of the Queen's Prison. By sect. 12, the liberty of the rules is abolished, and it is to be deemed an escape if any prisoner be suffered to go beyond the walls of the prison, except as by the said statute is provided.

In an action for an escape against the marshal it was necessary to prove that the person that escaped was in actual custody since the *committitur*; the entry of the *committitur* in the marshal's book or on record was insufficient; 1 Keb. 375, 775. See also 2 Rol. Ab. 681, pl. 4; 2 Keb. 384; Salk. 90.

(s) Let the judgment be stated so as to agree in substance with that recovered; see the notes as to the mode of stating it, and what a variance, *ante*, 558, note (m).

ESCAPES.	sustained, as well on occasion of the not performing certain promises and undertakings (a) before then made by the said E. F. unto the plaintiff, as for his costs and charges by the plaintiff about his suit in that behalf expended, whereof the said E. F. was convicted. (b) And thereupon (c) on &c. the said E. F. then being present in the said Court of our said lady the now queen, before the queen herself at Westminster aforesaid, was then, in and by the said Court, at the prayer of the plaintiff, committed to the custody of the now defendant, then being the keeper of the Queen's Prison, in execution for the damages aforesaid, there to remain until he should satisfy the plaintiff the said damages, as by the record of the said commitment remaining in the said Court more fully appears. (d) By virtue of which said commitment the now defendant, so being such keeper as aforesaid, kept and detained the said E. F. in his custody, in execution for the damages aforesaid, at the suit of the plaintiff, until the defendant so being such keeper as aforesaid, not regarding the duty of his said office as keeper of the Queen's Prison as aforesaid, afterwards, to wit, on &c., [the day of escape, or about it,] freely and voluntarily (e) suffered and permitted the said E. F. to escape and go at large out of the said prison and out of the said custody of the now defendant, wheresoever the said E. F. would, without restraint, and without the license and against the will of the plaintiff, he the plaintiff then and still being wholly unpaid and unsatisfied his said damages [or "debt and damages," if in debt,] and every part thereof, and the said	
Commitment of original defendant to custody of keeper of the Queen's Prison.		
The escape.		

(a) If the judgment was on one count only, as where there has been a reference to the master, say "promise;" 5 B. & Cres. 339; 8 D. & R. 98, S. C.

(b) There is no occasion to refer to the record of the judgment, *ante*, 558, note (u).

(c) As to the meaning of the word *thereupon*, see 4 Bar. & Cres. 384. This is to be according to the language of the *committitur*. The above form would, it should seem, be equally applicable whether the party were brought up by *habeas* or not.

(d) There appears considerable confusion in the authorities relative to the necessity of referring to the record of the commitment. It seems, however, that inasmuch as a commitment in execution ought formerly to be (2 Bar. & Cres. 342; 3 D. & R. 597, S. C.; 2 Stra. 1215; 3 Burr. 1841,) entered of record on the judgment-roll, and inasmuch as such commitment was as much the foundation of the action as the escape itself, (*per* Chambers, J. 3 B. & P. 463,) there ought to have been an averment referring to the record of such commitment, otherwise the declaration would be bad on special demurrer. In 2 J. B. Moore, 561; 8 Taunt. 512, S. C., in an action for an escape against the warden, on a commitment in execution, in the Common Pleas, an omission to refer to the record of it was considered bad on special demurrer. Indeed that Court can only act by record.

In 2 Stra. 1226, K. B. which was an action against the marshal for an escape in execution, the declaration averred a commitment by Sir W. C. "as by the said commitment may more at large appear," and on special demurrer, for that it did not appear the commitment was of record, the declaration was

held ill. In that case the commitment was by a single judge. In another case, in 3 Bos. & Pul. 463, which was an action for an escape on final process, the declaration averred that the party was by *habeas corpus* brought before a judge of the King's Bench, and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said Court, more fully appears;" and it was there decided, that evidence of a commitment by a judge of that Court, but not filed of record, would not support the action; and secondly, that the allegation, although unnecessary, must be proved as laid. In 2 J. B. Moore, 561; 8 Taunt. 512, S. C., in an action against the warden for an escape, on a commitment by *habeas corpus*, the declaration referred to the commitment, but not to its record, the plaintiff amended the declaration on a special demurrer, for not referring to the record of the commitment. It was always safest and best therefore to refer to the record of the commitment.

It is clear there is no necessity to refer to the record of a commitment in the Queen's Bench, by *habeas* or otherwise on *maine process*, for there can be no such record; 5 East, 440; 2 M. & Sel. 202; and see also 1 Saund. 39, n. 4. However, a reference to the record would not prejudice, and might be proved by production of the *habeas* and commitment from the clerk of the papers, for they are proceedings *quasi* of record; *id.*; 3 Y. & Jerv. 104.

(e) Under a count for a voluntary escape, a negligent escape may be given in evidence; 2 T. R. 126. See the form, Lil. Ent. 156; where these words are omitted.

judgment then and still being in force and effect wholly unpaid and unsatisfied. Whereby, &c.

ESCAPES.

Commencement as ante, 13.] For that whereas one E. F. before and at the time of the escape hereinafter mentioned, was in the lawful custody of the defendant, as keeper of the Queen's Prison, in execution at the suit of the plaintiff, for the sum of [£100], upon and by virtue of a certain judgment (g) for that sum before then, to wit, on &c., recovered by the plaintiff against the said E. F. in the Court of our said lady the queen, before the queen herself at Westminster aforesaid, and which judgment then was and still is in full force and effect, not in any respect reversed, annulled, paid off, satisfied, discharged or made void, as by the record and proceedings thereof still remaining in the said Court of our said lady the queen, before the queen herself at Westminster aforesaid, will more fully appear. And the said E. F. so being in custody of the now defendant as such keeper as aforesaid, in execution at the suit of the plaintiff for the said sum of money, the defendant not regarding the duty of his office of keeper as aforesaid, afterwards, to wit, on &c., freely and voluntarily suffered and permitted the said E. F. to escape and go at large out of the said prison and out of the custody of him the now defendant, so being such keeper as aforesaid, wheresoever he the said E. F. would without restraint, and without the license or consent, and against the will of the plaintiff, he the plaintiff being then and still wholly unpaid and unsatisfied the said sum of money, and the said judgment being then and still in full force and effect, not in any respect reversed, annulled, paid off, satisfied, discharged or made void. Whereby, &c.

A declaration against the keeper of the Queen's Prison for the escape of a prisoner in execution more general, and without stating how the original defendant was in his custody. (f)

The escape.

Commencement as ante, 13.] For that whereas the plaintiff heretofore, to wit, on &c., in the Court of our said lady the queen, before the Right Hon. Sir Nicholas Coningham Tindal, Knight, and his companions, then her majesty's justices of the Court of our said lady the queen of the bench at Westminster, in the county of Middlesex, by the consideration and judgment (h) of the same Court, recovered against one J. Y. £—, which were adjudged to the plaintiff for his damages by him sustained, as well on occasion of the non-performing of a certain promise and undertaking [or "promises and undertakings," if the judgment was on more than one count, and if the judgment was in debt, state it as ante, 558.] before then made by the said J. Y. to the plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said J. Y. was convicted, as by the record and proceedings thereof, which were afterwards removed by a certain writ of error into the Court of our said lady the queen, before the queen herself, for certain alleged causes of error, and are there now remaining, fully appears. And afterwards such proceedings were had upon the said writ of error, in the said Court of our said lady the queen, before the queen herself, that it was on &c. considered

Against the keeper of the Queen's Prison for escape of prisoner charged in execution on judgment in C. P. removed into Q. B. on error, for damages in C. P. and costs in error.

Judgment affirmed in writ of error, and costs in error awarded.

(f) It should seem that this general count, which has of late been adopted in practice, would, at all events, suffice after verdict. If this count be valid, a similar concise form may be adopted in declaring against a sheriff.

Reg. Hil. Term, 2 W. 4, reg. 95. In

VOL. II.

order to charge a defendant in execution it shall not be necessary that the proceedings be entered of record; and see Jervis's Rules, 69, note (s).

(g) As to the statement of the judgment, see ante, 558, note (m).

(h) Ibid.

ESCAPES.

Commitment in execution of the original defendant into present defendant's custody.

The escape.

For a false return of *nulla bona* to a writ of *fiery facias*.
(*)

and adjudged in and by the said Court of our said lady the queen, before the queen herself, that there was no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid, and that the judgment aforesaid, in form aforesaid, should be in all things affirmed, and should stand in full force and effect, and that the said plaintiff should recover against the said J. Y. as well his damages aforesaid, as also £—— which in and by the said Court of our said lady the queen, before the queen herself, were adjudged to the plaintiff at his request, according to the form of the statute in such case made and provided, for his damages, costs and charges, which he had sustained and expended by reason of the delay of the execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error, which said damages, costs and charges, in the whole amount to £——, and that the plaintiff should have execution thereof, whereof the said J. Y. was also convicted, as by the record and proceedings thereof still remaining in the said Court of our said lady the queen, before the queen herself, at Westminster, will more fully and at large appear. And such proceedings were thereupon had, that afterwards, to wit, on &c. [*day of commitment*,] the said J. Y., then being a prisoner in the custody of the defendant as keeper of the Queen's Prison, was in and by the said Court of our said lady the queen, before the queen herself, at the prayer of the plaintiff, committed to the custody of the defendant, then being keeper of the Queen's Prison, in execution for the said sum of £——, the damages, costs and charges aforesaid, so recovered as aforesaid, there to remain, until the said J. Y. should satisfy the plaintiff the said damages, costs and charges. By virtue of which said commitment the defendant, so being such keeper as aforesaid, kept and detained the said J. Y. in his custody in execution for the damages aforesaid, at the suit of the plaintiff, until the defendant, so being such keeper as aforesaid, not regarding the duty of his said office as keeper as aforesaid, afterwards, to wit, on &c. [*day of escape, or about it*,] freely and voluntarily suffered and permitted the said J. Y. to escape and go at large out of the said prison, and out of the said custody of the defendant wheresoever the said J. Y. would, without restraint, and without the license and against the will of the plaintiff, the plaintiff then and still being wholly unpaid and unsatisfied the said sum of £——, so recovered as aforesaid, and every part thereof, and the said judgment then and still being in full force and effect wholly unpaid and unsatisfied, whereby, &c.

Commencement as ante, 13.] For that whereas the plaintiff heretofore, to wit, on &c., [*the day of signing judgment*] in the Court of our said lady the queen, before the queen herself, [*or if the judgment were in C. P. say*, "in the Court of our said lady the queen of the bench, at Westminster, before the Right Honourable Sir Nicholas Conyngham Tindal, knt., and his companions, then her said majesty's justices of the bench, at Westminster, in the

(*) See Bac. Abr. Sheriff; Com. Dig. Return, F. 2. The precedents, 8 Wentw. 455, 485; and *id.* Index, xxxiii. See the form, *ante*, 555, for false return of *non est inventus*. The venue in this action is transitory; 1 Wils. 336. As to when the sheriff is liable to an action for a false return, see Tidd, 9th edit. 309, 1005, and Chitty's Arch. Prac. 7th ed.

The sheriff cannot go into circumstantial evidence to impeach the judgment, on the ground of a collateral fraud; 2 Stark. 218. As to whether the plaintiff may do so where he disputes a judgment of another creditor under an execution, whereof the sheriff had the goods when plaintiff's writ was delivered, see 5 B. & C. 660; 8 D. & R. 442, S. C. Where the sheriff

county of Middlesex,"] by the consideration and judgment (t) of the same Court, recovered against one E. F. a certain debt, [or if the judgment were in *assumpsit*, state it as ante, 561,] of £—, and also — costs, which in and by the same Court were adjudged to the same plaintiff, and with his assent, for his damages, which he had sustained as well by the occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted. As by the record and proceedings thereof still remaining in the same Court of our said lady the queen, before the queen herself, [or if in *C. P.* say, "of the bench aforesaid," (u)] at Westminster aforesaid, will more fully appear. And the plaintiff further saith, that the said judgment being in full force, and the said debt and damages [or if in *assumpsit*, "damages,"] remaining unpaid and unsatisfied, the plaintiff, on &c., (x) in the — year of the reign of our said lady the queen, for the obtaining of satisfaction thereof, sued and prosecuted out of the said Court of our said lady the queen, before the queen herself, [or if in *C. P.* "of the bench aforesaid,"] at Westminster aforesaid, a certain writ of our said lady the queen, called a *feri facias*, directed to the sheriff of —, by which said writ our said lady the queen commanded the said sheriff, (y) that of the goods and chattels of the said E. F., in the said sheriff's bailiwick, he should cause to be levied the debt and damages [or if in *assumpsit*, "damages,"] aforesaid, and that he should have that money before our said lady the queen [or if in *C. P.* "justices of the bench,"] at Westminster aforesaid, immediately after the execution thereof, [or "on the — day of —,"] to render to the plaintiff for his debt and damages [or if in *assumpsit*, "damages,"] aforesaid; and that the said sheriff should have there then that writ. Which said writ afterwards, and before the delivery thereof to the said sheriff as hereinafter mentioned, to wit, on the said &c. was duly indorsed, with a direction for the said sheriff to levy £—, besides sheriff's poundage, officers' fees, and all other incidental expenses. (z) And which said writ so indorsed, afterwards, and

ESCAPES.

The *feri facias* issued.

Indorsed to levy £—, &c.

Delivery of writ to sheriff.

returned *nulla bona* after satisfying the landlord's claim for rent and the king's taxes, and the plaintiff assented to his quitting possession of the premises, and sued out a *ca. sa.*, it was held, that he could not afterwards maintain an action for a false return to the *fi. fa.*, however unfounded the claim for rent might turn out to have been; R. & M. C. N. P. 300. In an action for a false return of *non est inventus*, where it was proved the sheriff's officer had frequently an opportunity of arresting the defendant, who afterwards absconded, it was holden that the jury did right in assessing the damages to the amount of the whole debt; 2 Lord Raym. 1411; 1 Stra. 650, S. C.; Tidd, 9th edit. 886. An action does not lie against a sheriff who has not been ruled to return the writ, for neglecting to have the money in Court according to the exigency of a *fi. fa.*; 1 Stark. 388. When money had and received does not lie against the sheriff, see 16 East, 254; 1 B. & B. 380. When sheriff may dispute his return made in plaintiff's favour, see 6 M. & Sel. 42. Where the sheriff returns that he has levied part of the debt, and that the debtor has no goods whereof the resi-

due can be levied, and the creditor accepts the amount levied on account and towards payment of his debt, he is not thereby precluded from bringing an action for a false return; *Holmes v. Clifton*, 2 P. & D. 556; 10 A. & E. 673, S. C. As to when the late or present sheriff is liable, see *Harrison v. Paynter*, 6 M. & W. 387.

(t) The judgment must be accurately described. As to what a variance, see the notes, ante, 558, n. (m); see also 5 B. & C. 339; 8 D. & R. 98, S. C.; 11 East, 516; 9 East, 298; 2 Campb. 625; 4 Taunt. 13.

(u) There is no occasion to refer to the record of the judgment by a *prout patet per recordum*; 3 B. & C. 2; 4 D. & R. 624, S. C.

(x) The tests of the writ.

(y) Examine the statement with the writ of *fi. fa.* For the different descriptions of writs, see Tidd's *Prac. Forms*, Index, tit. *Fieri Facias*; T. Chitty's *Forms*, 5th edit. Writs of execution are now returnable immediately, and not as heretofore in a subsequent term.

(z) What a variance, 2 Bing. 255; 9

ESCAPES. before the said execution thereof, to wit, on the day and year last aforesaid, was delivered to the now defendant, who then and from thence until and at and after the execution of the said writ (a) was sheriff of the said county of —, to be executed (b) in due form of law.* By virtue of which said writ, the defendant so being sheriff of the said county of — as aforesaid, afterwards, to wit, on the day and year last aforesaid, and within his bailiwick, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said E. F. (c) of great value, to wit, of the value of the monies so indorsed and directed to be levied as aforesaid, and then levied the same thereout. Yet the defendant, so being such sheriff of the said county of — aforesaid, not regarding his duty as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in that behalf, and to deprive him of the said monies so indorsed on the said writ and directed to be levied as aforesaid, and of the means of obtaining the same, had not the said monies so levied as aforesaid, or any part thereof, before our said lady the queen, [or if in C. P. "before the justices of the bench,"] at Westminster aforesaid, according to the exigency of the said writ and of the said indorsement so made thereon as aforesaid, but therein wholly failed and made default, nor hath he paid the said sum of £ — or any part thereof to the plaintiff; and the now defendant, after the said levy, to wit, on &c., falsely and deceitfully returned to the said Court of our said lady the queen, upon the said writ, that (d) the said E. F. had not any goods or chattels in his bailiwick whereof he could cause to be levied the debt and damages [or if in *assumpsit*, "damages,"] aforesaid, or any part thereof, as by the said writ and the return thereof remaining of record in the said Court of our said lady the queen, before the queen herself, fully appears. (e) By means of which premises the plaintiff hath been and is greatly injured and deprived of the means of obtaining the said monies so indorsed on the said writ and directed to be levied as aforesaid, and which are still wholly unpaid, and is likely to lose the same.

The levy.

False return of
nulla bona.

Reference to
writ.

Second count,
for not levying,
and false return
of *nulla bona*.
(f)

The same as in the last precedent, to the asterisk, observing the notes, and then proceed as follows:] And although there then and afterwards, and whilst the said last-mentioned writ remained in full force, were divers goods and chattels of the said E. F. within the bailiwick of the now defendant, as such sheriff as aforesaid, whereof he could and might and ought to have levied the monies so indorsed and directed to be levied as last aforesaid, whereof the defendant during all the time aforesaid had notice; Yet the now defendant, so being sheriff of the said county of —, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the now plaintiff in

Moore, 425, S. C.; 5 Esp. Rep. 133; Ry. & Moo. C. N. P. 291. Examine with the indorsement on the writ.

(a) This would be no variance, though defendant's shrievalty expired before the return of the writ; 3 D. & R. 483.

(b) See the effect and proof of this averment, 2 Bing. 479; 10 Moore, 210, S. C.

(c) If the *sf. fa.* were against two, and it

be alleged that the goods of both were taken, it will suffice to prove that the goods of one were taken; 4 M. & Sel. 349.

(d) Examine with the return.

(e) As to this reference, see Fortesc. 379.

(f) The count for not levying is clearly a distinct subject-matter of complaint within the pleading rules.

this behalf, and to deprive him of the monies so indorsed on the said last-mentioned writ and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would, within a reasonable time for that purpose, which hath long since elapsed, levy the money last aforesaid or any part thereof, but wholly neglected and refused so to do, and therein failed and made default, and afterwards, to wit, on &c. aforesaid, falsely and deceitfully returned to the said Court of our said lady the queen, that the said E. F. had not any goods or chattels in his bailiwick whereof he could cause to be levied the debt and damages [or if in *assumpsit*, "damages,"] last aforesaid, or any part thereof, as by the said last-mentioned writ, and the return thereof remaining, &c. [*Proceed as in the first count to the end.*]

ESCAPES.

If the sheriff seized and improperly sold the goods, a count should be added as in 9 *East*, 298.

Other counts, for different misconduct relating to a *feri facias*.

See *Jacobs v. Humphreys*, 2 *Crom. & Mees.* 413; *Aireton v. Davis*, 3 *Moore & Scott*, 138; 9 *Bing.* 740, *S. C.*; *Rowe v. Amos*, 8 *Dowl.* 750.

For not selling within a reasonable time after seizure under a *feri facias*.

See *Mason v. Paynter*, 1 *G. & D.* 381.

For not executing a writ of *ha. fu. pos.*

NOT TAKING A REPLEVIN BOND.

NOT TAKING A REPLEVIN BOND.

Commencement as ante, 13.] For that whereas the plaintiff, heretofore, to wit, on &c. in a certain close and premises situate in the county of —, took and distrained divers goods and chattels, [or "large quantities of potatoes," according to the fact, "then planted and growing"] in the said close and premises, of great value, to wit of the value of £—, as a distress for certain arrears of rent, to wit, for the sum of £— of lawful money, then due and owing from one E. F. to the plaintiff for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof theretofore made, rendering rent for the same. And the plaintiff then detained the said goods and chattels, [or "potatoes,"] so taken and distrained for the cause aforesaid, until the defendant, then being sheriff of the said county of —, afterwards, to wit, on the day and year aforesaid, and within his bailiwick, as such sheriff, (that is to say,) on the complaint of the said E. F. made to the now defendant, so then being such sheriff as aforesaid, against the plaintiff in that behalf, and under colour of his office

For not taking a replevin bond, on granting replevin on a distress for rent, according to the 11 *Geo. 2*, c. 19, s. 23. (g)

The replevin.

(g) See the forms, *Mod. Ent.* 215; 2 *Hen. Bla.* 36, 547; *Lil. Ent.* 37. As to what replevin bond ought to be taken, see *Harr. Landl. and Ten.* 736. An action is sustainable against the sheriff, either for not taking a replevin bond, (*Cro. Car.* 446; *Sir W. Jones*, 378; 1 *Saund.* 195 b; 2 *T. R.* 617;) or for taking insufficient pledges, 1 *Saund.* 195 b; 2 *Hen. Bla.* 36, 547; 4 *T. R.* 433; 2 *Sel. Prac.* 2d edit. 175 to 177. The action must be brought in the name of the avowant, or in case there be no avowant, of the person making cognisance in the replevin suit; 1 *B.*

& *B.* 378. The forms, *ante*, 325 to 330, and the notes thereto, will assist in framing declarations of this nature. What not a variance, see 3 *M. & Sel.* 169. The Courts will not grant an attachment against the sheriff for neglecting to take a replevin bond, as the party injured might have his action; 2 *T. R.* 617. If the sheriff has lost the bond, he may, it seems, be sued for the negligence, and if there be reason to apprehend that a bond was taken, it may be prudent to insert a count to meet such negligence; 5 *B. & C.* 284; 8 *D. & R.* 72, *S. C.*

NOT TAKING A REPLEVIN BOND.	of such sheriff as aforesaid, caused the said goods and chattels [<i>or</i> "potatoes"] to be replevied and delivered to the said E. F., and then made deliverance of the said distress to the said E. F. And the plaintiff further saith, that at the then next County Court (<i>h</i>) of the said sheriff, to wit, at the County Court of the said sheriff, holden in and for the said county of — heretofore, on &c., before the then suitors of the said Court, to wit, — and —, (<i>i</i>) the said E. F. did appear, and then in the same Court, without the writ of our said lady the queen, levied his plaint against the now plaintiff for taking and unjustly detaining of the said goods and chattels, [<i>or</i> "potatoes"] and afterwards, to wit, on the day and year last aforesaid, the now plaintiff did duly appear in and before the said Court, to answer the said E. F. in the plea of his said plaint; and such proceedings were thereupon had in the said plea, (<i>k</i>) that afterwards, to wit, at the next County Court of the now defendant as such sheriff as aforesaid, holden at &c. aforesaid, in and for the said county of —, on &c. aforesaid, before the said then suitors of the said Court, the said E. F. did not duly prosecute his suit, and it was then duly considered in and by the said last-mentioned Court, (<i>l</i>) that the said E. F. should take nothing by his said plaint, but that he and his said pledges to prosecute should be in mercy &c., and that the now plaintiff should have a return of the said goods and chattels [<i>or</i> "potatoes,"] as by the remembrance and proceedings thereof still remaining in the said Court more fully and at large appears. And although it was the duty of the now defendant, as such sheriff, before his making deliverance of the said distress to the said E. F. as aforesaid, in pursuance of the statute in such case made and provided, to take from the said E. F. and two (<i>m</i>) responsible persons as sureties, a bond in double the value of the said goods and chattels [<i>or</i> "potatoes"] so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said E. F. for the taking of the said goods and chattels [<i>or</i> "potatoes"] with effect, and without delay, and for duly returning the goods and chattels [<i>or</i> "potatoes"] so distrained, in case a return should be awarded, as the defendant then well knew. Nevertheless the now defendant, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving and wrongfully and unjustly intending to injure the now plaintiff, and to deprive him of the benefit of his said distress, and of the means of obtaining satisfaction for the said arrears of rent so due and owing as aforesaid, did not nor would, before his making deliverance of the said distress to the said E. F. as aforesaid, take from the said E. F. and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do.* And the plaintiff further saith, that he hath not as yet obtained a return of the said goods and chattels [<i>or</i> "potatoes"] so dis-	
The plaint levied.		
Judgment against plaintiff in replevin.		
Reference to proceedings. Defendant's duty to take a replevin bond.		
Defendant's neglect of duty.		
The replevied goods not re- turned.		

(*h*) If the plaint in replevin were removed into Q. B. or C. P. by *re. fa. lo.* and there was a declaration and avowry and judgment in the Court above, observe the form, *ante*, 325 to 329. It is not necessary, where pledges have been taken, to state any proceedings against them.

(*i*) A misdescription of the suitors under a *videlicet* is not a fatal variance, 3 D. & R.

226; 2 B. & C. 2, S. C.

(*k*) As to this *taliter processum*, see 1 Saund. 92, note 2; Carth. 53.

(*l*) If the proceedings were removed into Q. B. or C. P. see the form, *ante*, 325 to 329.

(*m*) A bond with one surety seems sufficient to enable the sheriff to sue thereon; 2 Marsh. 352; 7 Taunt. 28, 327; 1 Moore, 68, S. C.

trained as aforesaid, or any or either of them, or any part thereof, and the said arrears of rent have not, nor hath any part thereof, as yet been paid to the now plaintiff, nor hath the said E. F. hitherto answered to the now plaintiff for the value of the said goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, and by reason of the premises the now plaintiff hath been and is wholly deprived of the said goods and chattels [*or* "potatoes"] so distrained as aforesaid, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and his costs and charges by him expended in and about the endeavouring to obtain satisfaction thereof, and a return of the said goods and chattels [*or* "potatoes."] And whereas also heretofore, to wit, on the day and year first aforesaid, the now plaintiff took and distrained certain other goods and chattels of great value, to wit, of the value of £—, for a certain sum of money, to wit the sum of £—, then due and owing to the now plaintiff for rent, and the said last-mentioned goods and chattels being so distrained as aforesaid, the now defendant, then being sheriff of —, afterwards, to wit, on the day and year last aforesaid, at the prayer of the said E. F. replevied and made deliverance of the said last-mentioned goods and chattels to the said E. F. And afterwards, to wit, at the County Court of the now defendant, as such sheriff as aforesaid, duly holden, to wit, on the day and year last aforesaid, before certain then suitors of the same Court, the said E. F. did not duly appear at the same Court and then prosecute with effect his suit by him before then commenced in the same County Court against the now plaintiff for the taking of the said goods and chattels as last aforesaid; and it was thereupon then duly considered in and by the same Court, that the now plaintiff should have a return of the said last-mentioned goods and chattels; as by the remembrance and proceedings thereof still remaining in the said Court more fully appears. And the now plaintiff further saith, that the now defendant, so being sheriff of the county of —, at the time of the causing the said last-mentioned goods and chattels to be replevied and delivered to the said E. F. as aforesaid, not regarding his duty as such sheriff, nor the statute in that case made and provided, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff in that behalf, and to deprive him of the benefit of the said last-mentioned distress, did not nor would, before the replevying and delivery of the said last-mentioned goods and chattels so distrained as last aforesaid, to the said E. F. take, in the name of the now defendant, so being sheriff as aforesaid, of the said E. F. and two responsible persons, a bond in double the value of the said last-mentioned goods and chattels so distrained as last aforesaid, such value being ascertained by the oath of one or more credible witness or witnesses not interested in the said last-mentioned goods and chattels or distress, and conditioned for the prosecuting the suit of replevin of the said E. F. with effect and without delay, and for duly returning the said last-mentioned goods and chattels, in case a return thereof should be awarded before the deliverance of the said last-mentioned distress was so

NOT TAKING A
REPLEVIN
BOND.

Second count
stating the cause
of action more
concisely.⁽ⁿ⁾

⁽ⁿ⁾ Before the pleading rules of Hil. T. 4 Wil. 4, reg. 5, several counts were admissible, but now only one count should be in-

serted. But for conciseness this second may sometimes be preferred to the first.

NOT TAKING A
REPLEVIN
BOND.

caused to be made to the said E. F. as last aforesaid, as the defendant as such sheriff ought to have done; but the now defendant then wholly neglected so to do, nor hath the said last-mentioned arrear of rent, or any part thereof, been paid or satisfied to the now plaintiff, nor hath the said E. F. hitherto answered to the plaintiff for the value of the said last-mentioned goods and chattels so distrained as last aforesaid, or any or either of them, or any part thereof. By means &c. [*Conclude as in the first count.*]

FOR TAKING
INSUFFICIENT
PLEDGES.

FOR TAKING INSUFFICIENT PLEDGES.

For taking in-
sufficient pledges
in replevin. (o)

Proceed as in the first count of the last precedent to the asterisk, and then as follows:— And on the contrary the defendant wrongfully and unjustly, before the replevying and delivery of the said [cattle,] goods and chattels as aforesaid, to wit, on &c., did take, in the name of the now defendant, as such sheriff as aforesaid, of the said E. F. and two other persons, to wit, G. H. and I. K. (p). a certain bond, conditioned (q) for the prosecuting the said suit of the said E. F. with effect, and for duly returning the said [cattle,] goods and chattels so distrained as aforesaid, in case a return thereof should be adjudged as a bond taken in pursuance of the said statute. Nevertheless the now plaintiff saith, that the said G. H. and I. K. so taken as sureties as aforesaid, at the time of their becoming pledges and sureties in that behalf as aforesaid, were not good, able, sufficient or responsible sureties for prosecuting the said suit of the said E. F. with effect, or for duly returning the said [cattle,] goods and chattels so distrained as aforesaid, in case a return thereof should be adjudged; but the said G. H. and I. K., at the time of their becoming such sureties as aforesaid, were and each of them was and ever since hath been and still are wholly insufficient for that purpose, nor have the said [cattle,] goods and chattels, or any or either of them, or any part thereof, as yet been returned to the plaintiff, nor have the said arrears of rent, or any part thereof, been as yet paid or satisfied to the plaintiff, nor hath the said judgment been in any way satisfied, nor hath the said E. F. hitherto answered to the plaintiff for the value of the said [cattle,] goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof. By means of which said premises the now plaintiff hath been and is wholly deprived of the said [cattle,] goods and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent and the said costs and charges by him in and about his said suit in that behalf expended, and in

(o) See other forms, 1 Mall. 215; Mod. Ent. 215; Lil. Ent. 37; 4 T. R. 433; Gilb. Rep. 24; 3 Bing. 50; and see note, ante, 565, note (g), and 2 Hen. Bl. 36, 547. If the sureties were apparently responsible at the time they were taken, and diligent and reasonable inquiries were made, before they were accepted, into their actual sufficiency, the sheriff is not liable; 5 Taunt. 225; 1 Marsh. 27; 8 Moore, 27; but see *Jeffery v. Bastard*, 4 A. & E. 823. What is evidence of insufficiency, see 3 Stark. 168; 4 A. & E. 823. As to this action, Cro. Car. 11, 46; Sir W. Jones, 378; 2 T. R. 617; 1 Saund. 195; 2 Sel. Prac. 175 to 177. Some forms

state the issuing of a writ *retorno habendo*, but this is unnecessary. As to the damages, see 1 Chit. Col. Stat. 676, note; 3 Bing. 56; 5 B. & C. 290; 4 T. R. 433; 2 Hen. Bl. 547. The sureties in the bond may be witnesses to prove whether they were sufficient or not; 1 Saund. 195; 5 Taunt. 225. The penalty of the bond is the limit of damages; 4 A. & E. 823.

(p) It is not necessary to prove the execution by the sureties; Ry. & Moo. C. N. P. 264; and see 3 Stark. C. N. P. 168; Roscoe on Evid. 418.

(q) Examine with the bond and condition, and let this correspond.

and about the endeavouring to obtain a return of the said [cattle,] goods and chattels.

FOR TAKING
INSUFFICIENT
PLEDGES.

As in the count for an escape, ante, 552, to the end of the statement of the arrest, and then proceed as follows :] And the plaintiff further saith, that the said E. F. having been so arrested and being in the custody of the defendant as such sheriff, under and by virtue of the said writ, the defendant, as such sheriff, afterwards, and before the return of the said writ, to wit, on &c. [the date of the bail bond,] took bail for the appearance of the said E. F. in the said Court of our said lady the queen, before the queen herself, according to the form of the statute in such case made and provided, and on that occasion the now defendant then took of the said E. F. and two other persons, as his sureties or bail, according to the form of the said statute, a certain writing obligatory, commonly called a bail bond, to wit, in the penal sum of £—, lawful money of Great Britain, conditioned for the said E. F. causing special bail to be put in for him to the said action in her said majesty's said Court, as required by the said writ ; (s) and the plaintiff in fact further saith, &c. [state the forfeiture of the bail-bond, (t) as ante, 324, and then proceed as follows :] And although the plaintiff, [by G. H. his attorney on that behalf,] did (u) afterwards and whilst the defendant was such sheriff as aforesaid, to wit, on &c. [day of request to assign, or about it,] request the defendant to assign the said writing obligatory to the now plaintiff, being the plaintiff in the said action, according to the form of the statute in such case made and provided ; and although the now plaintiff was then ready and willing and offered to pay to the now defendant the costs payable to him in that behalf, according to the form of the said last-mentioned statute ; Yet the now defendant, so being such sheriff as aforesaid, not regarding the duty of his said office as such sheriff, nor the statute in that case made and provided, but contriving and wrongfully and unjustly intending to injure the plaintiff in this behalf, and to hinder and prevent him from bringing any action or actions on the said writing obligatory and to deprive him of the means of recovering the damages [if in debt, say, "debt and damages"] aforesaid, did not, nor would, at the said time when he was so requested as aforesaid, assign the said writing obligatory to the plaintiff, (x) but on the contrary thereof then wholly neglected and refused and hath from thence hitherto wholly neglected and refused so to do and by means of the premises last aforesaid, the plaintiff hath been and is hindered and prevented from bringing any action or actions on the said writing obligatory and hath been and is deprived of the means of recovering the said damages [or if in debt, say "debt and damages"] and is likely to lose the same. [If it be doubtful

Against the
sheriff for not
assigning a bail
bond, on 4
Anne, c. 16, s.
20. (r)

(r) Though an action cannot be supported against the sheriff for not taking a bail bond, or for taking insufficient sureties by the plaintiff in the suit, (see Tidd's Prac. 9th ed. 223, and 2 Saund. 61 f,) yet if a bond be taken, the sheriff is, by the 4 Anne, c. 16, s. 20, bound, on the request of the plaintiff or his attorney, to assign such bond as therein mentioned, and if he refuse to do so, he is liable to an action on the case, 7 T. R. 122 ; 2 Saund. 61 a ; and if there be any doubt whether the sheriff has taken a bail bond, it is advisable to demand an assignment, and to add this count to those for an escape, and not

taking the defendant, as ante, 552 to 555 ; see 5 Taunt. 325.

(s) This should be examined with the bail bond.

(t) This statement does not appear to be absolutely necessary, as the bond may be assigned before it is forfeited ; Tidd's Prac. 9th ed. 298 ; and see the words of the statute, 4 Anne, c. 16, s. 20.

(u) See the words of the statute, 4 Anne, c. 16, s. 20.

(x) Or if the assignment were not sufficient, state " by indorsing the same," &c. as in 4 Anne, c. 16, s. 20.

FOR TAKING
INSUFFICIENT
PLEDGES.

whether a bail bond was taken, add a count for an escape, as ante, 552; see T. R. 109.

For taking in-
sufficient bail.

See form, Brunskill v. Robertson, 9 A. & E. 840.

For not arrest-
ing within a
reasonable time
and on the first
opportunity.

See forms, Brown v. Jarvis, 5 Dowl. P. C. 281; Randell v. Whible, 10 A. & E. 719.

FOR
NOT OBEYING
SUBPŒNA.

Against a wit-
ness who had
been served
with a subpoena
duces tecum for
neglecting to
produce the
papers men-
tioned in the
subpœna,
whereby the
plaintiff was
nonsuited. (y)

FOR NOT OBEYING SUBPŒNA.

For that whereas the plaintiff, before the committing of the grievances by the now defendant as hereinafter mentioned, to wit, on &c., in the Court of our lady the queen, before the queen herself, [or if in C. P. "before her majesty's justices,"] at Westminster, impleaded one E. F. in a certain plea of [trespass on the case] to the damage of the now plaintiff of £—, and such proceedings were thereupon had in the said Court of our said lady the queen, before the queen herself, in that plea, that afterwards, to wit, at the sittings at Nisi Prius, holden in [the Great Hall of Pleas, commonly called Westminster Hall, at Westminster,] on, &c. before the Right Honourable Thomas Lord Denman, then and still being chief justice of our said lady the queen, a certain issue [or "issues" if there were several joined in the record,] before then joined in the said plea between the now plaintiff and the said E. F., in due manner came on to be tried by a jury of the country then chosen, tried and sworn for that purpose. And whereas, before the trial of the said issue [or "issues,"] and also before the committing of the grievances by the defendant hereinafter next mentioned, to wit, on, &c. the now plaintiff prosecuted out of the Court of our said lady the queen, before the queen herself, her said majesty's writ of subpœna, directed to [G. H., I. K., and] the now defendant, by which said writ our said lady the queen commanded [the said G. H., I. K., and] the now defendant, (z) that all other things being set

(y) See the law and form, 9 East, 473; 8 Bing. 224; 3 Chit. Gen. Prac. by Lush, 704, &c. This action lies at common law; Dougl. 561. The party may proceed by action founded on the statute 5 Eliz. c. 9, s. 12, for the penalty of £10, and also for the further recompense given by that statute, if it has been previously assessed by the Court, out of which the process issued; Dougl. 561. A witness is entitled to be paid or tendered to him a reasonable sum for going to and returning from the place of trial; *Newton v. Harland*, 9 Dowl. 17; but when a witness was subpoenaed at Camberwell to attend a trial in London on the part of the plaintiff, having admitted that he had received a guinea with a subpoena from the opposite party, consented to receive 1s. with the plaintiff's subpoena, it was held sufficient payment to render him liable to an action for not obeying the plaintiff's subpoena; *Betteley v. M'Leod*, 3 Bing. N. C. 405; 5 Dowl. 481, S. C. The question as to whether a subpoena is served within a reasonable time, depends upon the circumstances of each particular case; see *Maunsell v. Ainsworth*, 8 Dowl. P. C. 869. The declaration need not aver in express terms

that the subpoena was served within a reasonable time, the usual averment that the defendant could and might have appeared, and had no reasonable excuse for omitting to do so, being sufficient; *ibid.* It is not necessary to show that the defendant was called on his subpoena, if it be shown by other evidence that he was not present; nor is it necessary that the jury should be sworn, and the plaintiff nonsuited; it is sufficient if he withdrew the record, being unable safely to go to trial in the absence of the witness; *Lament v. Cook*, 6 M. & W. 615. In an action against a witness for not obeying a subpoena, it is *prima facie* sufficient to allege that the defendant was a material witness, and that his absence caused the plaintiff to be nonsuited, without averring that plaintiff had a good cause of action. At all events such allegation is sufficient after verdict; *Masterman v. Judson*, 8 Bing. 224; *Davis v. Lovell*, 4 M. & W. 678. See fully as to the liability of a witness in case of non-compliance with a subpoena, 3 Chitty's Gen. Prac. by Lush, 704, &c.

(z) Set out the subpoena in its terms. Where the declaration stated that the plaintiff caused to be left with the defendant a

aside, and leaving every excuse, he [or "they"] should appear in his proper person [or "their proper persons respectively,"] before the said Thomas Lord Denman, the said chief justice of our said lady the queen, assigned to hold pleas in her said majesty's Court at Westminster Hall, in the county of Middlesex, on — then next, that is to say, on the — day of —, by nine o'clock of the forenoon of the same day; and that [the said G. H., I. K. and] the now defendant, [or "either of them,"] should produce and show forth, at the time and place aforesaid, a [certain warrant granted to them, or one of them, by the then, &c. upon a certain writ of *non omittas testatum f. fa.* issued out and under the seal of the said Court of our said lady the queen, &c. on or about the 13th day of May then last, between — plaintiff, and — defendant, and the paper-writing or instruction which accompanied the same warrant,] and then and there to testify and show all and singular those things which they knew of the bill of exchange therein mentioned, warrant, papers, writings, records and ordinances, might report of and concerning the said action then in her said majesty's Court, between the said A. B. plaintiff, and the said E. F. defendant, of a plea of trespass on the case on the plaintiff's part, and at the said day, by a jury, &c. to be tried, which said writ the plaintiff afterwards, and before the committing the grievances by the defendant as hereinafter mentioned, to wit, on, &c. caused to be made known and shown to the defendant, and then caused a copy to be left with the defendant, and then paid to the defendant a certain sum of money, to wit, the sum of one shilling, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpoena. And the plaintiff avers that the said action came on for trial at the said time and place mentioned in the said writ of subpoena for that purpose, and that he the said plaintiff had a good cause of action in the said suit. (a) And although the defendant, in part obedience to the said writ of subpoena, did afterwards, to wit, on, &c. appear as a witness on the trial of the said issue, and although the now defendant could and might, in obedience to the said writ of subpoena, have produced and shown forth at the time and place aforesaid, on the said trial of the said issue, the said warrant, and the said papers, writings or instructions so mentioned and referred to in the said writ of subpoena as aforesaid, and thereby so required to be produced and shown forth as aforesaid; and although the production and showing forth of the said warrant and papers, writing or instructions, were material evidence for the now plaintiff on the said trial, and would have enabled him to have obtained a verdict on the said issue against the said E. F. to wit, whereof the defendant there had notice. Yet the defendant, not regarding his duty in that behalf, but contriving and wrongfully and unjustly intending to injure the now plaintiff, and to deprive him of the benefit of the same evidence on the trial of the said issue, and thereby to prevent him from obtaining a verdict against the said E. F. thereon, and to put him to great charges and expenses of his monies, did not nor would, at the time and place aforesaid, on the said trial of the said issue, produce and show forth the said warrant, papers, writings or instructions so mentioned

copy of the writ of subpoena, it was held that the judge at Nisi Prius had authority under 9 Geo. 4, c. 15, to allow this allegation to be amended as follows,—"a copy of so much of the said writ of subpoena as related to the said

defendant." *Masterman v. Judson*, 8 Bing. 224.

(a) As to this averment, and generally as to how the declaration should be framed, see *Mullatt v. Hunt*, 1 C. & M. 752; *Davis v. Lovell*, 4 M. & W. 678; 7 Dowl. 178, S. C.

FOR
NOT OBEYING
SUBPŒNA.

and referred to in the said writ of subpoena as aforesaid, although the defendant was then and there solemnly called upon for that purpose, and had no lawful or reasonable excuse or impediment to the contrary, but then wholly neglected and refused so to do, and by reason thereof the plaintiff was then forced and obliged to become and was then nonsuited in the said action. And such proceedings were thereupon had, that afterwards, to wit, in — term, in, &c. it was adjudged in and by the said Court, that the said E. F. should recover against the now plaintiff £——, for his costs and charges by him laid out in and about his defence in that behalf, as by the record and proceedings thereof more fully appears. By means of which said several premises he the plaintiff was not only forced and obliged to pay and did necessarily pay to the said E. F. the said sum of £——, so recovered against him as aforesaid, but was also greatly hindered and delayed in the recovery of his damages in the plea aforesaid; and was also forced and obliged to expend and did necessarily expend divers other sums of money, in the whole amounting to a large sum of money, to wit, the sum of £——, in and about the prosecuting the said suit, and was and is, by means of the premises, otherwise greatly injured and damnified.

INFRINGING
COPYRIGHTS.

On the 5 & 6
Vict. c. 45, for
infringing the
copyright of a
book. (b)

First count, for
printing for sale
or exportation.

INFRINGING COPYRIGHTS.

Commencement as ante, 13.] For that whereas before and at the time of the committing of the grievances by the defendant hereinafter next mentioned, there was a subsisting copyright in a certain book, intituled &c.,

(b) The late stat. of 5 & 6 Vict. c. 45, repeals the 54 Geo. 3, c. 156, on which the declaration in the last edition of this work was framed, except so far as the continuance of the same may be necessary for carrying on or giving effect to any proceedings at law or in equity, pending at the time of the passing of the 5 & 6 Vict. c. 45, or for enforcing any cause of action or suit, or any right of contract then subsisting; and by the third section it is enacted that the copyright in every book which shall after the passing of that act be published in the life-time of its author, shall endure for the natural life of such author, and for the further time of seven years, commencing at the time of his death, and shall be the property of such author and his assigns; provided always, that if the said term of seven years shall expire before the end of 42 years from the first publication of such book, the copyright shall in that case endure for such period of 42 years; and that the copyright in every book which shall be published after the death of its author, shall endure for the term of 42 years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published and his assigns. By the fourth sect. it is also enacted that the copyright, which at the time of passing that act shall subsist in any book theretofore published (except as thereinafter mentioned), shall be extended and endure for the full term provided by that act in cases of books thereafter published, and shall be the property of the person who at the time of pass-

ing of that act shall be the proprietor of such copyright; provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher, or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by that act, but shall endure for the term which shall subsist therein at the time of passing that act and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall before the expiration of such term consent and agree to accept the benefits of that act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to that act annexed to be entered in the book of registry thereafter directed to be kept, in which case such copyright shall endure for the full term by that act provided in cases of books to be published after the passing of that act, and shall be the property of such person or persons as in such minute shall be expressed.

By sect. 5 it is enacted that it shall be lawful for the judicial committee of her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book in such manner and subject to such conditions as they may think fit, and

[*set forth the title accurately,*] and the plaintiff was then the proprietor (c) of such copyright, and had printed and published for sale divers, to wit, — copies of the said book, to his great profit and advantage; Yet the defendant, well knowing the premises, but contriving and wrongfully and injuriously intending (d) to injure the plaintiff, and to deprive him of the profits, emoluments and advantages, which he might and otherwise would have derived and acquired from the sale of the said book, and also to deprive him of the benefit of his said copyright, heretofore, and after the passing of a certain act of parliament made and passed in the session of parliament holden in the 5th and 6th years of the reign of her present majesty, intituled "An Act to amend the Law of Copyright," to wit, on &c. and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously, and without the consent of the plaintiff, so being the proprietor of the said copyright of and in the said book, first had and obtained in writing, (e) in a certain part of the British dominions, to wit, in England, printed and caused to be printed for sale [or "exportation," *according to the fact*], divers, to wit, — copies of the said book, in which there was such subsisting copyright as aforesaid, contrary to the said statute in that case made and provided; by means whereof the plaintiff hath been greatly injured, and hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his said copyright therein hath been and is greatly injured and damnified. And whereas also before and at the time of the committing of the grievance by the defendant hereinafter next mentioned, there was a subsisting copyright in the said

INFRINGING
COPYRIGHTS.

Second count,
for importing for
sale or hire a
book unlawfully
printed.

that it shall be lawful for such complainant to publish such book according to such license.

As to the remedy for Piracy.—By sect. 15 it is enacted, that if any person shall in any part of the British dominions, after the passing of that act, print or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published or exposed to sale or hire, or shall have in his possession for sale or hire any such book so unlawfully printed or imported without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any Court of record in that part of the British dominions in which the offence shall be committed; provided always, that in Scotland such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.

Sect. 16 requires the defendant to give notice of the objections to the plaintiff's title on which he means to rely.

As to the copyright of designs for ornamenting articles of manufacture, see 5 & 6 Vict. c. 100, by sect. 8 of which statute a summary remedy is given for the recovery of the penalties

inflicted on persons pirating such designs, but by sect. 9 it is enacted that notwithstanding the remedies thereby given for the recovery of any such penalty as aforesaid, it shall be lawful for the proprietor in respect of whose right such penalty shall have been incurred (if he shall elect to do so) to bring such action as he may be entitled to for the recovery of any damages which he shall have sustained either by the application of any such design, or of a fraudulent imitation thereof for the purpose of sale to any articles of manufacture or substances, or by the publication, sale, or exposure to sale, as aforesaid, by any person of any article or substance to which such design, or any fraudulent imitation thereof, shall have been so applied, such person knowing that the proprietor of such design had not given his consent to such application.

As to dramatic literary property, see 3 W. 4, c. 15, and *Cumberland v. Planché*, 1 Adol. & El. 580. See also 5 & 6 Vict. c. 45, s. 20, 21, 22; and as to the copyright in encyclopedias, periodicals, and works published in a series, reviews or magazines, see sect. 18 of the last-mentioned statute. As to the copyright in musical compositions, see 5 & 6 Vict. c. 45, sect. 20, by which the provisions of 3 & 4 W. 4, c. 15, are extended to them.

And as to copyrights in lectures, 5 & 6 W. 4, c. 65.

(c) This is the word used in the statute; see sect. 15.

(d) This allegation is immaterial, see 1 Campb. 98.

(e) The declarations do not usually negative a written licence; 7 T. R. 620.

INFRINGING
COPYRIGHTS.

book, and the plaintiff was then the proprietor of the said copyright,* and divers, to wit, — copies of the said book had been unlawfully printed without the consent in writing of the plaintiff, so being the proprietor of the said copyright as aforesaid, of all which the defendant at the time of the committing of the grievance hereinafter next mentioned had notice and well knew. Yet the defendant, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff, and to deprive him of the profits, emoluments and advantages which he might and otherwise would have derived and acquired from his said book, and also to deprive him of the benefit of his said copyright therein, heretofore, and after the passing of the said statute, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously, and without the consent in writing of the plaintiff, so then being the proprietor of the copyright of and in the said book, first had and obtained, imported for sale [or “hire,”] from parts beyond the sea into a certain part of the British dominions, to wit, into that part of Great Britain called England, divers, to wit, — copies of the said book so unlawfully printed as last aforesaid, contrary to the form of the statute in such case made and provided, and thereby the plaintiff hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his copyright therein hath been greatly injured and damnified.

Third count,
for selling, publishing, or exposing for sale or hire, or causing to be sold, published or exposed to sale or hire, or having in his possession for sale or hire, a book unlawfully printed or imported without the consent of the proprietor.
(e)

Proceed as in the second count to the asterisk, and then as follows:] And divers, to wit, — copies of the said book had been unlawfully printed [or “imported for sale or hire from parts beyond the sea into a certain part of the British dominions, to wit, into that part of Great Britain called England,”] without the consent in writing of the plaintiff, so then being the proprietor of the said copyright, contrary to the statute in such case made and provided, of which the defendant at the time of the committing of the grievance hereinafter next mentioned had notice, and well knew. Yet the defendant, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff, and to deprive him of the profits, emoluments and advantages which he might and otherwise would have derived and acquired from his said book, and also to deprive him of the benefit of his said copyright therein, heretofore and after the passing of the said statute, to wit, on the — day of —, A. D. —, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously and without the consent in writing of the plaintiff, so then being the proprietor of the copyright of and in the said book, first had and obtained, sold, [“published,” “exposed to sale,” or “hire,” or “caused to be sold,” “published,” or “exposed to sale” or “hire,” or “had in his possession for sale or hire,” *according to the fact,*] divers, to wit, — of the said copies of the said book, which had been so unlawfully printed [or “imported for sale or hire from parts beyond the sea,”] contrary to the form of the statute in such case made and provided, and thereby the plaintiff hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his copyright therein hath been greatly injured and damnified.

(e) This and the other counts on the late statute were drawn by the editor, and appear to him to be correct; but until decided to be

good, of course no pleader should use them without satisfying himself of their correctness.

For that whereas before and at the time of the committing of the grievances by the defendant hereinafter mentioned, there was a subsisting copyright in a certain book, to wit, a musical composition, called [*set out the title*] and the plaintiff was the proprietor of such copyright, and had printed and published for sale and sold divers, to wit, — copies of the said book, to his great profit and advantage; Yet the defendant, well knowing the premises, but contriving and fraudulently intending to injure and aggrieve the plaintiff in this behalf, heretofore, and after the passing of a certain act of parliament made and passed, &c. [*set out the act as ante*, 573.] to wit, on &c., and on divers other days and times between that day and the commencement of this suit, knowingly, wrongfully and injuriously, and without the consent of the plaintiff, so being the proprietor of such copyright as aforesaid of and in such book, first had and obtained in writing, in a certain part of the British dominions, to wit, in that part of Great Britain called England, printed and caused to be printed and published for sale [*or "exportation," according to the fact,*] divers, to wit, 2000 copies of the said book in which there was such subsisting copyright, and of which the plaintiff was the proprietor as aforesaid, contrary to the form of the statute in such case made and provided, by means whereof the plaintiff hath been and is greatly injured, aggrieved and damnified.

INFRINGING
COPYRIGHTS.

On 5 & 6 Vict.
c. 45, for in-
fringing the
copyright of a
musical compo-
sition.(f)

Commencement as ante, 13.] For that whereas the plaintiff, after the 24th day of June, in the year of our Lord, 1777, mentioned in a certain act of parliament made and passed in the 17th year of the reign of our lord the late King George the Third, to wit, on &c. and before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is *the proprietor of certain prints*, which had been heretofore etched in Great Britain, that is to say, of a certain print, intituled —, and of a certain other print, intituled —, and of a certain other print, intituled —. And the plaintiff, during all the time aforesaid had and was lawfully entitled to, and still hath and is lawfully entitled to, the sole right and liberty of printing and reprinting the said prints; Yet the defendant, well knowing the premises,(g) but disregarding the statute in such case made and provided, and contriving and wrongfully and unjustly intending to injure the plaintiff, so being the proprietor of the said prints as aforesaid, after the said 24th day of June, A. D. 1777, aforesaid, and whilst the plaintiff was such proprietor of the said prints as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, did

For infringing
the copyright of
a print.(g)

(f) The second section of the 5 & 6 Vict. c. 45, defines the word "book" to mean, amongst other things, "a sheet of music;" and therefore the 15th section of that act, before set forth, (*ante*, 573,) applies to this case. See 2 B. & C. 861; 4 D. & R. 598, S. C.; and 2 B. & Ald. 298, as to how the declaration was framed on the 54 Geo. 3, c. 156.

(g) *Quære*, whether the *scienter* is sufficiently alleged in this count. See the statutes, 8 Geo. 2, c. 13, s. 1; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; 1 Chit. Col. Stat. 192, and notes, observed upon in 5 T. R. 41; 7 T. R. 625; 3 Wils. 60; 4 Bing. 234; 2 Bla. Com. 407;

2 Woodd. Vin. Lec. 392 to 396. The assignee of a print may sue on the last statute. As to the declaration, see 5 T. R. 41; see 1 Campb. 94; 2 Campb. 25; 11 East, 244; see a form for pirating a book, 3 Campb. 111; for law, see Godson on Patents; 2 Chit. Com. Law, 252; 5 B. & Ald. 737; see *West v. Francis*, 1 Dowl. & R. 400; 5 Bar. & Ald. 737, S. C.; and see *Murray v. Heath*, 1 B. & Adol. 804, where see form of declaration against engraver for using plates engraved for plaintiff. In *Brooks v. Cocks*, 1 Har. & Wol. 129, it was held, that unless the engraver's name is upon each print he cannot sustain an action upon the statute.

INFRINGING
COPYRIGHTS.

publish and sell, and cause and procure to be published and sold, divers, to wit, — copies of each of the said prints, whereof the plaintiff so was the proprietor as aforesaid, without the consent of the plaintiff and against his will, and did expose to sale divers, to wit, 1000 other copies of the same print, without the consent and against the will of the plaintiff, and did engrave, etch and work, and copy and sell, and cause to be engraved, etched and copied and sold, in part, by varying in part from the main design. By means of the committing of which said last-mentioned grievances, the plaintiff hath been and is greatly injured in his said property in the said prints, and hath lost and been deprived of divers great gains and profits which he would otherwise have derived and acquired by the printing and selling of the said prints.

For representing or performing dramatic pieces or musical compositions.

See the 3 & 4 Will. 4, c. 15; 5 & 6 Vict. c. 45, ss. 20, 21; *Cumberland v. Planché*, 1 *Adol. & Ell.* 580; 3 *N. & M.* 573, *S. C.*; and *Chitty's Coll. of Stat.* vol. i. p. 191, as to this action.

INFRINGING
PATENTS.

For the infringement of a patent, by patentee and assignee. (h)

INFRINGING PATENTS.

Commencement as ante, 13.] For that whereas the said A. B. [*the patentee*] before and at the time of the making and obtaining of the letters-patent, and of the committing of the grievances by the defendant as hereinafter mentioned, was the true and first inventor of a certain — [*describing the invention concisely, as in the patent,*] and thereupon our lady the queen, heretofore, to wit, on &c., by her letters-patent bearing date at Westminster the day and year aforesaid, under the great seal of England, [*or "the United Kingdom of Great Britain and Ireland," according to the fact,*] (and which said letters-patent the plaintiffs now bring here into Court;) (i) reciting that, &c. [*Here set forth the recital, the grant of the patent, and the condition as to enrolling a specification, and those clauses which prohibit others from exercising it; if the recital be long it should be omitted.*] As by the said letters-patent, reference being thereunto had, will, amongst other things, more fully and at large appear. [*Here set forth the performance of the conditions in the patent, which may be thus, mutatis mutandis:*] And the plaintiffs further say, that the said A. B. [*the patentee*] did afterwards, to wit, on &c., in pursuance of the said proviso and of the said letters-patent, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of

Enrolment of the specification. (k)

(h) These parties may join where the patentee has not assigned *all* his interest; 2 *Wils.* 423; 2 *Saund.* 115, 116 a. *Ante*, vol. i. As to the law relating to patents, see 21 *Jac.* 1, c. 3; 1 *Chit. Col. Stat.* 197; *Bul. Ni. Pri.* 7th edit. 75; *Com. Dig. Patent*; 8 *T. R.* 95; 1 *T. R.* 602; 2 *Hen. Bla.* 463; 8 *Wentw.* 431, and *id.* *Index*, xxxii.; *Godson on Patents*; *Davies on Patents*; 2 *Chit. Com. Law*, 192 to 212. What assignment renders the patent void, see 6 *B. & C.* 169. In a declaration for infringing a patent, which granted that the plaintiff and no others should make, use, exercise and vend his invention, and forbade all others to make, use and put in practice the same, the plaintiff alleged that the defendant without his license

had exposed to sale articles intended to imitate and which did imitate his invention, and it was holden bad on general demurrer; see *Minter v. Williams*, 4 *A. & E.* 251. The construction of a specification belongs to the Court and not to the jury; see *Neilson v. Harford*, 8 *M. & W.* 806; but see *Bickford and others v. Skeaves*, 1 *G. & D.* 736. The grant of an exclusive license to use a patent does not invalidate the patent itself, although the patent may be vested in twelve persons; *Protheroe v. May*, 5 *M. & W.* 675.

(i) As to the profert, see 1 *T. R.* 149; 1 *Saund.* 9 b, note 1.

(k) What is a sufficient specification, see 11 *East*, 101; 2 *Chit. Com. Law*, 198 to 205, and cases there collected, 10 *B. & C.* 22.

his said invention, and in what manner the same was to be and might be performed, and afterwards, and within one calendar month next and immediately after the date of the said letters-patent, to wit, on &c., cause the said instrument in writing to be enrolled in her said Majesty's High Court of Chancery at Westminster, in the county of Middlesex, as by record of the said instrument in writing, now remaining of record in the said High Court of Chancery, more fully appears. (l) And the plaintiffs further say, that the said A. B. [*the patentee*] afterwards, and before the committing of the several grievances hereinafter mentioned, to wit, on &c., by a certain indenture then made between the said A. B. of the one part, and the said C. D. of the other part, which said indenture, sealed with the seals of the said A. B. and C. D. respectively, they the plaintiffs now bring here into Court, the date whereof is the day and year last aforesaid, for the considerations therein mentioned, did, amongst other things, assign, transfer and set over unto the said C. D. one moiety of, &c. [*State the words of the assignment.*] As by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. And the plaintiffs further say, that the said A. B. [*the patentee*] did always, from the time of the making of the said letters-patent as aforesaid, until the making of the said indenture, by himself, his deputies, servants and agents in that behalf, make, use, exercise and vend his said invention, [and that they the plaintiffs have always from the time of making the said indenture hitherto, by themselves, their deputies, servants and agents, made, used, exercised and vended the said invention, to their great advantage and profit.] (m) Yet the defendant, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiffs, and to deprive them of the profits, benefits and advantages which they might and otherwise would have derived and acquired from the making, using, exercising and vending of the said invention, after the making of the said letters-patent and of the said indenture, and within the said term of years in the said letters-patent mentioned, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, and within that part of the United Kingdom of Great Britain and Ireland called England, unlawfully and unjustly, without the leave or license and against the will of the plaintiffs, or either of them, made and sold divers, to wit, —, in imitation of the said invention of the said A. B. [*the patentee*] as aforesaid, [in breach of the said letters-patent, and against the privilege so granted to the said A. B. [*the patentee*] and his assigns as aforesaid, whereby the plaintiffs have been and are greatly injured and deprived of a great part of the profits and advantages which they might and otherwise would have derived and acquired from the said invention.] (n)

INFRINGING
PATENTS.

Assignment by
A. B. of a
moiety of his
interest to C. D.

Defendant
wrongfully
made and sold
divers imita-
tions of plain-
tiff's invention.

And the plaintiffs further say, that the said [A. B. so being such inventor, and the said letters-patent having been so made as aforesaid, and the said instrument in writing having been so made and enrolled as aforesaid, and the said indenture having been so made as aforesaid, and the said invention

Second count,
for making
imitations of
the invention.

(l) *Quere* this allegation, see 8 Weutw. 430.

(m) This allegation between the brackets is sometimes omitted.

(n) Sometimes, instead of the averment

within the brackets, the form runs thus: "and thereby hindered and prevented the said A. B. in the sole use, exercise, and enjoyment thereof."

INFRINGING
PATENTS.

having been so made, used, exercised and vended by the plaintiffs as aforesaid, the (o)] defendant well knowing the premises, but further contriving and intending as aforesaid, after the making of the said letters-patent and of the said indenture, and within the said term of years in the said letters-patent mentioned, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, in England aforesaid, unlawfully and unjustly, and without the leave or license and against the will of the plaintiffs, *made divers*, to wit, —* on the said improved plan, and in imitation of the said invention of the said A. B. in breach of the said letters-patent, and against the privilege so granted to the said A. B. and his assigns as aforesaid. Whereby the plaintiffs have been and are greatly injured, and have lost and been deprived of divers great gains and profits which they might and otherwise would have derived and acquired from the said invention.

Other counts.
(p)

The other counts vary from the second only in the insertion of the following words, instead of the word in italics: Third count, "used and put in practice." Fourth count, "did counterfeit the said invention, and did use and put in practice." Fifth count, "did imitate the said invention, and did use and put in practice." Sixth count, "did imitate in part the said invention, and did use and put in practice." Some of these counts may be omitted or others inserted, according to the facts of each particular case.

By assignee where there has been a disclaimer of part of the specification, and an alteration in the title of the patent and specification. (q)

After stating the granting of the patent, the enrolment of the specification, and the assignment to the plaintiff, proceed:] And the plaintiff further saith, that afterwards, to wit, on &c., he the said plaintiff having first obtained the leave of her majesty's then attorney-general [or, "solicitor-general"], certified

(o) The second and subsequent counts generally commence as above, with this summary of the allegation in the first count, as between the brackets, but that statement may be omitted.

(p) In a declaration settled by a very eminent pleader, the second was similar to the above as far as the asterisk, except that it omitted the words in that count within the brackets. At the asterisk was inserted as follows: "with certain improvements on the construction thereof respectively, which were then intended to imitate and resemble, and did imitate and resemble the said improvements so invented by the said A. B. as aforesaid, whereby, &c." Conclusion as in the above second count. The third count stated, that the defendant "did counterfeit and resemble." The fourth count, "with part of, &c." The fifth count, "did imitate in part, and did make a certain addition to the said invention, whereby to pretend himself the inventor or deviser thereof, and did then put in practice the said imitation in part, with such additions as aforesaid, whereby, &c."

(q) The 5 & 6 W. 4, c. 83, sect. 1, enacts, "that any person who as grantee, assignee, or otherwise hath obtained, or who shall hereafter obtain letters-patent, for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents of England, Scotland, or

Ireland respectively, as the case may be, having first obtained the leave of his majesty's attorney-general or solicitor-general, in case of an English patent, of the lord advocate or solicitor-general of Scotland in the case of a Scotch patent, or of his majesty's attorney-general or solicitor-general for Ireland, in the case of an Irish patent, certified by his fiat and signature, a disclaimer of any part of either the title of the invention or of the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters-patent; and such disclaimer or memorandum of alteration being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters-patent, or such specification, in all Courts whatever; provided always, that any person may enter a caveat in like manner as caveats are now used to be entered against such disclaimer or alteration, which caveat being so entered shall give the party entering the same a right to have notice of the application being heard by the attorney-general, or solicitor-general, or lord advocate respectively; provided also, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and

by his fiat and signature, entered with the clerk of the patents of England, a disclaimer of part of the specification which had been so executed and enrolled by the said A. B. as aforesaid, and also a memorandum of alterations in the title of the said patent and specification, and did then and there state the reason of the said disclaimer pursuant and according to the statute in that case made and provided; and which said disclaimer and memorandum of alterations were then filed by the clerk of the patents, and enrolled with the specification, under and by virtue of the said statute, and were and are deemed and taken to be part of such letters-patent and specification. And the plaintiff further saith, that such disclaimer and alterations did not extend the exclusive right granted by the said letters-patent. And the plaintiff further saith, that the title of the said invention as altered by the said memorandum of alterations was and is as follows: [*Set out the title.*] And the plaintiff further saith, that he hath always from the time of the making and executing of the said indenture of assignment, and the entering, filing and enrolling of the said disclaimer and memorandum of alterations as aforesaid, hitherto by himself, his deputies, servants and agents in that behalf made, used and exercised and vended the said invention to his great advantage and profit. Yet the defendant well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff, and to deprive him of the profits, benefits and advantages which he might and otherwise would have derived and acquired from the making, using, exercising and vending of the said invention, after the making of the said letters-patent, and of the said indenture of assignment, and after the entering, filing and enrolling of the said disclaimer and memorandum of alterations as aforesaid, and within the said term of years in the said letters-patent mentioned, to wit, on the — day of —, A. D. —, and on divers other days and times between that day and the commencement of this suit, and within that part of the United Kingdom of Great Britain and Ireland called England, unlawfully and unjustly, without the leave or license and against the will of the plaintiff, *made and sold* divers, to wit, —, in imitation of the said invention, and in breach of the said letters-patent, and against the privilege so granted to the said A. B. and his assigns as aforesaid, whereby the plaintiff hath been hindered and prevented in the sole use, exercise and enjoyment of the said invention, and hath been and is greatly injured and deprived of a great part of the profits and advantages which he might and otherwise would have derived and acquired from the said invention. And whereas also the said letters-patent having been so made as aforesaid, and the said specification so enrolled as aforesaid, and the said indenture of assignment having been so made and executed as aforesaid, and the said disclaimer and memorandum of alterations having been so entered, filed and enrolled as aforesaid, and the said invention having been so made, used,

Second count,
for imitating the
invention, and
using and put-
ting it in prac-
tice.

except in any proceeding by *scire facias*) pending at the time when such disclaimer or alteration was enrolled, but in every such action or suit the original title or specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters-patent have been or shall have been granted; provided also, that it shall be lawful for the attorney-general, or solicitor-general, or lord advocate, before granting such fiat, to require

the party applying for the same to advertise his disclaimer or alteration in such manner as to such attorney-general, or solicitor-general, or lord-advocate, shall seem right, and shall, if he so require such advertisement, certify in his fiat that the same has been duly made." The grantee may enter a disclaimer under this statute, though at the time of doing so he has parted with a portion of his interest; *Spilsbury v. Clough*, 2 G. & D. 17.

INFRINGING
PATENTS.

exercised and vended by the plaintiff as aforesaid, the defendant well knowing the premises, but further contriving and intending as aforesaid, after the making of the said letters-patent and of the said indenture, and the entering, filing and enrolling of the said disclaimer and memorandum of alterations as aforesaid, and within the said term of years in the said letters-patent mentioned, to wit, on the — day of —, A. D. —, and on divers other days and times between that day and the commencement of this suit, in England aforesaid, unlawfully and unjustly, and without the leave or license and against the will of the plaintiff, *did imitate the said invention, and did use and put in practice the said invention*, in breach of the said letters-patent, and against the privilege so granted to the said L. H. and his assigns as aforesaid. Whereby, &c. [*as in the first count*]. To the plaintiff's damage, &c.

PROPERTY IN
REVERSION.

For an injury to plaintiff's reversionary interest in goods in possession of a tenant. (r)

PROPERTY IN REVERSION.

Commencement as ante, 13.] For that whereas the plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was the owner and proprietor of divers goods and chattels, to wit, &c. [*here specify them according to the exact description or as in trover*,] of great value, to wit, of the value of £—, and which said goods and chattels had been and were before then let to hire to one E. F. for a certain time then to come and unexpired, and the same were then in the possession of the said E. F. under and by virtue of the said letting. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his reversionary interest and property in the said goods and chattels, and to deprive him of the benefit and advantage thereof, whilst the plaintiff so was the owner and proprietor of the said goods and chattels, and whilst the same were so let to and in the possession of the said E. F. as aforesaid, to wit, on &c., wrongfully and unjustly broke, damaged and spoiled (s) the said goods and chattels, [*or* “seized and took the said goods and chattels of the plaintiff from and out of the possession of the said E. F. and converted and absolutely sold and disposed thereof to his own use,” (t) *according to the fact*.] And thereby the plaintiff hath been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said goods and chattels. [*Add a count in trover, and conclude, To the plaintiff's damage, &c.*]

(r) The *general* or *absolute* property in goods draws to it a possession in law sufficient to enable the owner to maintain *trespass* or *trover*, unless the right of possession be in a third person at the time of the injury complained of; 2 Saund. 47, n. But if the right of possession be in such third person, the general owner, whose *reversionary* interest has been prejudiced, cannot support *trespass* or *trover*, but must declare specially; 4 T. R. 489; 7 T. R. 9; Ry. & M. C. N. P. 99. However, in the case of *trees cut and taken away* by a stranger, pending a lease, as the interest of the lessee continues no longer than whilst the trees were growing, the landlord may support *trespass* or *trover*; 7 T. R. 13; Vin. Ab. *Trespass*, S. pl. 10; 4 Leon. 162;

1 Saund. 322, note 5; 4 B. & C. 465; *ante*, vol. i. 167. *Quere* if the statement “that defendant *absolutely sold*,” shows a sufficient cause of action, inasmuch as the sale could only pass the tenant's *temporary* interest in the goods, and not affect the *reversionary* interest; 3 B. & A. 471, 473; and *post*, 590, note.

(s) If in fact any *actual damage* or *injury* was committed to the goods the same should be stated.

(t) This is the *usual allegation*, but as an *absolute sale* by the sheriff conveys no better or greater interest than the occupier of the goods had, it would seem that a mere *sale* affords no cause of action, and that some *actual injury* should be stated.

III. FOR TORTS TO REAL PROPERTY CORPOREAL.

TORTS TO REAL
PROPERTY
CORPOREAL.

See the forms of declarations for different nuisances to houses in possession, 8 Wentw. Index, 62; 3 Ld. Raym. 259; Lil. Ent. 81, 82; Mal. Ent. 143, 146; 2 Rich. C. P. 140; Morg. 330, 333. The following forms are those most frequently required in practice. See a form of declaration for erecting a smith's shop, 1 Lutw. 69; for undermining a house, 2 Hen. Bla. 267; 2 Saund. 397; for obstructing an entrance to a house, 4 T. R. 794; for carrying on trades offensive on account of noise, *Elliotson v. Feetham*, 2 Bing. N. C. 134; on account of noxious vapours and smells, *Bliss v. Hall*, 4 Bing. N. C. 183; *Flight v. Thomas*, 2 P. & D. 531. As to the law, see Com. Dig. Action on the Case for a Nuisance; 3 Bla. Com. 208 to 309, and the notes there by Chitty. In a case where an action on the case was brought by a reversioner of a house in Cheapside, London, against the owner of an adjoining house, for pulling it down, without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down: it was held, first, that upon this declaration the plaintiff could not recover, on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as the cause of the injury; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it; 9 B. & C. 735. The mere circumstance of juxta-position does not render it necessary for a person who pulls down his wall to give notice of his intention to the owners of an adjoining wall; nor, if he be ignorant of the existence of the adjoining wall, as where it is underground, is he bound to use extraordinary caution in pulling down his own; 6 Bing. N. C. 1. In declarations of this nature the immediate cause of the injury must be stated; and under an averment of the remote cause, and an allegation that by means of the premises the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate causes. Thus, a declaration stated that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away down a ditch at the back of his house. The evidence was, that the heap was not so originally placed as to obstruct the water, but that in process of time earth from the heap was trodden down and fell into the ditch and obstructed it, and this variance was held fatal; 5 Taunt. 534. But in case for negligently pulling down a wall adjoining a wall of the plaintiff's cellar, whereby the roof of the latter fell in, and a quantity of wine was destroyed, and it appearing that the approximate cause of the damage was the placing a quantity of bricks (in taking down the wall) on the roof of the cellar, it was held no variance; 1 Dowl. & Ry. C. N. P. 35; 3 Stark. 162, S. C.; and see 1 D. & R. 497, and other cases; as to describing injuries to water-courses, *post*.

As to the liability of parties for improperly making a sewer, see 3 Bing. N. C. 34. See a form of a declaration for *carelessly excavating defendant's ground*, thereby causing or accelerating the fall of plaintiff's house adjoining, *Dodd v. Holme*, 3 Nev. & Man. 739; 1 Adol. & Ell. 498; 1 Gale, 61; and see another similar form, 3 Bar. & Adol. 871. See also *Davis v. The London*

**TORTS TO REAL
PROPERTY
CORPOREAL.**

and *Blacknall R. C.*, 1 Man. & Gr. 799; *Trower v. Chadwick*, 3 Bing. N. C. 334.

See a form for digging too near, 3 Nev. & Man. 739; 1 Adol. & Ell. 493; 1 Gale, 61. If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another, at least until twenty years have elapsed since the house first stood on the excavated land, and was in part supported by the adjoining land, so that a grant may be inferred; *Partridge v. Scott*, 3 M. & W. 220.

See a form for negligently working a mine, 5 M. & W. 60. See form of declaration for injury to house in possession of plaintiff and others in possession of tenants, against a corporation for not repairing and sustaining a sea wall and bank according to charter liability, whereby plaintiff's house became injured, *Lynn Regis v. Henley*, 1 Bing. N. C. 222.

For obstructing
ancient windows.
(u)

Commencement as ante, 13. *The venue is local, ante, vol. i.*] For that whereas the plaintiff, before and at the time of the committing of the griev-

(u) By a reversioner and party in possession; 2 Bar. & Adol. 97; 8 Wentw. 548. Formerly it was held, that a party could not maintain an action for a nuisance to an ancient light, unless he had gained a right to the window by prescription; 1 Leon. 168; Cro. El. 118. But the modern doctrine is, that upon proof of an adverse enjoyment of light for twenty years or upwards, unexplained, a jury may be directed to presume a right by grant or otherwise; 2 Saund. 175 a; 1 Esp. Rep. 148. See 2 & 3 Wil. 4, c. 71, ss. 3, 4. If the window was opened during the seisin of a mere tenant for life, or a tenancy for years, and the owner in fee did not acquiesce in or know of the use of the light, he would not be bound; 11 East, 372; 3 Campb. 444; 4 Campb. 616. And where the adjoining land was glebe land, in the possession of a rector, tenant for life, it was held that there could be no presumption of a grant, so as to preclude a purchaser thereof under 55 Geo. 3, c. 147, from building and obstructing an ancient light; 4 B. & Ald. 579. But where the window has been proved to have been in existence upwards of twenty years, and its origin cannot be traced, the purchaser from the owner in fee cannot disturb it, though no evidence that the latter acquiesced in the window can be adduced; 2 B. & C. 686; 4 D. & R. 234, S. C. If the owner of land build a house in part, and afterwards sell the house to one person, and the rest of the land to another, the vendee of the house may maintain an action against the vendee of the land for obstructing his light, though the house was not an ancient one, because the law will not suffer the vendor, or any person claiming under him, to derogate from his own grant, and consequently less than twenty years use of the light suffices; 1 Lev. 122; 1 Ventr. 237; 1 Price, 27; R. & M. 24; 1 M. & M. 400; 2 Saund. 114, n. 4. Where A., the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then exist-

ing in it certain windows, and B. afterwards accepted a new lease of his house from A.; it was held that B. could not alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows were not twenty years old at the time of the alteration; 1 M. & M. 396. But if an ancient window has been completely blocked up above twenty years, it loses its privilege; 3 Campb. 514. And even the presumption of right from twenty years undisturbed enjoyment is excluded by the custom of London, which entitles every citizen to build upon an ancient foundation as high as he pleases; Com. Rep. 273; 2 Swanst. 333. But the circumstance of a window being built contrary to the Building Act affords no defence to an action for obstructing it; 1 Marsh. 140. And if ancient windows be raised and enlarged, the owner of the adjoining land cannot legally obstruct the passage of light and air to any part of the space occupied by the ancient window; 3 Campb. 80. Total deprivation of light is not necessary to sustain this action, and if the party cannot enjoy the light in so free and ample a manner as he did before, he may sustain the action, but there should be some sensible diminution of light or air; 4 Esp. Rep. 69; 2 C. & P. 465; *Chilton v. Sir T. Plumer*, in the King's Bench, A. D. 1822. The building a wall which merely obstructs the prospect is not actionable; 9 Rep. 58 b; 1 Mod. 55. Nor is the opening a window and destroying the privacy of the adjoining property, but such new window may be immediately obstructed, to prevent a right to it being acquired by twenty years' use; 3 Campb. 82; *Blanchard v. Bridges*, 4 A. & E. 192. A party may so alter the mode in which he has been permitted to enjoy this right as to lose it altogether; 3 A. & E. 330.

The person in actual possession, whether lawfully or not, may support this action against a wrong-doer; 1 East, 244; 1 Show. 7, n. a; Cro. Car. 325. A landlord may also sue for

ance hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed (x) of a certain messuage or dwelling-house, with the appurtenances, (y) in which said messuage or dwelling-house, during all the time aforesaid, there were, and still of right ought to be, (z) divers, to wit, — [ancient] (a) windows, through which the light and air, during all the time aforesaid, ought to have entered, and until the committing of the said grievances hereinafter next mentioned did enter, and still of right ought to enter into the said messuage or dwelling-house, for the convenient and wholesome use, occupation and enjoyment thereof. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession and enjoyment of the said messuage or dwelling-house, with the appurtenances, heretofore, to wit, on &c. (b) wrongfully and injuriously* [here state the means of obstruction, which may be thus:] erected and raised, and caused and procured to be erected and raised, a certain wall and building (c) near to the said windows, and wrongfully and injuriously kept and continued the said wall and building so there erected and made for a long time, to wit, from the day and year aforesaid hitherto. (d) By means of which premises, the said messuage or dwelling-house, with the appurtenances, during all the time aforesaid, was and still is greatly darkened, (e) and the light and air were and are hindered and prevented from coming and entering into and through the said windows into the said messuage or dwelling-house,

an injury during the tenancy; Com. Dig. Action on Case for Nuisance, B.; but the form of the declaration will in such case be different; see the forms, *post*, 589. A reversioner may sue, see 4 Burr. 2141; 3 C. & P. 817; and see a form at the suit of a reversioner, 8 Wentw. 548. An action lies for continuing a nuisance created before the possession by the plaintiff of the property, in respect of which he sues; *Thompson v. Gibson*, 7 M. & W. 456.

The action may be either against the party who made or continued the nuisance, Com. Dig. Action for Nuisance, B.; 1 B. & P. 404; and generally against the occupier of the adjoining premises, 4 T. R. 318; 2 Hen. Bla. 350; or an agent, 6 Moore, 47; or it may be against the lessor for a nuisance erected by him and continued by his tenant, 2 Salk. 460; 12 Mod. 636; *The King v. Pedley*, 1 A. & E. 822.

(x) Possession in fact is sufficient, 1 East, 244; 4 T. R. 719; 1 Show. 7, note a; and the term "lawful" is unnecessary, 5 East, 276; and it is improper to declare on a seisin in fee, or otherwise to state the plaintiff's title, 2 Saund. 113 a, note 1; Com. Dig. Plead. C. 39. If a title be stated, and it appear to be insufficient, the declaration will be demurrable, 2 Ld. Raym. 1228; Salk. 365; and if not demurred to, it must be proved as stated, 2 Saund. 206 a, note 22, 207 a, note 24.

(y) The venue is local, Com. Dig. "Action," N.; but it is not necessary to give a local description of the nuisance, 2 East, 497; 11 East. 226; 1 Taunt. 379; and since pleading rules, Hilary Term, 4 Wil. 4, the statement of place should be omitted.

(z) This is a sufficient statement of the right; 1 Show. 7; 2 Saund. 113 b.

(a) Lil. Ent. 81, note. It is usual to insert the word "ancient," but it is unnecessary, and in cases where the windows are not so, should be omitted; Com. Dig. Action for Nuisance, E. 1; 1 Show. 7; Lil. Ent. 81, 82; 2 Saund. 113 b, 114. Twenty years uninterrupted use of the windows is sufficient; see *supra*, note (i). 2 & 3 Will. 4, c. 71, ss. 3, 4.

(b) The precise day is not material; Cro. Eliz. 191; 2 Saund. 24 a.

(c) It is not necessary to allege that the building was on a new foundation; though in London a person may build upon an ancient foundation against the lights of another; Yelv. 215, 216; 1 Rol. 558; 1 Burr. 248; 9 Rep. 58 b; 2 Swanst. 333. Such custom to obstruct lights must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his, so as to darken the lights in a fourth wall belonging to his neighbour; 3 C. & P. 615; 1 M. & M. 350. If the mode in which the injury were committed be doubtful, add a count generally for obstructing the light, without stating the means, as *post*, 584, and which will be sufficient; 3 Leon. 13; Cro. Jac. 606; Willes, 577; 1 B. & P. 180; Lord Raym. 452.

(d) In some cases this *adhuc existit* would be improper, 1 Show. 366; 3 Lev. 345. It seems more correct here to insert a particular day, or to say "until the commencement of this suit," since in all cases it is improper to declare for damages which can only have accrued after the time of declaring; 2 Saund. 169 to 171.

(e) Any discernable diminution is actionable; 4 Esp. Rep. 69.

**TORTS TO REAL
PROPERTY
CORPOREAL.**

and the same hath thereby been rendered and is close, uncomfortable, unwholesome, and unfit for habitation, and the plaintiff hath thereby been and still is greatly annoyed and incommoded in the use, possession and enjoyment of his said messuage or dwelling-house, with the appurtenances. And also, by means of the premises, the plaintiff hath been forced and obliged, for the obtaining sufficient and requisite light in his said messuage or dwelling-house, to lay out and expend a large sum of money, to wit, the sum of £—, in and about the making of a sky-light therein. (*f*)

Second count,
for continuing
the nuisance. (*g*)

Second count same as the first, to the asterisk, and then proceed as follows: "kept and continued, and caused to be kept and continued, a certain wall and building, before then wrongfully erected and raised near to the said windows, for a long space of time, to wit, hitherto." By means, &c. [*Conclude as in the first count.*]

Third count,
more general,
and not stating
the means of
obstruction.

And whereas also the plaintiff, long before and at the time of the committing of the grievances hereinafter next mentioned, was and from thence hitherto hath been and still is lawfully possessed of a certain other (*g*) messuage and premises, with the appurtenances, situate and being in the county aforesaid, in which said last-mentioned messuage and premises, with the appurtenances, during all the time aforesaid, there were, and still of right ought to be, divers, to wit, — windows, unto, into, and through which the light and air, during all the time aforesaid, ought to have entered, and still of right ought to enter, into the said last-mentioned messuage and premises, with the appurtenances, for the convenient and wholesome use, occupation, and enjoyment thereof, and of which said premises the defendant hath always had notice. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said last-mentioned messuage and premises, with the appurtenances, heretofore, to wit, on &c., [*any day about the time*] and on divers other days and times aforesaid, and before the commencement of this suit, wrongfully and injuriously greatly darkened the said windows, and hindered and prevented the light and air from coming and entering unto, into, and through the said windows, into the said last-mentioned messuage and premises, with the appurtenances, and the same have thereby been rendered and are uncomfortable, unwholesome, and unfit for habitation; and the plaintiff hath thereby been and still is greatly annoyed and incommoded in the use, possession, and enjoyment of his said last-mentioned messuage and premises, with the appurtenances.

(*f*) Omit this, if not the fact.

(*g*) Case is the proper remedy, though trespass is sometimes maintainable; see *ante*, vol. i. 157; 1 Stark. 22. When case does not lie, 2 Stark. 534; see Lil. Ent. 82. In a declaration for continuing a nuisance, it is not necessary to show the time when the nuisance was erected; Cro. Eliz. 191. As to this count in general, see *Ld. Raym.* 370; 1 Salk. 10; Carth. 455. If the action is not brought against the original erector of the

nuisance, but against his feoffee, lessee, &c., it may be necessary to allege a special request to the defendant to remove the nuisance; Willes, 583; Cro. Jac. 555; 5 Co. 100, 101; Jenk. 260. A notice of removal, left at the premises, is evidence against a subsequent occupier to render him liable; Ry. & Moo. C. N. P. 189. As to the effect of the word "other" in a second or subsequent count, see *Holford v. Dunnnett*, 7 M. & W. 348; *Deere v. Ivey*, 12 L. J. R., N. S., Q. B. 132.

Commencement as ante, 13. The venue is local.] For that whereas the plaintiff, before and at the time of the committing the grievances hereinafter mentioned, was and from thence hitherto hath been and still is lawfully possessed (i) of a certain dwelling-house, with the appurtenances, and wherein the plaintiff and his family, at the times hereinafter mentioned, inhabited and dwelt, and still do inhabit and dwell. And whereas also the defendant, before and at the time of the committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been and still is, possessed of a certain other dwelling-house, with the appurtenances, and of a certain privy near to the said dwelling-house of the plaintiff; and by reason of the possession of his said dwelling-house and privy, with the appurtenances, during all the time hereinafter next mentioned, the defendant ought to have repaired, and still of right ought to repair, (k) a certain wall adjoining the said privy, and near to the said premises of the plaintiff, as often as need or occasion hath been or required, or should be or require. Nevertheless the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him and his family in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, heretofore, to wit, on &c., and from thence for a long time, to wit, until the commencement of this suit, wrongfully and unjustly suffered and permitted the said wall to be and continue, and the same during all that time was and still is out of repair for want of needful and necessary reparation thereof, and by means thereof, on the day and year aforesaid, and on divers other days during that time, divers large quantities of excrement and filth penetrated, issued, and flowed from and out of the said privy, through the said wall, unto and into the said premises of the plaintiff, and stayed, continued, and remained therein during all the time aforesaid;* and also thereby divers noisome, noxious, offensive, and unwholesome smells, vapours, and stench, during the time aforesaid, ascended and came unto and into the said premises of the plaintiff, and on those several days and times there greatly annoyed and incommoded the plaintiff and his family in their said habitation of the said dwelling-house of the plaintiff, and also, by means of the premises, the plaintiff hath been and is hindered and prevented from exercising and carrying on his trade and business of a — in so beneficial a manner as he, before the committing of the said grievances by the defendant, had been used and accustomed to do, and would have continued to do, and hath thereby been deprived of divers great gains and profits which he otherwise might and would have derived and acquired.

TORTS TO REAL
PROPERTY
CORPOREAL.

For not repairing a privy adjoining plaintiff's house. (h)

And whereas also the plaintiff, being so possessed of his said dwelling-house, with the appurtenances as aforesaid, the defendant, before and at the time of the committing of the grievance hereinafter mentioned, was possessed of a certain privy and cesspool, near to the said dwelling-house, with the appurtenances, of the plaintiff, and by reason thereof the defendant, before and at the time of the committing the grievance by the defendant as herein-

Second count,
for not empty-
ing the cesspool.

(h) See the general note, *ante*, 582, 583; and the precedents, 3 Ld. Raym. 324; Morg. 333, 347, 353, 354, 357, 449.

(i) This is sufficient; *ante*, 583, note (x).

(k) This allegation of *debut reparation* is sufficient; 1 Salk. 360; Lord Raym. 1092; 3 T. R. 766; 2 Saund. 114 a, b, c.

TORTS TO REAL
PROPERTY
CORPORAL.

after mentioned, ought to have hindered and prevented the excrement, filth, and water, from time to time being in the said privy and cesspool, from running and proceeding therefrom unto and into the said dwelling-house, with the appurtenances of the plaintiff. Nevertheless the defendant, well knowing the said last-mentioned premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him and his family in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, heretofore, to wit, on &c., and on divers other days and times between that day and the day of commencing this suit, wrongfully and unjustly suffered and permitted divers large quantities of excrement, filth, and water, to penetrate, issue, and flow, from and out of the said last-mentioned privy and cesspool, unto and into the said premises of the plaintiff, and to stay, continue, and remain therein during all the time last aforesaid, and also thereby, &c. [*State as in first count from the asterisk to the end.*]

For manufac-
turing candles
near a dwelling-
house. (1)

For that whereas the plaintiff, before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, was, and from thence hitherto hath been and still is possessed of a certain messuage or dwelling-house and premises, and the said messuage or dwelling-house and premises, the plaintiff, with his family, at the times hereinafter mentioned, occupied and inhabited, and still doth occupy and inhabit. And whereas also the defendant, before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been and still is, possessed of a certain piece or parcel of ground contiguous and near to the said messuage or dwelling-house and premises of the plaintiff. Nevertheless the defendant, contriving and intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him and his family in the possession, occupation and enjoyment of his said messuage or dwelling-house and premises heretofore, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously erected and built a certain building and erection on the said piece or parcel of ground of the defendant, so being contiguous and near to the said messuage or dwelling-house and premises of the plaintiff as aforesaid, and wrongfully and injuriously kept and continued, and caused to be kept and continued, the same building and erection so erected and made, for a long space of time, to wit, hitherto; and on the several days and times aforesaid wrongfully and injuriously exercised and carried on in the said house or building the trade or business of a candle-maker or manufacturer of candles, and made and caused and procured to be made and manufactured divers large quantities of candles therein. By means of which several premises divers noisome, noxious, and offensive vapours, fumes, smokes, smells, and stench, on the several days and times aforesaid, rose, issued, and proceeded from the said building and erection, and entered into and spread and diffused themselves over and upon, into, through, and about the said messuage or dwelling-house and premises of the plaintiff, and the air over, through, and about the same, was thereby greatly filled and im-

(1) See other forms, Morg. Prec. 333, 353, 354, 357, 449; 8 Wentw. Index.

pregnated with the said noisome, noxious, and offensive vapours, fumes, smokes, smells, and stench, and was rendered, on the said several days and times aforesaid, and became and was and still is corrupted, offensive, unwholesome, unhealthy, and uncomfortable, and the plaintiff hath thereby been and still is greatly annoyed and incommoded in the use, possession, occupation, and enjoyment of his said messuage or dwelling-house and premises, and hath been and is, by means of the committing of the grievances aforesaid by the defendant as aforesaid, otherwise greatly injured and damaged.

TORTS TO REAL
PROPERTY
CORPOREAL.

For that whereas the plaintiff, before and at the time of the committing of the grievances hereinafter next mentioned, was and from thence hitherto hath been and still is lawfully possessed of a certain messuage and premises, and in which said last-mentioned messuage and premises the plaintiff and his family, at the said several times hereinafter next mentioned, occupied, inhabited, and dwelt, and still do occupy, inhabit, and dwell. Yet the defendant, well knowing the premises, but contriving and intending to injure, prejudice, and aggrieve the plaintiff, and to incommode and annoy him and his family in the possession, occupation, and enjoyment of his said last-mentioned messuage and premises, heretofore, to wit, on the day and year aforesaid, and on the several days and times aforesaid, wrongfully and injuriously caused and procured divers noxious, offensive, and unwholesome vapours, fumes, smokes, smells, and stench, to arise and ascend near to, in, and about the said last-mentioned messuage and premises of the plaintiff, and the same have thereby been rendered and are become uncomfortable, unhealthy, and unwholesome, and unfit for habitation; and the plaintiff hath thereby been and still is greatly annoyed and incommoded in the possession, use, occupation, and enjoyment of the said last-mentioned messuage and premises, and hath been and is, by means of the premises, otherwise greatly injured and damaged.

The like more
general.

For that whereas the plaintiff, before and at the time of the committing of the grievances in this count mentioned, was, and from thence hitherto hath been and still is lawfully possessed of a certain dwelling-house and premises, with the appurtenances, and in which said dwelling-house, with the appurtenances, he the plaintiff, at the said several times in this count hereafter mentioned, used, exercised, and carried on the business and employment of a schoolmaster; and also, at the said several times did, together with his family, and divers, to wit, — scholars, by him boarded and lodged in his said dwelling-house, inhabit and dwell, and still doth inhabit and dwell. And whereas also the defendant, before and at the time of the committing of the said grievances, was, and from thence hath been and still is, possessed of a certain other dwelling-house and piece of ground, with the appurtenances, near to the said dwelling-house of the plaintiff; Yet the defendant, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the plaintiff, and to incommode and annoy him, together with his said family and scholars, in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, to wit, on &c., wrongfully and injuriously erected and made, on the said piece of ground, a certain slaughter-house, and also divers, to wit, — sheep-pens,

For keeping a
slaughter-house
near to plain-
tiff's house,
whereby plain-
tiff, who was a
schoolmaster,
was prevented
from inhabiting
his house, and
lost many
scholars.

**TORTS TO REAL
PROPERTY
CORPOREAL.**

— cattle-pens, and — hogsties, and the same so erected and made, wrongfully and injuriously kept and continued for a long space of time, to wit, from the day and year aforesaid until the commencement of this suit, and on divers days and times during the said space of time killed and slaughtered divers cattle and beasts, to wit, — oxen, — calves, — sheep, and — hogs, in the said slaughter-house, and put and placed in and near the same divers large quantities of blood, garbage, and offal, arising from the carcasses of the said cattle and beasts, and the same so there put and placed wrongfully and injuriously kept and continued for divers long spaces of time, to wit, for the space of — hours next after the respective times of so putting and placing the said blood, garbage, and offal as aforesaid, whereby, during the times aforesaid, divers noxious and offensive smells and stenches arising from the said blood, garbage, and offal, penetrated and entered and came into the said dwelling-house of the plaintiff, and rendered the same unwholesome and uninhabitable; and the defendant also, on the said several days and times, wrongfully and injuriously kept and continued in the said sheep-pens, cattle-pens, and hog-sties, divers, to wit, — sheep, — oxen, — calves, and — hogs; by means whereof divers loud and offensive sounds and noises arising from the bleating, lowing and grunting of the said sheep, oxen, calves, and hogs, entered and came into and about the said dwelling-house of the plaintiff, and further greatly annoyed, incommoded, and disturbed the plaintiff, together with his said family and scholars, in the possession and enjoyment thereof, so that, by means of the several premises aforesaid, the plaintiff hath been, during all the time aforesaid, and yet is, not only disturbed and annoyed, injured, and prejudiced in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, and hindered and prevented from occupying and enjoying the same in so ample and beneficial a manner as he otherwise might, could, and would and ought to have done, but is also much injured in his said business of a schoolmaster, and likely to lose many of his said scholars, and to be prevented from procuring others, and thereby to lose great profits arising therefrom.

For cutting down trees in an avenue, to the shade of which plaintiff was entitled as occupier of a messuage.

For that whereas the plaintiff, on &c. and long before, was, and continually from thence hitherto hath been and still is, lawfully possessed of and in a certain messuage or dwelling-house, with the appurtenances, and by reason thereof, during all the time aforesaid, was and still is lawfully entitled to the use and enjoyment of a certain coachway or avenue, and of a certain foot-walk or avenue near to and leading to the said messuage or dwelling-house, and to the shade, shelter, protection, and ornament of divers trees, to wit, — elm trees, — lime trees, and — other trees, during all the time aforesaid, growing and being and near the said way-walk avenues. Yet the defendant, well knowing the premises, but contriving and wrongfully intending to hurt, injure, and prejudice the plaintiff in this behalf, and to obstruct him in the use and enjoyment of the said walks and avenues, and to deprive him of the shade, shelter, protection and ornament of the said trees there, whilst the plaintiff was so possessed and entitled as aforesaid, to wit, on the same day and year aforesaid, and on divers other days and times between that day and the day of commencing this suit, wrongfully and injuriously cut, lopped, and topped the said trees, to wit, — of the said elm

trees, — of the said lime trees, and — of the said other trees. By means whereof the plaintiff hath been and is greatly obstructed and prejudiced in the use and enjoyment of the said way-walk and avenues, and hath been and is greatly deprived of the shade, shelter, protection, and ornament of the said trees so lopped, topped, and cut as aforesaid.

TORTS TO REAL
PROPERTY
CORPOREAL.

For that whereas the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is, lawfully possessed of a certain messuage and premises, with the appurtenances, and in which said messuage and premises the plaintiff and his family have, for and during all the time aforesaid, resided and dwelt, and still do reside and dwell. Nevertheless the defendant, contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in the possession, use, occupation, and enjoyment of his said messuage and premises, and to render the same incommodious, unfit for habitation, and of little or no use or value to the plaintiff, whilst the plaintiff was so possessed thereof, and so resided and dwelt therein with his family as aforesaid, to wit, on the day and year aforesaid, wrongfully and unjustly erected and built, and caused and procured to be erected and built, a certain building near to the said messuage and premises of the plaintiff, in so careless, negligent, and improper a manner, that by reason thereof afterwards, to wit, on the day and year aforesaid, and on divers other times afterwards, and before the commencement of this suit, divers large quantities of rain water ran and flowed from the said building of the defendant down to, upon, against, and into the said messuage and premises of the plaintiff, and the walls, roofs, ceilings, beams, wainscotings, paperings, floors, stairs, doors, and other parts thereof, and therein being, and thereby greatly weakened, injured, wetted and damaged the said messuage and premises of the plaintiff, and the said walls, roofs, ceilings, wainscotings, paperings, floors, stairs, doors, and other parts thereof, and by reason of the premises, the said messuage and premises of the plaintiff became and were and are damp, incommodious, and less fit for habitation; and also by reason of the premises, one E. F., who before the time of committing of the said grievances had resided and lodged in the said messuage and premises of the plaintiff as a lodger, at a certain rent and profit payable by the said E. F. to the plaintiff in that behalf, from the time of the committing of the said grievances, hath hitherto ceased to reside or lodge in such messuage and premises as a lodger or otherwise, and thereby the plaintiff hath lost divers great gains and profits, which she would have otherwise enjoyed and received.

For erecting a building next to plaintiff's, so that the rain-water ran therefrom on plaintiff's house, and injured it, and plaintiff thereby lost lodgers, &c. (m)

See *Elliotson v. Feetham and another*, 2 Bing. N. C. 134.

continuing a manufactory of iron, and making noises and annoying plaintiff in the occupation of his house.

For a noisy nuisance in con-

TO HOUSES OR LAND IN REVERSION.

Commencement as ante, 13. *The venue is local*.] For that whereas, before and at the time of the committing of the grievances by the defendant as

TO HOUSES OR
LAND IN
REVERSION.

By reversioner, for damage done to a messuage whilst in the possession of his tenant. (n)

(m) See a form in 1 Gale, 61.

(n) See forms, 9 Wentw. 186; 8 Wentw.

Index, 61 to 63; Morg, 363; Plead. Assist. 76; 3 Wils. 361; 1 Taunt. 136; 1 M. &

**TO HOUSES ON
LAND IN
REVERSION.**

hereinafter mentioned, a certain messuage and premises, with the appurtenances, (o) was in the possession and occupation of a certain person, to wit, one E. F. as tenant thereof (p) to the plaintiff, (the reversion thereof then and still (q) belonging to the plaintiff). Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff in his reversionary estate and interest of and in the said messuage and premises, with the appurtenances, whilst the said messuage and premises were so in the possession and occupation of the said tenant, as such tenant thereof to the plaintiff as aforesaid, and whilst the plaintiff was so interested therein as aforesaid, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly, without the leave or licence of, and against the will of the plaintiff, [*here state the nuisance or subject-matter of complaint, and which must be shown to have been of such a permanent nature as to affect the reversionary interest; 1 M. & Sel. 234. The description of the injury will necessarily vary according to the circumstances of each case; see the forms referred to below in the note, conclude thus:*] By means of which said several premises the plaintiff hath been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest (r) of and in the said messuage and premises, with the appurtenances, so in the possession and occupation of the said E. F. as tenant thereof to the plaintiff as aforesaid.

For a nuisance to a house in which plaintiff had reversion, and for stopping up a chimney, whereby the rooms were rendered smoky, &c. (s)

For that whereas, long before and at the time of the committing of the several grievances by the defendant hereinafter mentioned, a certain messuage and premises, with the appurtenances, was in the possession and occupation of a certain person, to wit, one E. F. as tenant thereof to the plaintiff, the reversion thereof expectant on the determination of the said tenancy then and still belonging to the plaintiff. And whereas also, before

Sel. 234. See form relating to a messuage and fixtures in possession of tenant, *Hare v. Horton*, 5 B. & Adol. 715. See a form at the suit of reversioner for stopping a way, 8 Wentw. 550. That reversioner may sue, see Com. Dig. Action on Case, Nuisance, B.; 3 Lev. 360. In 4 Burr. 2141, it was held, that case lies by a reversioner for obstructing ancient lights, and see a form of declaration in such a case, 8 Wentw. 548. As to an action by a remainder-man of copyhold premises, see 3 Lev. 130; Fisher on Copyh. 114; by a remainder-man against a tenant for life, see 2 Saund. 252 a. The statement of the reversionary interest is merely inducement, and though a seisin in fee, &c. is often stated in a declaration by a reversioner, (see 3 Wils. 461,) yet, in order to avoid the necessity of proving the precise estate as alleged, it may be advisable to adopt the above form, which will suffice; 2 Saund. 133 b, 252 d; Com. Dig. Pleader, C. 39. It seems unnecessary for the plaintiff to have the *immediate reversion* to support this action, but of course if he have not such reversion, it will be necessary to set out more particularly the nature of his estate in the premises. The plaintiff must distinctly allege and prove such a permanent injury as to affect his reversionary interest; an injury merely affecting the possession will not suffice; 1 M. & Sel. 234.

As to what is such a permanent injury, see *Tucker v. Newman*, 11 A. & E. 40. The want of such an allegation will be a cause for arresting the judgment; therefore, where the plaintiff declared as reversioner of a yard and part of a wall, which W. F. occupied as tenant to him, and that the defendant wrongfully placed on the wall quantities of bricks and mortar, and raised it to a greater height than before, and placed pieces of timber on the wall, over-hanging the yard, *per quod* the plaintiff during all that time lost the use of the wall, and by means of the timber over-hanging the wall, the rain flowed from the wall on the yard, and thereby the yard and wall were injured, and did not state that his reversion had been prejudiced, the Court arrested the judgment; 1 M. & Sel. 234. If the tenant holds under a written agreement, it must, it seems, be produced; 4 B. & C. 465; 6 D. & R. 551, S. C.

(o) The precise local situation of the premises need not be inserted.

(p) A mortgagor is tenant to mortgagee; 5 B. & Ald. 604; 1 D. & R. 272, S. C.

(q) The allegation as to the possession or title still continuing is immaterial, and need not be proved; 3 Taunt. 137.

(r) This allegation is necessary and must be proved; 1 M. & Sel. 234, 239.

(s) See *ante*, 589, note (n).

and at the time of the committing the several grievances hereinafter mentioned, the defendant was and still is possessed of a certain other messuage and premises, with the appurtenances, situate and being near and adjoining to the said messuage and premises first mentioned. And whereas for divers and very many years before and until and at the time of committing the grievances hereinafter next mentioned, there was, and of right ought to have been, and still of right ought to be, a certain flue, funnel or passage for smoke, leading from and out of a certain room in and parcel of the said first-mentioned messuage and premises, unto and into and communicating with a certain chimney, being in the said messuage and premises of the defendant, into, through and out of which said chimney, so being in the said messuage and premises of the defendant, the smoke which might from time to time arise and proceed from the wood, coals and other fuel kindled, burnt and consumed at and in a certain fire-place in the said room for the necessary heating and the wholesome and convenient use and occupation thereof, during all the time aforesaid, until the committing of the grievance hereinafter next mentioned, was used and accustomed, and of right ought by and by means of the said flue, funnel or passage, to enter, pass, ascend and be carried away. Yet the defendant well knowing the premises, but contriving and wrongfully intending to injure, prejudice and aggrieve the plaintiff in his reversionary estate and interest of and in his said messuage and premises, with the appurtenances, whilst the said messuage and premises were so in the possession and occupation of the said E. F. as tenant thereof to the plaintiff as aforesaid, whilst the plaintiff was so interested therein as aforesaid, to wit, on &c., wrongfully and unjustly, and without the leave or licence of the plaintiff, by and by means of divers large quantities of bricks, stones and mortar, shut, closed, stopped up and obstructed the said flue, funnel or passage, and the same so shut, closed, stopped up and obstructed as aforesaid, kept and continued for a long space of time, to wit, from the day and year aforesaid, hitherto and still doth keep and continue, whereby such smoke was and is wholly hindered and prevented from entering, passing, ascending and being carried away, into and through and out of the said chimney from the said room, by or by means of the said flue, funnel or passage, and the said room hath thereby been rendered and still is uncomfortable, unwholesome and unfit for habitation: and the said messuage and premises, with the appurtenances, of the plaintiff is thereby become greatly deteriorated and lessened in value. By means of which said several premises the plaintiff hath been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said messuage and premises, with the appurtenances, so in the possession and occupation of the said E. F. as tenant thereof to the plaintiff as aforesaid.

To HOUSES OR
LAND IN
REVERSION.

NOT REPAIRING FENCES.

Commencement as ante, 18. The venue is local.] For that whereas the plaintiff heretofore, to wit, on &c. was, and from thence hitherto hath been and still is, lawfully possessed and in the occupation of a certain close. And the defendant during that time was and still is possessed of and in the occupation of a certain other close, contiguous and near to the said close of the plaintiff. And the defendant, by reason of the possession of his said close,

NOT
REPAIRING
FENCES.

For not repairing a fence between plaintiff's and defendant's closes, whereby plaintiff's cattle escaped, and were hunted

NOT
REPAIRING
FENCES.

and damaged,
and defendant's
cattle got into
plaintiff's close,
and committed
damage. (t)

with the appurtenances, during all the time aforesaid, of right ought (u) to have repaired and amended, and still of right ought to repair and amend, a certain hedge or fence between the said close of the plaintiff and the said close of the defendant as often as occasion hath required, to prevent cattle lawfully feeding and depasturing, or being in those respective closes from erring or escaping from and out of the one into the other of the said closes, through the defects and insufficiencies of the said hedge or fence, and doing damage in those respective closes. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff in that behalf, whilst the plaintiff and defendant were so respectively possessed of their said respective closes, with the appurtenances as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of commencing this suit, wrongfully and unjustly suffered and permitted the said hedge or fence between the said close of the plaintiff and the said close of the defendant, and which the defendant so ought to have repaired and amended as aforesaid, to be and continue, and the same then was ruinous, prostrate, fallen down, out of repair and in great decay for want of needful and necessary repairing and amending of the same, whereby divers cattle, to wit, — horses, — cows, — sheep, &c. of the plaintiff, lawfully feeding and depasturing in the said close, piece or parcel of land of the plaintiff, on the several days and times aforesaid, went, erred and escaped from and out of the same, through the said defects and insufficiencies of the said hedge or fence, into the said close of the defendant, and were then driven about and hunted in the said close of the defendant. And thereby one of the said cattle, to wit, a certain cow of the plaintiff, then prematurely calved and became and was greatly injured and damaged. And the plaintiff was forced and obliged to lay out and expend a large sum of money, to wit, the sum of £5, in and about the endeavouring to cure the said cow. And also by reason of the said defects and insufficiencies of the said hedge or fence, on the several days and times aforesaid, divers other cattle, as well of the defendant as of divers other persons, feeding and depasturing and being in the said close of the defendant on the several days and times aforesaid, through the said defects and insufficiencies of the said hedge or fence, erred and escaped out

(t) See the forms, Bro. Rep. 62, 486; Herne, 61, 62; 1 Bro. Ent. 66; 8 Wentw. Index, lxx.; Morg. Prec. 436; 1 Rich. C. P. 131; Lil. Ent. 64, 69. As to the law, see Vin. Ab. Fences; 1 Taunt. 529; Harrison, Landl. and Ten. When the defendant's cattle have escaped into plaintiff's close, he may declare either in case or trespass; 1 Salk. 335. The action should in general be against the occupier and not the landlord, who is not in possession; 4 T. R. 318; 2 Hen. Bla. 350; 12 Mod. 168. If a man who ought to inclose against land, do not inclose, whereby the cattle of his tenants enter into the land and do damage, the owner may have his remedy; Bul. N. P. 74. So an action on the case lies for breaking the fences of a third person, whereby the cattle of the plaintiff escape into the land of the former, and are distrained; 1 Lord Raym. 273. Where the plaintiff declared in case against the tenant for not repairing his fences, *per quod* the

plaintiff's horses escaped into the defendant's close and were there killed by the falling of a hay-stack, it was held that the damage was not too remote, and that the action was maintainable; 2 Y. & J. 391; and see 1 Bar. & Ald. 59.

(u) This is now determined to be a sufficient allegation of the defendant's liability to repair; 1 Salk. 335; 1 Vent. 264; 2 Lord Raym. 804; 3 T. R. 766. It is not necessary to introduce the word "tenants," unless the defendant be owner as well as occupier of the soil, as it is only in the latter capacity that a mere lessee can be sued; 4 T. R. 318; 2 Hen. Bla. 350; 12 Mod. 168. *Debit reparare* is sufficient, without showing how the defendant is liable; 3 T. R. 766; Cro. Jac. 665; 1 Salk. 335, 360; 2 Saund. 114 a, b, c; 1 Price, 27. It seems sufficient although the defendant was bound to repair by agreement; see 6 B. & C. 333, 338; 9 D. & R. 430, S. C.

of the said close of the defendant into the said close of the plaintiff, and eat up, trod down, trampled upon, consumed and spoiled other the grass and herbage of the said close then growing and being, of great value, to wit, of the value of £20. To the plaintiff's damage, &c.

NOT
REPAIRING
FENCES.

NOT REPAIRING SEA WALLS.

See the Mayor and Burgesses of Lyme Regis v. Henley, in error, 5 Moore & Scott, 29; 3 Bar. & Adol. 77 S. C.; 1 Bing. N. C. 222.

Regis, for not repairing sea walls pursuant to charter, whereby plaintiff's houses were damaged by the sea.

NOT
REPAIRING
SEA WALLS.

Against the
mayor and bur-
gesses of Lyme

NOT CARRYING AWAY TITHE.

Commencement as ante, 13. The venue is local.] For that whereas the defendant heretofore, to wit, on &c. was and from thence hitherto hath been and is still rector of the rectory of the parish church of —, in the county of —, and as such rector of the said rectory, the said defendant hath been for and during all the time aforesaid and still is entitled to have, take and receive, all and singular the tithes of [wheat] yearly growing, arising, renewing and happening upon and from a certain close or piece or parcel of land called —, situate and being in the parish aforesaid and within the bounds, limits and titheable places of the said parish and rectory. And whereas the tenants and occupiers of the said close or piece or parcel of land for the time being, *from time whereof the memory of man is not to the contrary,* (y) have been used and accustomed and ought yearly and every year, when the said close or piece or parcel of land hath been sown (z) with corn, to divide, separate and set out the tenth part or tithe of all corn growing and arising, renewing and happening in every such year, upon and from the said close or piece or parcel of land and every part thereof, after the reaping and cutting down of the said corn, from the nine parts residue thereof upon the said close or piece or parcel of land where the same hath so grown, and there to leave such tenth part or tithe for the use of the rector of the said rectory, or his farmer of the tithes thereof for the time being; which said tenth part or tithe so as aforesaid divided, separated, set out and left, the rector of the said rectory, or his farmer of the tithes thereof for the time being, at his own proper costs and charges, in a convenient time next after the dividing, separating and setting out and leaving thereof, *and after notice* (a) thereof given to the said rector or farmer for the time being, hath been, during all the time aforesaid, used and accustomed and ought to carry

NOT
CARRYING
AWAY TITHE.
For not carrying
away great
tithe. (z)

(x) See the forms, 8 Wentw. Index, 72; 1 Ld. Raym. 187; Morg. 398; 1 Mall. 214; and the law, 1 Stra. 245; 10 East, 5; Eagle on Tithes. If the proprietor of the tithe leave it on the land more than a reasonable time after it is set out, and after he has notice thereof, the owner of the land cannot justify, in trespass, turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes; but his remedy is either by distress damage feasant, or by action on the case; 8 T. R. 72. And trespass *vi et armis* cannot be supported for such nonfeasance; Ld. Raym.

187; Burr. 1891; 1 Roll. 109.

(y) This allegation is not necessary, and in some cases might be improper; 5 T. R. 264; *ante*, 348.

(z) Where the plaintiff claims tithe of grass, he must not allege that the closes were sown with grass if it was natural grass; M'Clel. Rep. 388.

(a) As to the statement of notice of having set out the tithe, see 1 Rol. Ab. 648; 2 Ventr. 48; 3 Burr. 1892; 1 Stra. 245. What notice is sufficient, see 11 East, 358. As to notice of being about to set out the tithe, 3 Burr. 1891; 2 Wentw. 48.

NOT
CARRYING
AWAY TITHE.

away from the said close or piece or parcel of land whereon the said tenth part or tithe hath so grown and been so divided, separated and set out and left as aforesaid. (b) And whereas the plaintiff, before and on the said — day of —, in the year aforesaid, was and from thence hitherto hath been and still is the tenant (c) and occupier of the said close or piece or parcel of land, and which said close or piece or parcel of land was in that year sown with wheat; and the plaintiff so being tenant and occupier of the said close or piece or parcel of land, and the defendant so being rector of the said rectory and so entitled to the said tithes as aforesaid, he the plaintiff afterwards, to wit, on the day and year aforesaid, reaped and cut down certain wheat then growing upon the said close or piece or parcel of land, and then lawfully and in due manner (d) divided, separated and set out thereon the tenth part or tithe of the said wheat from the nine parts residue thereof, and there left the same for the use of the defendant, so being rector of the said rectory as aforesaid, and afterwards, to wit, on the day and year aforesaid (e) the plaintiff gave notice thereof (f) to the defendant. Yet the defendant so being rector of the said rectory and so entitled to the said tithes as aforesaid, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in this behalf and to deprive him of a great part of the profit, benefit and advantage of the said close or piece or parcel of land, did not nor would, in a convenient (g) time after the dividing, separating, setting out and leaving the said tenth part or tithe of the said wheat from the nine parts residue thereof, and after the said notice (h) thereof given as aforesaid, take or carry away from the said close or piece or parcel of land the tenth part or tithe of the said wheat, or any part thereof, but on the contrary thereof the defendant wrongfully suffered and permitted the said tenth part or tithe of the said wheat to continue and remain upon the said close or piece or parcel of land, where the same had so grown and been divided and separated, set out and left as aforesaid for a long, inconvenient and unreasonable space of time, to wit, for the space of [six (i) weeks] next after the dividing, separating, setting out and leaving the said tenth part or tithe of the said wheat from the nine parts residue thereof, and after the said notice thereof so given as aforesaid, and after the said nine parts residue thereof had been carried away from the said close or piece or parcel of land of the plaintiff. Whereby the said close or piece or parcel of land was, for and during all that time, greatly encumbered with the said tenth part or tithe of the said wheat, and the plaintiff was thereby, for and during all the time aforesaid, hindered and prevented

Damage. (k)

(b) As to this inducement and statement of the custom, see 3 Burr, 1893.

(c) As to this statement of the plaintiff's possession, &c. of the close, see 3 Bulst. 337.

(d) Under this the plaintiff may give in evidence that it was set out according to the agreement, though it varied from the mode prescribed by the common law; 3 B. & C. 213; 5 D. & R. 68, S. C.; see 3 Esp. 31.

(e) If the defendant omitted to carry away the tithe on several occasions after several notices say, "and on divers other days and times afterwards and before the commencement of this suit."

(f) See preceding page, note (a)

(g) This is necessary, as a reasonable time must be allowed to carry the tithe away after notice and before action brought; 3 Bulst. 336; Ld. Raym. 189; Stra. 245. What is sufficient, see 11 East, 358. Query, whether the time allowed be a question for the Court or jury, 3 B. & C. 213; 5 D. & R. 68, S. C.; *semble*, that it is principally for the jury, 2 Adol. & El. 263.

(h) Or respective notices.

(i) It is necessary to state how long the corn remained upon the ground; Latch, 8.

(k) It is necessary to state some damage; Latch, 8.

from feeding and depasturing certain cattle upon the said close or piece or parcel of land and from ploughing, cultivating or sowing the same with —, as he otherwise would have done, and also thereby a certain crop of —, which was afterwards sown upon the said close or piece or parcel of land, for want of being sown in due and proper time, became and was stunted in its growth, unproductive and of little or no use or value to the plaintiff, and by means of the said several premises, he the plaintiff lost and was deprived of a great part of the profits, benefits and advantages which might and otherwise would have arisen and accrued to him from the said close or piece or parcel of land.

Not
CARRYING
AWAY TITHE.

FOR WASTE, &c.

FOR WASTE,
&c.

Commencement as ante, 13.] For that whereas the defendant, before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed a certain messuage or dwelling-house and land, with the appurtenances, as tenant thereof to the plaintiff, that is to say, as tenant thereof from year to year, for so long time as they the plaintiff and defendant should respectively please, the reversion thereof expectant on the determination of the tenancy then and still belonging to the plaintiff. Yet the defendant contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff in his reversionary estate and interest of and in the said messuage or dwelling-house and land, with the appurtenances, whilst the same so were in the possession of the defendant as tenant thereof to the plaintiff as aforesaid, to wit, on &c. and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly felled, (m) cut down and prostrated and caused and procured to be felled, cut down and prostrated (n) divers trees, to wit, — oaks, —

By reversioner
in fee against
his tenant for
years, for volun-
tary waste, by
cutting down
trees or other
waste. (l)

(l) See precedents, 8 Wentw. Index, 67 to 71; and *Torriano v. Young*, 8 Car. & P. 8. As to when this action lies, see *ante*, vol. i. 157, &c. By landlord against tenant, or by remainder-man in fee against the tenant for life, see 2 Saund. 252 c, d; Mod. Ent. 201; 3 Lev. 128; 3 East, 38; and see the forms of stating the particular waste, whether voluntary or permissive, in houses, lands, or woods, 2 Saund. 252 d, e, f; 3 East, 38. This action may be supported by any person who has the immediate remainder or reversion, whether in fee, in tail, for life, or years, against the tenant in possession, or a stranger; see the instances, 2 Saund. 252, n. 7, where, see the mode of declaring in general. If the declaration be against a stranger for waste, at the suit of a reversioner, the right of the plaintiff and the possession of the tenant should be described as in the precedent, *ante*, 590. An action on the case in the nature of waste lies at the suit of a landlord against his tenant, for acts done by the latter while holding over after the expiration of a notice to quit; 1 Campb. 360. The landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis* against a third person for carrying it away after it has been cut down; 2 Chit. Rep. 636. Where a

lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber, it was held, that as the tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them; 5 B. & C. 897; 8 D. & R. 651, S. C. On a declaration alleging that the defendant being tenant to plaintiff, "cut down and destroyed trees on the premises, and otherwise used the said premises in so untenant-like and improper a manner, that they became and were and are dilapidated and in bad and untenantable condition," it was held that the plaintiff could not recover for permissive waste; *Martin v. Gilham*, 7 A. & E. 540; 2 N. & P. 568.

(m) It is necessary in this action to state in the declaration the nature and kind of waste which is the subject of the action. See the several forms in 2 Saund. 252 d, e, f.

(n) When trees are excepted in the lease, trespass is sustainable and not case, 8 East, 190; and, if not excepted, the interest of the lessor in the body of the trees continues, so

FOR WASTE, &c. elms, — apple trees, — walnut trees and — other trees of the plaintiff, of great value, to wit, of the value of £——, then standing, growing and being in and upon the said land and took and carried away the same and converted and disposed thereof to his own use. Whereby the plaintiff hath been and still is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said messuage or dwelling-house and land, with the appurtenances.

The like in another form, by a reversioner, against a tenant who had quitted premises, for having cut down timber and committed waste.

For that whereas the defendant, before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed divers, to wit, [1000] acres of land, with the appurtenances, as tenant thereof to the plaintiff, under and by virtue of a certain demise thereof theretofore made, for a term which is since determined. Yet the defendant contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his reversionary estate and interest of and in the said land, with the appurtenances, whilst the same were so in the possession of the defendant, as tenant thereof to the plaintiff as aforesaid, to wit, on &c. and on divers other days and times between that day and the — day of —, A.D. —, wrongfully and unjustly felled, cut, prostrated and destroyed, and caused and procured to be felled, cut, prostrated and destroyed, divers timber trees and other trees, and divers saplings and standards likely to become timber, that is to say, 500 timber trees, 500 other trees, 2000 saplings, and 2000 standards likely to become timber, and also large quantities of coppice wood and underwood, to wit, 2000 cart-loads of coppice wood, and 2000 cart-loads of underwood, at those times respectively standing, being and growing in and upon the said land, the coppice wood and underwood, so felled and cut as aforesaid, at the several times of felling and cutting thereof, not being of fit, proper and seasonable growth for being felled and cut; and the said timber trees, other trees, saplings, standards, coppice wood and underwood, being of great value, to wit, of the value of £1000, and took and carried away the same respectively, and converted and disposed thereof to his own use; and the defendant also, on the said several days and times aforesaid, and during his said tenancy, took down, pulled down, prostrated and destroyed a certain kiln, to wit, a lime kiln, of great value, to wit, &c. standing and being on the said premises, and took and carried away the same and the materials thereof, containing, to wit, 50 cart-loads of bricks, 50 cart-loads of stone, 50 cart-loads of mortar, 100 weight of iron, and 500 other building materials, and carried away the same, and converted and disposed thereof to his own use, whereby the plaintiff hath been, and still is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said land, with the appurtenances.

The like, for not cutting underwood at the proper age, as defendant ought to have done.

And whereas also the defendant, before and at the time of the committing the grievances hereinafter next mentioned, held and enjoyed divers, to wit, 1000 acres of other land, with the appurtenances, comprising, amongst other

that he may support trespass for carrying them away; 1 Saund 322, n. 5; 7 T. R. 13; 2 Campb. 491. But if a lessor, during the term, cut down trees growing upon the demised premises, which are fit only for fire-

wood, and the lessee take them away, trespass will not lie against the lessee at the suit of either the lessor or his vendee; 8 D. & R. 651; 5 B. & C. 897, S. C.

land, divers, to wit, 300 acres of coppice wood, and 300 acres of underwood, as tenant thereof to the plaintiff; and thereupon it then became and was the duty of the defendant to cut the coppice wood and underwood growing in and upon the said premises at due and proper times and seasons. Yet the defendant contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff, in his reversionary estate and interest of and in the said land, with the appurtenances, whilst the same were so in the possession of the defendant, as tenant thereof to the plaintiff as aforesaid, to wit, on &c. and from thence for a long and unreasonable time, to wit, until the — day of —, A. D. —, wrongfully delayed cutting, and did not cut divers, to wit, 100 acres of coppice wood, and 100 acres of underwood, of and belonging to the said premises, which ought to have been cut before, to wit, in the year of our Lord —, and wrongfully and injuriously cut the same, after the expiration of such reasonable time as aforesaid, to wit, on the — day of —, in the year of our Lord —, and just before the expiration of the said tenancy of the defendant, by reason whereof he the plaintiff was by the defendant wrongfully and unjustly deprived of the benefit of the fresh growth of the said underwood and coppice wood after the time when the same ought to have been cut, and which he would have had if the same had been cut at due and proper times in that behalf, and thereby the plaintiff hath been and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said land, with the appurtenances.

Commencement as ante, 13.] For that whereas the defendant heretofore, to wit, on &c. was, and from thence hitherto hath been, and still is tenant to the plaintiff, of a certain messuage, farm, land and premises, with the appurtenances, and by reason thereof during all that time it was the duty of the defendant, as such tenant, to manage, use and cultivate the said farm, lands and premises, with the appurtenances, in a good and tenant-like manner. Yet the defendant, not regarding his duty in that behalf, but contriving, &c. [*State the breaches of good husbandry, &c. according to the fact, see the forms in assumpsit, ante, 223 to 227.*]

By landlord against tenant, for not cultivating according to good husbandry. (o)

Commencement as ante, 22.] For that whereas by the law and custom of England hitherto used and approved of, all and singular the rectors and vicars of this kingdom for the time being are bound and ought to repair

Against administratrix of a deceased rector at the suit of the successor, for dilapidations. (p)

(o) See forms in assumpsit, and notes, ante, 223 to 227. When case is maintainable; *id.* and ante, vol. i. 157, 158.

(p) See forms, 8 Wentw. lxvii.; Lil. Ent. 21, 67, 68; Plead. Ass. 303; 1 Rich. C. P. 489; 4 M. & Sel. 183. As to the law, see Willes, 421; 3 Wooddes. 205; 2 T. R. 636; Wats. Cl. Law, chap. xxxix.; Vin. Ab. Dilapid. 15; 2 Burn's Eccl. Law, 146, 153; 3 Lev. 268; 1 Lut. 116. The successor may have separate actions against the executor of the late rector for dilapidations to different parts of the rectory; 4 M. & Sel. 183. See further *Bird v. Relfe*, 1 Nev. & Man. 415; 4 B. & Ad. 826, S. C.; 1 Chitty's Gen. Prac. 393. See also 3 & 4 W. 4, c. 42,

sect. 2. Two clergymen being possessed of livings agreed to exchange the one for the other with the consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop and each party respectively inducted. There was no agreement as to dilapidations, and it was held that one incumbent might sue the other for dilapidations in the ordinary form; see *Downes v. Craig*, 9 M. & W. 166. As to when this action is maintainable in general, see 2 T. R. 630, 637; 4 B. & Adol. 830, 826; 3 Lev. 268; Willes, 421; 2 Adol. & E. 773; 2 Car. & P. 460; 10 B. & C. 299; 4 M. & S. 183.

FOR WASTE, &c. and sustain all and singular the houses, buildings and tenements of and belonging to their respective rectories and vicarages, and to leave the same so repaired, supported and sustained, to their successors, and that if such rectors and vicars do not leave such houses, buildings and tenements to their successors, so repaired, supported and sustained, but leave them out of repair and dilapidated, then the executors or administrators of the goods and chattels of such rectors and vicars respectively, after their deaths, *having sufficient of the goods and chattels of such rectors and vicars*, are bound and ought to satisfy so much as shall be necessary to be expended or paid for the necessary repairing of such houses, buildings and tenements as aforesaid. And whereas the said E. F. deceased, in his life-time, and at the time of his death, to wit, on &c. was [vicar] of the parish of — aforesaid, and was seised, in right of the said [vicarage] of and in a certain messuage called [“the vicarage-house,”] and the out-houses and gardens thereunto belonging, and also of certain glebe lands lying and being. And the said E. F. being so seised, afterwards, to wit, on the day and year aforesaid, died, and the plaintiff afterwards, and after the death of the said E. F. to wit, on &c. was in due form of law presented, admitted, instituted and inducted (g) into the said [vicarage] of the said parish church of &c. so void by the death of the said E. F. deceased, as aforesaid, and the said plaintiff thereby then and there became, and was and still is [vicar (r)] of the said parish church, and the next successor of the said E. F. of and to the same. And the plaintiff in fact saith, that at the time of the death of the said E. F. the said [vicarage-house] and the out-houses, and the fences of the garden and glebe lands aforesaid, were and still are out of repair and greatly dilapidated, ruinous, broken and in great decay, for want of due repairing thereof, and were so left by the said E. F. out of repair, and greatly dilapidated, ruinous, broken and in great decay, at the time of his death, as aforesaid, and that the sums of money sufficient for the necessary repairing of the said premises, so ruinous and in decay at the time of the death of the said E. F. as aforesaid, will amount to a large sum of money, to wit, the sum of £——, of all which said premises the defendant, administratrix as aforesaid, afterwards, and after the death of the said E. F. and after the plaintiff was so presented, admitted, instituted and inducted to the said parish church as aforesaid, to wit, on the day and year last aforesaid, (s) had notice, and was then requested by the plaintiff to pay the said sum of money. Nevertheless the defendant, so being administratrix as aforesaid, contriving and fraudulently intending to deceive the plaintiff in this behalf, (although she, as administratrix as aforesaid, had sufficient of the goods and chattels of the said E. F. deceased, in her hands to be administered, (t) to pay the said sum of £——) hath not yet paid the plaintiff the said sum of £—— or any part thereof, or any sum of money for or towards the repairs aforesaid, although often requested so to do, but hath hitherto

(g) It is necessary to state the plaintiff's title. As to the mode, *ante*, 404, &c. And if the plaintiff entitle himself by the resignation of his predecessor, he ought to show how the resignation was made; *Lutw.* 116; 21 *Hen. 8*, c. 13; *Burn's Eccl. Law*, Plurality.

(r) *Ante*, 404, &c.

(s) The precise day is not material.

(t) This allegation is said to be necessary, because an administrator is not liable, unless he has goods of the intestate; *Giba.* 753; 3 *Kep.* 619. But this appears to be a mistake, as the want of assets is matter of defence to be pleaded by the defendant; see *Lil. Ent.* 21, 67, 68. *Sed quære*, see the statement of the *qualified liability*.

altogether neglected and refused, and still doth neglect and refuse to pay FOR WASTE, &c. him the same.

To WATER-COURSES, &c.

Commencement as ante, 13.] For that whereas the plaintiff, before and at the time of the committing of the grievances by the defendant herein-

To WATER-COURSES, &c.

For diverting the water of a river from plaintiff's mill. (u)

(u) See forms, 8 Wentw. Index, lrv.; 2 East, 497; 4 Id. 107; 6 Id. 208; Lil. Ent. 55; Plead. Ass. 74, 78, 106, 226, 251, 300, 307, 311, 365; Morg. 349, 365; 2 Rich. C. P. 163; see like form, 5 B. & Adol. 1; where, see law on this subject, and see 2 Nev. & Man. 787; see *Dickers v. Gosling*, 1 Bing. N. C. 588; and see form in *Thomas v. Thomas*, 1 Gale, 61; 2 Crom. M. & Ros. 36, S. C. for disturbing right to a drain; and a form against a canal company for not managing the canal according to act of parliament, 3 Y. & J. 60; see a more general form, 1 Malk. 141; post, 602, and the notes to the form, ante, 582, most of which are applicable. An action lies for diverting or obstructing a water-course to which the plaintiff has a right, and whereby he has sustained damage. Running water is originally *publici juris*, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. But where the plaintiff alleged that defendant had erected one dam above plaintiff's premises, and widened another, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner to the plaintiff's premises, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of plaintiff, but did not allege any injury from the want of a sufficient quantity of water, and the jury found that plaintiff's premises were not injured, but were of opinion that defendant had no right to stop the water, or keep it pent up in the summer time; it was held, that the plaintiff could not recover damages for the erection of the dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water; 2 B. & C. 910; 4 D. & R. 583, S. C. The owner of land through which a river runs cannot, by enlarging a channel of certain dimensions, leading out of the river through which the water had been used to flow, before any appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel; 6 East, 208. And the occupier of a mill may maintain an action for forcing back water, and injuring his mill, although he has within a few years previous erected a wheel requiring less water than the one he had previously used; *Saunders v. Newman*, 1 B. & Ald. 258. But where the defendant erected a dam above the mill of the plaintiff, by

which the water was diverted from its accustomed channel, but to which it returned long before it reached the plaintiff's mill, which diversion affected the regularity of the supply, though it produced no waste of water, it was held that the plaintiff was entitled to recover; 7 Moore, 345. Where a plaintiff, who had a right to irrigate his meadow, by placing a dam of loose stones across a small stream, and occasionally a board or fender fastened (the board by means of two stakes), which had never been done by his predecessors, and the defendant, who had rights on the same stream, having removed the stakes and the board also, a verdict was given for the plaintiff in an action for such removal; the Court refused to set it aside, holding that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency, incompatible with the defendant's rights; 6 Bingh. 379. After twenty years uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground, and the owner of an adjoining close cannot lawfully cut a drain, whereby the supply of water to the spring is diminished; 1 Campb. 463. If one has ancient pits, which are separated by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the water-course; 1 Wils. 174.

The proprietor of lands contiguous to a stream may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it, and it is no answer to the action that the defendant first appropriated the water to his own use, unless he had had twenty years undisturbed enjoyment of it in the altered course; *Mason v. Hill*, 3 Bar. & Adol. 304.

In the absence of a special custom, artificial water-courses are not distinguished in law from natural ones; and a title may be gained by twenty years user as well to the former as the latter. Therefore where mine owners made an adit through their lands to drain the mine which they afterwards ceased to work, and the owner of a brewery through whose premises the water flowed for twenty years after the working had ceased, had, during that time, used it for brewing, it was held that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it; *Magor v. Chadwick*, 11 A. & E. 571; 3 P. & D. 367; but see *Arkwright v. Gell*, 5 M. & W. 203. A right to a water-course is not destroyed by the owner altering the course of the stream, and the

WATER-
COURSES, &c.

after mentioned, was, and from thence hitherto hath been and still is (x) lawfully possessed (y) of certain [iron and tin] works and premises, with the appurtenances, (z) and by reason thereof, before (a) and at the time of the committing of the grievances hereinafter mentioned, of right (b) ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream or water-course in

owner may establish his claim notwithstanding an interruption within twenty years of action brought; *Hall v. Swift*, 4 Bing. N. C. 381.

Where there is no actual grant of an exclusive right, nor any presumption of such grant, each proprietor of the soil over which the water flows is entitled to use it for the ordinary purposes of life, provided that such use does not proceed to such an extent as to cause any sensible diminution of quantity, or any prejudicial deterioration in the quality of the water itself. But this only applies to the case of streams of water flowing over the surface of the earth, and is entirely inapplicable to the case of *wells*. In the late case of *Acton v. Blundell*, Exchequer Chambers, May 17, 1843, which was an action for injuring the supply of water to a well, and where it was contended that the law applicable to streams of water flowing over the surface of the earth applied also to the case of *wells*, the following distinction was pointed out between the cases. The Court there said:

"Running water flows over the land for the benefit of all parties who may happen to be proprietors of the land over which it flows; but if the doctrine contended for on the part of the plaintiff were to be upheld, any person by sinking a well, which was a mere voluntary act upon his part, might take all the water to himself. There are many considerations of great public importance connected with the claim of the plaintiff; and although these considerations do not actually involve any principle of law, yet they cannot be overlooked in the decision of a case like the present. The advantages which a well may afford to the proprietor may be very small, whilst the injury which its existence may inflict upon other individuals and upon the public, may be extremely great; and a well which only furnished the means of watering some cattle, may be a cause sufficient to prevent the working of mines and minerals of inestimable value. It is also obvious that a well may be fed by streams percolating through veins and fissures of the earth for several miles before the appearance of the water upon the surface. The protection, therefore, which the owner of a well may claim against a person whose operations cut off the supply of water to the well, may reach to an extent which, if established, would produce the greatest private and public injury. All the analogies which it has been attempted to draw from the law of running streams are entirely inapplicable; no direct authority has been cited for the plaintiff, except one, which, however, was really unfavourable to his case; a direct authority against him has been

adduced from the Digest, in the form of an opinion delivered by Marcellus upon the point in question; and, as the greatest public inconvenience would result from the doctrine contended for upon the part of the plaintiff, the Court are of opinion that the case in question ought rather to be decided upon that rule which gives to the owner of the soil every thing under the surface of it; and that, if the plaintiff has suffered any loss in consequence of the exercise of the right which the defendant possessed, it was a loss which was *damnosum non injuriosum*, and for which therefore, the law of this country gives no right to maintain an action."

(x) This allegation is immaterial, and need not be proved; 3 Taunt. 137 to 139.

(y) The statement of possession is sufficient; *ante*, 582.

(z) The venue is local, but a local description of the nuisance is unnecessary; 2 East, 477. A variance in a statement of the local situation from that proved, would be fatal. Describing a weir to have been erected by the defendant at H., when it was erected at a lower part of the same water at T., the variance was held fatal; 1 New Rep. 290; 2 Smith's Rep. 677, S. C.; and see Reg. Gen. Hil. T. 4 W. 4, as to omission of venue in body of declaration.

(a) Sometimes this allegation would be improper; 4 East, 107; 6 East, 438; 1 Taunt. 205, 206; 1 B. & P. 37. And where one declared in case for obstructing a water-course upon his possession of a mill, with the appurtenances, and that by reason of such his possession he had a right to the use of the water running in a certain tunnel to the mill; it was held, that such allegation was not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration, but of which no conveyance was made by him to the plaintiff, and he had since refused assent, because the plaintiff had not the water by reason of his possession of the mill, but by parol license or contract, which could not pass the title to the land, and the license was revocable and revoked; 4 East, 107; and see 5 B. & C. 221; 7 D. & R. 783, S. C. So if the right to the benefit of a water-course be described as in respect of a mill, and it appear that such mill has been erected within twenty years, and there be no count describing the right in respect of the close on which the mill was erected, the plaintiff would fail, if the defendant's plea raise the objection; *Frankum v. Earl Falmouth*, 6 Car. & P. 529; 1 Har. & Wol. 1; 4 Nev. & Man. 330; where see form of declaration.

(b) *Ante*, 582, and 6 East, 208.

the county aforesaid, which during all that time of right ought to have run and flowed, (c) and, until the diversion thereof hereinafter mentioned, of right had run and flowed, and still of right ought to run and flow unto (d) the said works of the plaintiff, for the supplying the same with water for the working thereof. (e) Yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in this respect, and to deprive him of the use, benefit and advantage of the water of the said stream, and to hinder and prevent the plaintiff from working his said works in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in the way of his trade and business of a manufacturer of [tin plates], which he, during all the time aforesaid, exercised and carried on, and still doth exercise and carry on at the said works and premises, and to put him to great charge, expense, trouble and inconvenience, whilst the plaintiff was so possessed of his said works and premises, with the appurtenances as aforesaid, and so exercised and carried on his said trade and business therein, to wit, on &c., and on divers other days and times, between that time and the day of commencing this suit, (f) wrongfully and injuriously cut, (g) dug and made, and caused to be cut, dug and made in and out of the sides of the said stream or water-course above the said works and premises, divers, to wit, — sluices, — trenches, — channels, and — cuts, of great depth and width, to wit, of the width of — feet, and of the depth of — feet, and kept and continued, and caused to be kept and continued, the said sluices, trenches, channels and cuts on the sides of the said stream or water-course for a long time, to wit, from thence hitherto, and thereby during all the time aforesaid, unlawfully and wrongfully diverted and turned divers large quantities of the water of the said stream or water-course out of and away from the said works of the plaintiff, and stopt, prevented and hindered the water of the said stream or water-course from running or flowing along its usual course to the said works, and from supplying the same with water

(e) It is not necessary to show any other title in a declaration for the diversion of a water-course that "*quæ ad terrum*," &c. of plaintiff "*currens consequit*"; 2 Saund. 114; ante, 582; Cro. Car. 500, 575; 3 Lev. 139; 3 Mod. 49; 1 Show. 64; 2 Show. 243; Carth. 85; 1 Leon. 247; Palm. 290; 3 Lev. 133, S. C.; 2 Vent. 292; Fitz. N. B. 123; and see 6 M. & Sel. 29.

(d) It is not necessary to show the *termini* of a water-course; Skin. 389; Comb. 231.

(e) If the defendant was entitled to irrigate, here insert in one count the following qualifications of the plaintiff's right; viz. "*save and except at such times when it should and might be reasonable and proper to water a certain close in the occupation of the defendant, near to the said water-course, with reasonable quantities of the water thereof.*"

(f) If the defendant was entitled to irrigate, then insert the following words; "*and at times when it was not reasonable or proper to irrigate or water the said close of the defendant with water from the said stream or water-course.*"

(g) It seems that a declaration for obstruct-

ing a water-course, without showing how, is bad on demurrer, but not after verdict; 1 Lord Raym. 452, *sed quære*. The injurious act should be described according to the fact, and a count for diverting and turning, &c. is not supported by proof of penning back and checking a stream; 6 Price, 1; and 5 Taunt. 534. Where the declaration alleged that the defendant placed and raised a dam across the stream, and thereby diverted and turned the water and prevented it from running along its usual course to the plaintiff's mill, and from supplying the same with water for the necessary working thereof, as the same of right ought and otherwise would have done; it was held, that such allegation was supported by proof that, in consequence of the dam, the water was prevented from being regularly supplied to the plaintiff's mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam; 7 Moore, 345.

**WATER-
COURSES, &c.**

Second count,
stating a general
diversion of the
water, without
showing the
means. (h)

for the necessary working thereof, as the same of right ought to have done, and otherwise would have done, and by reason thereof the water of the said stream or water-course, sufficient for the supplying of the said works of the plaintiff during all or any part of that time, could not nor did run or flow to the same, as the same of right ought to have done, and otherwise would have done, and the plaintiff thereby, for want of such sufficient water, could not during that time use his said works and premises, or follow, use, or exercise his said trade or business therein in so large, extensive, and beneficial a manner as he might and otherwise would have done, but was thereby during all that time deprived of the use and enjoyment of his said works and premises, and of all the benefits, profits, gains and advantages which he otherwise might and would have made by carrying on his trade and business therein. And whereas also the plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was, and from thence hitherto hath been, and still is lawfully possessed of certain other works and premises, with the appurtenances, near to a certain other stream or water-course, before and at the time of committing of the grievances hereinafter next mentioned, had run and flowed, and been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow in great plenty and abundance, unto the said last-mentioned works of the plaintiff, for the supplying the same with necessary water for the working thereof. Yet the defendant, well knowing the said last-mentioned premises, but contriving and intending to injure and prejudice the plaintiff in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said last-mentioned stream or water-course, and to deprive him of the benefit and profits of his said last-mentioned works, and of his trade and business as manufacturer of [tin plates] as aforesaid, and to put him to great charge, trouble, expense and inconvenience, whilst the plaintiff was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on the said business therein, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly diverted and turned divers large quantities of the water of the said last-mentioned stream and water-course out of the same, and away from the said last-mentioned works of the said plaintiff, and hindered and prevented (i) the water of the said last-mentioned stream or water-course from running or flowing along its usual course to the said last-mentioned works of the plaintiff, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done, and by reason thereof the water of the said last-mentioned stream or water-course, sufficient for the supplying of the said last-mentioned works during that time, could not nor did run or flow to the same, as the same ought to

(h) See a more general form, 1 Mall. 141; but see 1 Ld. Raym. 452, and *ante*, 601, note (g). Since the pleading rules, Hil. T. 4 W. 4, reg. 5, a second count for precisely the same cause of action is inadmissible. But *semble*, a count might be added varying the statement of the right, as in respect of a *close* instead of a building; *Frankum v. Lord Falmouth*, 6 Car. & P. 529; 1 Harr. & Wol. 1;

4 Nev. & Man. 334, S. C. As to the effect of the word "other" in a second or subsequent count, see *Holford v. Dunnatt*, 7 M. & W. 348, and *Deere v. Ivey*, 12 L. J. R., N. S., Q. B. 132.

(i) *Quere*, if it ought not to be averred how the defendant prevented the water flowing, &c. see 1 Ld. Raym. 452; *ante*, 601, note (g).

have done, and otherwise would have done, and the plaintiff, for want of such sufficient water, could not during that time use his said last-mentioned works, or follow, use, or exercise his trade and business therein, in so large, extensive and beneficial a manner as he ought to have done, and otherwise would have done, but was thereby during all that time deprived of the use and enjoyment of the said last-mentioned works and premises, and of all benefit, profit, gain and advantage which he otherwise might and would have made by carrying on his said trade and business therein. And whereas also the plaintiff, before and at the time of the committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is lawfully possessed of certain other works and premises, with the appurtenances, near to a certain other stream or water-course there, and which said last-mentioned stream or water-course, before and at the time of committing the grievances hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance unto the said last-mentioned works of the plaintiff, for the supplying of the same with necessary water for the working thereof. And whereas the defendant, before and at the time of the committing of the same grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is possessed of divers, to wit, — closes of land, on the banks and sides of the said last-mentioned stream or water-course, and the defendant, by reason thereof, during all the time aforesaid, of right ought to have repaired and amended, and still of right ought to repair ^(l) and amend such part of the banks of the said stream or water-course which are situate within and are parts of the same closes, as occasion hath required or should require, to prevent the water of the said last-mentioned stream or water-course from escaping or running from the same through the same banks, through the defects and insufficiencies thereof. Yet the defendant, well knowing the said last-mentioned premises, but contriving and intending wrongfully and unjustly to injure, prejudice and aggrieve the plaintiff in this behalf, and to deprive him of the use, benefit and advantage of the water of the said last-mentioned stream or water-course, and of the benefits and profits arising from his exercising and carrying on his said trade and business in the said last-mentioned works and premises as aforesaid, whilst the plaintiff was so possessed of the said last-mentioned works and premises, with the appurtenances, as aforesaid, and carried on his trade and business therein, to wit, on &c., and from thence for a long space of time, to wit, hitherto, wrongfully and unjustly suffered and permitted the said banks to be and continue, and the same during all that time were ruinous and in bad condition for want of needful and necessary repairing and amending the same, whereby divers large quantities of the water of the said last-mentioned stream or water-course, which otherwise would have run and flowed to the said last-mentioned works of the plaintiff and have worked the same, on the said day and year aforesaid, and on divers other days and times,

WATER-
COURSES, &c.

Third count, for not keeping the banks of the river in repair. (k)

(k) See Plead. Assist. 226. This count was used in order to avoid the risk of not being able to prove that the defendant made the cuts as stated in the first count.

(l) This is a sufficient allegation; Lord

Raym. 1566; Salk. 360; 3 T. R. 766; 2 Saund. 113, 114; *ante*, 592, n. (u). This count might certainly be added as a different cause of action to that for making cuts, &c., and thereby subtracting the water.

WATER-
COURSES, &c.

Fourth count,
for widening,
&c. cuts from
the stream. (m)

between that day and the commencement of this suit, escaped and ran from and out of the said last-mentioned stream or water-course, through the said defects and insufficiencies of the said banks, and became and were wholly lost to the plaintiff, and never did run or flow to the said last-mentioned works for the working thereof, as the same ought to have done, and otherwise would have done, and thereby the plaintiff, for want of the said water, could not during all or any part of the time last aforesaid use or work his said last-mentioned works, or follow, use or exercise his said trade or business therein, in so large, extensive and beneficial a manner as he ought to have done, and otherwise would have done, and was thereby during all that time deprived of the use and enjoyment of his said last-mentioned works, and of the benefits, profits and advantages which he otherwise might and would have derived and acquired from carrying on his said trade and business. And whereas also the plaintiff, before and at the time of committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is lawfully possessed of certain other works and premises, with the appurtenances, near to a certain other stream or water-course, which, before and until the time of the committing of the grievances by the defendant as hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the plaintiff for the supplying of the same with necessary water for the working thereof; Yet the defendant, well knowing the said last-mentioned premises, but contriving and intending unlawfully and wrongfully to injure and prejudice the plaintiff in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said last-mentioned stream or water-course, and to deprive him of the benefit and profit of his said last-mentioned works, and his trade and business as such manufacturer as aforesaid, and to put him to great charge, trouble, expense, and inconvenience, whilst he the plaintiff was so possessed of the said last-mentioned works and premises, with the appurtenances as aforesaid, and carried on the said business therein, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit wrongfully and injuriously widened, deepened and enlarged, divers, to wit, — feeders, — sluices, — cuts, and — water-courses, leading from and out of the said stream or water-course in this count first above-mentioned, and thereby, on those several days and times, drew off and diverted from the same stream or water-course, a much greater quantity of water than had before then used to flow, or ought then to have flowed from the said stream or water-course, and away from the said last-mentioned works of the plaintiff, and hindered and prevented the water of the said last-mentioned stream or water-course from running or flowing along its usual course to the said last-mentioned works of the plaintiff, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done, and wrongfully and injuriously kept and continued the said feeders, sluices, cuts, and water-courses, so widened, deepened, and enlarged, and the water so drawn off in larger quantities as aforesaid, from thence hitherto, and by reason thereof the water of

(m) As to this count, 6 East, 208; 1 Wils. 175.

the said stream or water-course, sufficient for the supplying of the said last-mentioned works, during all or any part of that time, could not nor did run or flow to the same, as the same ought to have done, and otherwise would have done, and the plaintiff thereby, for want of such sufficient water, could not, during all or any part of that time, use his said last-mentioned works and premises, or follow, use, or exercise his trade and business therein in so large, extensive and beneficial a manner as he ought to have done, and otherwise might and would have done, but was thereby during all that time deprived of the use and enjoyment of the said last-mentioned works and premises, and of all the profits, benefits, and advantages, which he otherwise might and would have made by carrying on his said trade and business therein.

WATER-
COURSES, &c.

And whereas also the plaintiff, before and at the time of the committing of the grievances by the defendant as hereafter in this count mentioned, was, and from thence hitherto hath been and still is lawfully possessed of divers, to wit, three other closes, and whereas also the defendant, during the time aforesaid, was and still is possessed and in the occupation of a certain other close near to and adjoining the said closes of the plaintiff. And whereas also, long before and at the time of the committing of the grievances by the defendant as hereafter next mentioned, there was and still is a certain ditch or watercourse between and dividing the said closes of the plaintiff and the said close of the defendant, and for a long time before and at the time of the committing of the grievances by the defendant as hereafter in this count mentioned, the defendant, by reason of such his possession of the said close, of right ought to have scoured, cleansed, and kept open, and still of right ought to scour, cleanse, and keep open the said ditch or watercourse when and so often as it hath been or shall or may be necessary, to prevent the water from time to time being in the said ditch or watercourse from being hindered and prevented running and flowing in and along the same, and also to prevent it running out of the same unto, into, and about the said closes of the plaintiff, and doing damage there to the plaintiff; Yet the defendant, well knowing the premises, but not regarding his duty in that behalf, and contriving and wrongfully intending to injure the plaintiff in his possession, use, and enjoyment of his said closes, heretofore, to wit, on the — day of —, A. D. —, and from thence for a long time, to wit, hitherto, wrongfully and unjustly *permitted and suffered the said ditch or watercourse to be and* continue, and the same was for and during all that time greatly stopped and choked up and impeded with divers large quantities of mud, filth, earth, dirt, and rubbish, for want of needful and necessary cleansing, scouring, and keeping open the said ditch or watercourse, insomuch that the water in the said ditch or watercourse was during all the time aforesaid penned back, hindered, and prevented from running and flowing in and along the same, and ran out of the same, which it ought not to have done, and otherwise would not have done, and by means whereof divers large quantities of water, on the day and year last aforesaid, and on divers other days and times between that day and the day of the commencement of this suit, were penned back, and were hindered and prevented from running and flowing in and along the said ditch and watercourse, and ran and flowed from and out of the said ditch or watercourse out of its usual and proper course and channel

For suffering a ditch to be choked for want of cleansing, which it was defendant's duty to do, as occupier of an adjoining close, whereby water overflowed plaintiff's close, and injured the same.

WATER-
COURSES, &c.

into, upon, and about the said closes of the plaintiff, and overflowed, inundated, flooded, and saturated the same, and thereby the said closes, and the grass and herbage of the plaintiff thereon, of the value, to wit, of —, then became and were and still are greatly injured, spoiled, and much deteriorated in value, and the plaintiff hath been and is, by means of the premises, otherwise much injured and damnified.

Declaration for removing a hatch placed to prevent water from running to a mill, *per quod* plaintiff could not repair or work mill.

For that whereas, before and at the time of the committing of the grievances by the defendant hereafter next mentioned, the plaintiff was, and from thence hitherto hath been and still is lawfully possessed of a certain mill and premises, with the appurtenances, near unto a certain stream of water running towards the said mill and premises, and in and across which said stream of water there then was, and of right ought to have been, and still of right ought to be, a certain hatch for the purpose of preventing the water of the said stream from running to the said mill; Yet the defendant, well knowing the premises, but contriving and intending to injure and aggrieve the plaintiff, heretofore, to wit, on &c., seized and took the said hatch, and cast and threw the same therefrom, and thereby and otherwise on the day and year aforesaid, and on divers days and times between that day and the day of commencing this suit, caused and procured divers large quantities of the water in the said stream to flow to the said mill of the plaintiff, which would otherwise have run and flowed away from the same, and thereby the plaintiff was, on those several days and times, hindered and prevented from repairing a certain wheel, with the appurtenances, of and belonging to the then said mill, whereby also the plaintiff has been and is prevented from working his said mill so extensively and advantageously as he otherwise would have done, and has lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the said mill.

For interrupting plaintiff in his reversionary right to irrigate a meadow, &c.
(n)

For that whereas, before and at the time of committing the grievances by the defendant hereinafter mentioned, a certain close of meadow land, with the appurtenances, and near to a certain stream or watercourse there, was in the possession and occupation of one W. H. as tenant thereof to the plaintiff, (the reversion thereof then and still belonging to the plaintiff). And whereas also, long before, and until and at the time of the committing of the grievances hereinafter mentioned, a great part of the water of the said stream or watercourse did run and flow, and of right ought to have run and flowed, and still of right ought to run and flow therefrom, under a certain arch, unto and into and along a certain channel, and thence unto, into, and over a certain close of the defendant, and from thence through a hole under the cellar of a certain dwelling-house, unto and into a certain channel, and from thence unto and into the said close of meadow land, for the irrigating and watering of the said close, and the benefit and improvement of the soil thereof; Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, whilst the same was so in the posses-

(n) This was the form of declaration used in 6 Bing. 379, noticed *ante*, 599, n. (u).

sion and occupation of the said W. H. as tenant thereof to the plaintiff as aforesaid, and whilst the plaintiff was so interested therein as aforesaid, to wit, on &c., wrongfully and unjustly, without the leave or licence, and against the will of the plaintiff, pulled down and removed, and caused and procured to be pulled down and removed, a certain board before then erected, and then standing and being in and across the said stream or watercourse, for the purpose of diverting and turning the said part of the said water there under the said arch, and unto and into and along the said channel and close of the defendant, unto and into the said close of meadow land, for irrigating and watering the same, and benefiting and improving the soil thereof as aforesaid, and wrongfully and unjustly kept and continued, and caused to be kept and continued, the said board so pulled down and removed as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby, during the time aforesaid, wrongfully and unjustly let down and drew off, and caused to be let down and drawn off, a great part of the water of the said stream or watercourse, which, during the time aforesaid, ought to have run and flowed, and otherwise might and would have run and flowed, and hindered and prevented the same from running and flowing under the same arch unto, into and along the said channel, and thence unto, into and over the said close of the defendant, and through the said hole and channel unto and into the said close of meadow land, for the purposes aforesaid, and by means of the several premises aforesaid the said close of meadow land, and the soil thereof, have been and are greatly impoverished, deteriorated, and lessened in value, and the plaintiff has been and is thereby greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, so in the possession and occupation of W. H. as tenant thereof to the plaintiff as aforesaid.

WATER-
COURSES, &c.

For that whereas the defendant, before and at the time of the committing the grievance hereinafter next mentioned, was possessed of a certain wharf near to and adjoining the river Thames. And whereas also the plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was a barge-master, and was retained and employed by certain persons, to wit, &c. to carry and convey a large quantity, to wit, — bricks, to the said wharf of the defendant, and there, to wit, at the said wharf, to deliver the same to the defendant, and before and at the time of the committing of the grievances hereinafter next mentioned, a certain barge or vessel of the plaintiff, of great value, to wit, of the value of £—, was used and employed by him in and about the delivery of the said bricks; Yet the defendant, not regarding his duty, but contriving and intending to injure and damnify the said plaintiff, heretofore, to wit, on &c., wrongfully and injuriously put and placed a certain large tree, or piece of timber, in the said river Thames aforesaid, and near to the said wharf of defendant, sunk in the water and out of view, without placing or causing to be put or placed any buoy, mark, or other thing, to denote the same being there, and also wrongfully and injuriously kept and continued divers large quantities of other timber of the defendant in the said river Thames, near to the said wharf, floating and beating about, unfastened and insecure, by reason of the premises, and whilst the said barge of the plaintiff was at the said wharf, having been and being so used and employed as aforesaid, to wit, on &c.

Against the owner of a wharf, for placing a tree in the river Thames without a buoy, and other timber, unfastened, whereby plaintiff's barge struck against the timber.

WATER-
COURSES, &c.

aforesaid, and upon the tide and water ebbing there, and the plaintiff and his servants being wholly ignorant of the said tree or piece of timber so lying and being in the said river Thames as aforesaid, the said barge or vessel of the plaintiff dropped and fell and came upon the said tree or piece of timber, and struck upon and against the same, and thereby the bottom of the said barge or vessel became and was greatly broken and staved, and divers large quantities of water thereupon then penetrated and came into the said barge, and filled and sunk the same; and also by means of the premises, and of the said barge not being in a state to rise upon the return of the tide, as it otherwise would have done, the said other timber of the defendant, so floating and beating about and unfastened and insecure as aforesaid, then floated over and upon the said barge, and then forced out the side of the said barge, and broke and destroyed the same, and thereby the said barge, being of the value aforesaid, then became and was of no use or value to the plaintiff, and he the plaintiff hath lost and been deprived of the use of his said barge, and is by means of the premises otherwise greatly injured and damnified.

For turning and diverting the course of a navigable canal, whereby plaintiff's barges were hindered from proceeding. (e)

For that whereas before and until and at the time of the committing of the grievances by the defendant as hereinafter next mentioned, and after the making of a certain act of parliament made and passed in the 30th year of the reign of his late majesty King George the Third, intituled "An Act for Making and Maintaining a navigable Communication between Stowmarket and Ipswich, in the County of Suffolk," the said navigable communication had been and was made from Stowmarket to Ipswich aforesaid, and all the liege subjects of our said lady the queen had been used and accustomed to have, and of right ought to have had, and still of right ought to have, the said navigable communication for the carriage and conveyance of their goods, wares, and merchandizes, in boats, barges, and other conveyances, in, upon, and along the said navigable communication, subject to the terms and provisions in the said act mentioned. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, divers boats, barges, and other vessels, to wit, — boats, — barges, and — other vessels of the plaintiff were proceeding in and upon and along the said navigable communication, subject to the terms and provisions in the said act mentioned. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, divers boats, barges, and other vessels, to wit, — boats, &c. of the plaintiff, were proceeding in, upon, and along the said navigable communication, with divers goods, wares, and merchandizes therein of the plaintiff, to be carried and conveyed therein, in, upon, and along the said navigable communication. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in this respect, and to deprive him of the use and benefit of the said navigable communication, and to put him to great trouble, charge, inconvenience, and expense, whilst the said boats, &c.

(e) The plaintiff obtained a verdict after having been nonsuited, and a new trial granted, on the ground, that if an individual sustains any particular damage in consequence of a nuisance to the public, he may support

an action; see *Willes R.* 71, 73; *Carth.* 194; 3 M. & Sel. 472; 4 M. & Sel. 101; 2 Bing. 263, 156; *Willes v. Hungerford Market Co.*, 2 Bing. N. C. 281. See a form against a canal company, 3 Y. & J. 60.

and the said goods, wares and merchandizes of the plaintiff in and on board thereof, were so proceeding in, upon and along the said navigable communication as aforesaid, to wit, on &c. aforesaid, and on divers other days and times between that day and the commencing this suit, wrongfully, unjustly, and unlawfully diverted and turned divers large quantities of the water of the said navigable communication of and away from the same, and thereby stopped, prevented, and hindered the water of the said navigable communication from running and flowing along its natural course, as it ought to have done, and otherwise would have done, and thereby the said boats, &c. of the plaintiff, with the said goods, wares, and merchandizes of the plaintiff so laden in and on board thereof as aforesaid, and so proceeding in, along, and upon the said navigable communication as aforesaid, were stopped, prevented, and hindered from proceeding in, upon, and along the said navigable communication, for a long space of time then next ensuing, to wit, for the space of five days from the day and year first above mentioned, and thereby the plaintiff was not only deprived of the use, benefit, and enjoyment of his said boats, &c. and of divers, to wit, — horses, kept by him the plaintiff to draw the same, and of all the benefits, profits, gains, and advantages which he otherwise might and would have made by the use and employment of the said boats, &c. in the carriage and conveyance of his said goods, wares, and merchandizes, in, upon, and along the said navigable communication as aforesaid, but was also thereby hindered and prevented from selling and disposing of a large quantity, to wit, — tons of coals then on board the said boats, &c. and which he otherwise might and would have sold for divers large profits and advantages in that behalf. And whereas also, after the making of the said act of parliament, and before the committing of the grievances hereinafter next mentioned, a certain navigable canal had been and was made from Stowmarket aforesaid to Ipswich aforesaid, in pursuance of the said statute, and all the liege subjects of our said lady the queen then had been used and accustomed to have, and of right ought to have, the use of the said navigable canal, for the carriage and conveyance of their goods, wares, and merchandize, in boats, barges, and other vessels, in, upon, and along the said navigable communication, subject to the regulations in the said act mentioned; and whereas also, before and at the time of committing the said last mentioned grievances, the defendant was possessed of a certain mill, and certain works near to the said navigable canal, and was entitled to use in a reasonable, proper, and moderate manner, and at reasonable and proper times, the water of the said navigable canal, for the purpose of working the said mill and works; and whereas also, before and at the time of the committing of the grievances hereinafter next mentioned, divers boats, barges, and other vessels of the plaintiff were proceeding in, along, and upon the said navigable canal, with divers goods, wares, and merchandizes of the plaintiff, to be carried and conveyed therein, in and along the said navigable canal; Yet the defendant well knowing the premises last aforesaid, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in this respect, and to deprive him of the use and benefit of the said navigable canal, and to put him to great charge, trouble, expense, and inconvenience, whilst the said last-mentioned boats, barges, and other vessels, of the plaintiff, with the said goods, wares, and merchandizes in and on board thereof, were proceeding in, upon, and along the said canal as aforesaid, to

Second count,
that defendant
was possessed of
a mill on the
said canal, but
wrongfully and
at improper
times used more
water than was
necessary.

WATER-
COURSES, &c.

Third count,
more general,
that defendant
was possessed of
flood gates on
the said canal,
and wrongfully
suffered them to
remain open,
whereby plain-
tiff was pre-
vented from
proceeding.

wit, on, &c. and on divers other days and times before the commencement of this suit, wrongfully and unjustly, and in an unreasonable and immoderate manner, and at unseasonable and improper times, diverted and turned divers large quantities of water from and out of the said navigable canal, the same being much larger quantities of water than were necessary for the proper working of his said mill and works, out of and away from the said navigable canal; and thereby stopped, prevented, and hindered the water of the said navigable canal from running and flowing along its natural course as it ought to have done, and otherwise would have done, and thereby the said last-mentioned boats, barges, and other vessels of the said plaintiff, with the said goods, wares, and merchandizes of the plaintiff, so laden in and on board thereof, and so proceeding in and along the said navigable canal as aforesaid, were stopped, prevented, and hindered from proceeding in, upon, and along the said navigable canal, for a long space of time then next ensuing, to wit, for the space of — days from the said day and year last-mentioned, and thereby he the plaintiff was not only deprived of the use, benefit, and enjoyment of his said boats, barges, and other vessels, and of divers, to wit, — horses, kept by the plaintiff to draw and tow the same in and along the said canal, and all the benefits, profits, gain, and advantages which he otherwise might and would have made by the use and employment of his said boats, barges, and other vessels, in the carriage and conveyance of his said goods, wares, and merchandizes as aforesaid, in, upon, and along the said navigable canal as last aforesaid, but was also thereby hindered and prevented from selling and disposing of divers, to wit, — tons of coals, then and on board the said boats, barges and other vessels, and which he might and would have sold for divers large profits and advantages in that behalf. And whereas also, before and until the time of the committing of the grievances by the defendant hereinafter mentioned, there was a certain navigable canal from, &c. aforesaid, to, &c. aforesaid, and the plaintiff was there lawfully proceeding, with divers boats, barges, and other vessels, in, upon, and along the said navigable canal, with divers goods, wares, and merchandizes therein, of the plaintiff to be carried and conveyed therein, in and along the said navigable canal; and whereas the defendant, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is, possessed of certain works and premises near to the said canal, and of divers, to wit, — flood-gates, — sluices, and — flashes, adjoining to the said last-mentioned canal, and the defendant by reason thereof, before and at the time of the committing of the grievances hereinafter mentioned, of right ought to have kept the said flood-gates, sluices, and flashes closed and shut, to prevent the water of the said last-mentioned canal from running and flowing out of and away from the said last-mentioned canal; Yet the defendant well knowing the premises, but contriving and intending wilfully to injure the plaintiff, and to put him to great charges, whilst the said last-mentioned boats, barges, and other vessels of the plaintiff, with the said goods, wares, and merchandizes in and on board thereof, were so proceeding in, upon, and along the said last-mentioned navigable canal, to wit, on, &c. and on divers other days and times, between that day and the commencement of this suit, wrongfully and unjustly permitted the said flood-gates, sluices, and flashes, to be and continue, and the same were, during

all that time, open, whereby the water of the said navigable canal was wasted, and prevented and hindered from flowing in its usual course, as it ought to have done, and otherwise would have done, and thereby the said boats, barges and other vessels, were prevented and hindered from proceeding in, upon, and along the said navigable canal, &c. [*as in the count, ante*, 609.

WATER-
COURSES, &c.

See Manning v. Wasdale, 5. A. & E. 758 ; 1 N. P. 172, S. C.

For disturbance
of privilege of
watering cattle
at a pond.

IV. FOR TORTS TO REAL PROPERTY INCORPOREAL.

DISTURBANCE OF COMMONS.

It has long been the practice in a *declaration* in an action on *the case* for an injury to an incorporeal right to avoid setting out the right formally by prescription, or otherwise, and that mode of declaring has been sanctioned by 2 & 3 Wil. 4, c. 71, s. 5. But before that act it was necessary in *pleas* and *subsequent pleadings* to set out the right more formally. That act, however, introduces a more simple mode of stating the right in a plea, as will be fully shown in the next volume. The enactment is thus :—"And be it further enacted, that in all actions upon the case, and other pleadings wherein the party claiming may now by law allege his right generally without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation, and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done ; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

DISTURBANCE
OF COMMONS.
Of pleading an
incorporeal
right in general.

Commencement as ante, 13.] For that whereas (*p*) the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned,

For disturbance
of plaintiff's
common of
pasture, by turn-
ing sheep on the
common. (*q*)

(*p*) This is correct ; 2 Mod. 141.
(*q*) For the forms, see 8 Wentw. Index, 50 to 54 ; 2 East, 154 ; 3 Wils. 279 ; Morg. 320 to 336, 342 ; Plead. Assist. 214 ; and for such an injury, where certain common

fields ought to be cultivated in rotation, *post*, 614 ; and for injuries to common by taking off dung, putting on dung heaps, and otherwise injuring right of common, *post*, 616. Trespass or replevin are in many in-

DISTURBANCE
OF COMMONS.

was, and from thence hitherto hath been, and still is, lawfully possessed (r) of a certain messuage, and divers, to wit, — (s) acres of land (t) with the appurtenances, situate in the county of — ; and by reason thereof, (u) during all the time aforesaid, of right ought to have had, and still of right ought to have, common * of pasture for all his (x) commonable sheep, (y) *levant and couchant*, (z) in and upon his said messuage and land, with the appurtenances, (a) in a certain place, waste, or common, called the —, in the parish of —, in the same county, &c. (b) every year, at all times of

stances preferable to an action on the case, in order to compel the defendant in his plea to state his supposed right of common, or other justification.

(r) Formerly the declaration usually stated the plaintiff's seisin in fee, see Lil. Ent. 62; and this was necessary in a plea, 4 T. R. 719; until the enactment in 2 & 3 Wil. 4, c. 71, s. 5, *ante*, 611. But it is not necessary to state in a declaration any title to the common either by prescription or otherwise, and it is sufficient to allege that the plaintiff was possessed of certain land, &c. (as the case may be) and by reason thereof, 15 East, 108; 3 Taunt. 24; had a right of common in such a place for his commonable cattle *levant and couchant* upon his land, and that the defendant disturbed him, whereby the plaintiff could not enjoy his common in so ample a manner as he ought to have done; 1 Saund. 346, note 2; 2 Saund. 113, note 1; Com. Dig. Action on the Case for Disturbance, B. 1; Willes, 621; 4 Mod. 418; 1 Ventr. 319; *ante*, vol. i. But the allegation, "by reason of the possession," &c. is improper, if the right do not depend thereon, 4 East, 107; 6 East, 438; see *post*, 613, note (s); and as a title need not be shown, *vide supra*, it should seem that those words may be omitted; see 15 East, 108. In general, a variance in the title, which is set out by way of inducement only, is immaterial; 16 East, 33; 4 Mod. 218; Cro. Eliz. 336; 3 Taunt. 137; 2 Bla. Rep. 840.

(s) It is said to be proper to state a particular quantity, 4 Mod. 423; but the precise quantity is not material, Palm. 269; Cro. Jac. 629, S. C.; Cro. Eliz. 531.

(t) If plaintiff state he was possessed of a messuage and land, when in fact he was possessed of land only, he may still recover *pro tanto*; 2 B. & Ald. 360; 1 Chit. Rep. 104, 112, S. C.; and see *ante*, 392, note (a).

(u) See note (r), *supra*.

(x) This is in general material; 1 Saund. 346 c. This allegation will be supported in evidence, though proof should be adduced that the common was not sufficient to support all the plaintiff's cattle; 2 Chit. Rep. 297.

(y) Or if for all his commonable cattle, say, "for all his commonable cattle," but if there be any doubt as to the extent of the right, it is proper to qualify the statement of the right of common, and the plaintiff need not show more than makes for him; 2 Hen. Bla. 234; 2 Wils. 269. See *Bowen v. Jenkin*, 6 A. & E. 911, as to what evidence will support this allegation, and when it is

necessary to new assign. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he had never kept any sheep, it was held that this was evidence of a right for all commonable cattle to be left to the consideration of a jury; 4 B. & C. 161; 6 D. & R. 291, S. C. The right alleged must not be larger than can be proved; see *Beadsworth v. Torkington*, 1 G. & D. 482.

(s) This is necessary, unless the right of common be for a certain number; 1 Saund. 28, note 4, 346 b, c; 2 Saund. 327. A lease to plaintiff's testator for years, determinable upon lives, of a farm, &c. together with reasonable common of pasture, &c. will support this allegation, 6 M. & Sel. 47; and the right is not destroyed by a subsequent conveyance to the plaintiff in fee of the farm and common of pasture thereto belonging, for this operated as a new grant of common, *id*.

(a) It is not always necessary in pleading to state the common as appurtenant to land *ex nomine*, for if it be laid as appurtenant to a thing which in intentment of law *primâ facie* comprehends land, it is sufficient; 1 Saund. 346 b. Care must be taken to state the right to be incident only to the premises in respect of which it is claimable. An averment as above, that plaintiff was entitled to common of pasture for all his cattle *levant and couchant upon his land*, is well supported by evidence that the plaintiff was a part-owner with defendant and others of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained on such land during the winter, and though the custom proved was to turn out in proportion to the extent, and not to the produce of the land in respect of which the right was claimed; and it was held also, that it was not necessary to state his right to be with the exception of his own land, but that it was well laid to be over the whole common; 1 B. & Ald. 706.

(b) If the plaintiff has some land of his own in the *locus in quo*, say, "his own land therein excepted;" see Willes, 320; Vin. Abr. Prescription, Y. pl. 23; but this is not absolutely necessary; 1 B. & Ald. 706; 6 B. & C. 16; 9 D. & R. 12, S. C.; see note (a), *supra*.

the year, (c) as to the said messuage and land, with the appurtenances, (d) belonging and appertaining (e) Yet the defendant (f) well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff in the use and enjoyment of his said right of common, whilst he was so possessed of his said messuage and land, with the appurtenances, and entitled (g) to such common of pasture as aforesaid, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly † put, and caused to be put, divers, to wit, — sheep, (h) in and upon the said place, waste, or common, called the —, and kept and depastured the same there respectively for a long time, to wit, from the putting the same there respectively, as aforesaid, hitherto; (i) whereby the plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of pasture there, and could not nor can have or enjoy the same in so large, ample, or beneficial a manner (k) as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same. And whereas also, &c. [*proceed as in the first count to the *, and then as follows:*] incumbered and injured the said common, and obstructed and disturbed the plaintiff in the use and enjoyment of his said common of pasture there, so that the plaintiff on the several days and times, and during the time aforesaid, could not nor can have or enjoy the same in so large, ample, or beneficial a manner as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same; To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

DISTURBANCE
OF COMMONS.

Injury.

The injury
putting and
keeping sheep
on the common.

Second count,
for obstructing
the common, not
stating how.

For that whereas the plaintiff now is, and for divers, to wit, — years and more, now last past, hath been lawfully possessed of and in a certain

For injury to
plaintiff's right
of common in

(c) This will be taken to mean "all usual times of the day;" 2 Hen. Bla. 224, 234. If the right of common be only at certain times of the year, it must be so described; see the form 2 Saund. 2, 3; Willes, 320. As to describing the right from old St. Thomas's Day, see 3 Bingh. 401; *post*, vol. iii.

(d) See notes (a) and (b) *supra*; Willes, 319; 15 East, 108. It is better to repeat the premises than to say, "the said tenements;" 4 Mod. 423.

(e) These are the usual words descriptive of a right of common; see Lil. Ent. 62. But if the right of common be not by virtue of prescription, but by grant or demise, omit the latter words; 4 East, 107; 6 East, 438; 1 Taunt. 205; 1 B. & P. 371; 15 East, 108. In Willes, 319, it was held not to be necessary in pleading to allege, in express terms, whether it be common appendant, appurtenant or in gross.

(f) The declaration for disturbance generally is sufficient as well against a commoner as a stranger; 2 Bla. Rep. 817; 3 Wils. 278; 1 Saund. 346 a; and see 1 B. & Ald. 706; and it is not necessary in such case to show in the declaration that the defendant has any right of common, *id. ibid.*; but in an action against the lord, it is said to be necessary to state a particular surcharge; 2 Mod. 6; 1 Lutw. 107; 3 Wils. 290; see the form of a declaration against the lord; Herne, 125; 1 Saund. 346 a. If the lord

wantonly and unnecessarily exercise his manorial rights to the injury of commoners of pasture, he is, it seems, liable to an action; 4 D. & R. 318. If a commoner charge another with having locked up the way leading to his common, the action would not lie; for it does not follow that there is no other way to the common; per Patteson, J. in *Tebbutt v. Selby*, 6 A. & E. 787; 1 N. & P. 717, S. C., where see as to how the obstruction should be stated.

(g) Plaintiff need not show that he turned any cattle on the common at the time the injury was committed; 2 Bla. Rep. 1233.

(h) If the action be brought against the lord, it is said that the plaintiff must state a surcharge, 2 Mod. 7; 3 Wils. 268; but not against a commoner or stranger, 1 Lutw. 101, 102; 1 Saund. 346 a; *supra*, note (f).

(i) If cattle are permitted to depasture the common, whether they belong to a stranger or are the supernumerary cattle of a commoner, or whether they are driven or escape there, a commoner may have an action on the case, in which it is not necessary to prove that he has sustained any specific damage, the infraction of the right being a sufficient injury; 1 Saund. 346 a; 2 East, 154.

(k) This allegation is necessary, 1 Saund. 346 a; 9 Rep. 113 a; 2 Bla. Rep. 1235; but no evidence of any specific damage need be adduced, *id. ibid.*; 2 East, 154; *supra*, note (h).

DISTURBANCE
OF COMMONS.

certain common fields which ought to be cultivated in rotation, and one of them left annually fallow. (1)

The rotation of husbandry stated. (m)

messuage, and divers, to wit, — acres of land, with the appurtenances, lying and being in the parish of —, in the county of —, (m) and the plaintiff further saith that there now are, and from time whereof the memory of man is not to the contrary, there have been lying and being in the said parish of —, in the county of —, three common fields, that is to say, one common field called [the Home Field,] one other common field called [the Lower Field,] and one other common field called [the Upper Field,] and which said three several common fields have, from all the said time immemorial, been used and accustomed to be and of right ought to be tilled and cultivated in the following course and method of husbandry and tillage, to wit, in every year in rotation and successively, one of the said three fields hath been and of right ought to be sown with wheat or other corn or grain, and in and during that year hath been usually known and distinguished by the name of [the Wheat Field,] and another of the said common fields hath in such year been and of right ought to be sown with barley or other corn and grain, and in and during that year hath been usually known and distinguished by the name of [the Barley Field,] and the other of the said common fields hath in such year lain and of right ought to lie fallow and be summer-tilled, and in and during that year hath been known and distinguished by the name of [the Fallow-Field or Summer-Tilled Field,] so that by such rotation each and every of the said three fields has been and ought to be one year sown with wheat or other corn and grain, another year sown with barley or other corn or grain, and the third year hath lain and ought to be fallow and summer-tilled in rotation. And the plaintiff further says, that he by reason of his being so possessed of his said messuage and lands, with the appurtenances, during the said space of four years above mentioned, hath had and of right ought to have had, and still of right ought to have, common of pasture yearly and every year in and throughout such of the said common fields as by and according to the said rotation hath lain or ought to lie fallow and be summer-tilled, his own land in that field only excepted, for divers, to wit, [fifty] sheep, *levant and couchant* in and upon his said messuage and lands, with the appurtenances, in every such year, from the — day of —, according to the new and present style now used in this kingdom, until such time as such common field or some part thereof, after the manner aforesaid, had been sown with wheat or other corn or grain, according to the aforesaid courses and method of husbandry, as belonging and appertaining to his said messuage and lands, with the appurtenances.

(1) See notes, &c. *ante*, 611, 612; 1 Saund. 340 b; 2 Saund. 2, 3. Where there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common field are entitled to enjoy the right of inter-commoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown; 1 B. & Ald. 706; Willes, 319. Where A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they entered into an agreement for their mu-

tual advantage and convenience not to exercise their respective rights for a certain term of years, and each party covenanted to that effect; it was held, that if during the term the cattle of B. came upon the land of A., he might distrain them damage feasant, and that A. in his replication (in answer to a plea pleaded by B. of his right of common in bar of the cognizance of A.) might set forth the special circumstances of the agreement and covenants; 2 Hen. Bl. 4.

(m) *Semble*, a count would suffice, stating the course of husbandry to be, "that the three or four closes should be so cultivated in rotation, that the close in which the nuisance was committed should in every third or fourth year lie fallow, and then be commonable."

And the plaintiff further saith, that in the year of our Lord —, the said common field called &c., according to the aforesaid usage and custom, was fallow and summer-tilled. Yet the defendant, well knowing the premises, but contriving and maliciously intending to hurt, injure and prejudice the plaintiff in this behalf, and to deprive him in a great measure of his said common of pasture therein, in that same fallow field, whilst he the plaintiff was so possessed of his said messuage and lands, with the appurtenances as aforesaid, and during the time that the plaintiff had and of right ought to have had such right of common as aforesaid, and during the said time that the said common field was laying and ought to have been laying fallow, to wit, on &c. and on divers other days and times between that day and the — day of — in that year, all the said days and times being between the said — day of — in that year, and such time as the said fallow field or any part thereof was sown with wheat or other corn or grain, wrongfully &c., unjustly &c. [*Here state the injury to the common, as ante, 613, or as in the following forms.*]

DISTURBANCE
OF COMMONS.

*Same as the form, ante, 611, to the * 612, and then proceed as follows:]* caused to be erected and built divers, to wit, — cottages and — other buildings, in and upon the said waste or common, and then wrongfully and unjustly brought, laid and placed divers, to wit, — pieces of timber, into and upon other parts of the said waste or common, and then made a certain deep trench and pit of great length and depth, to wit, — feet in length and — feet in depth, in other parts of the said waste or common, and wrongfully and unjustly kept and continued the said cottages and buildings so erected and built as aforesaid, and the said pieces of timber so brought, laid and placed as aforesaid, and the said trench and pit so dug and made as aforesaid, there for a great length of time, to wit, from thenceforth hitherto, whereby &c. [*State the damage, as in the form, ante, 613, and add a count for merely continuing the buildings on the common, and a count for general obstruction, not showing how, as ante, 613.*]

For building,
&c. upon the
common.

*Same as the form, ante, 611, to the * 612, and then proceed as follows:]* erected and made, and caused and procured to be erected and made, a certain fence in and upon the said waste or common, and thereby and therewith then inclosed a great part, to wit, — acres of the said waste or common, and separated and divided the same from the residue of the said waste or common, and wrongfully and unjustly kept and continued the said fence so erected and made as aforesaid, and the said part of the said waste or common so separated and divided as aforesaid, for a long space of time, to wit, from thence hitherto; whereby &c. [*Damage, as ante, 613.*]

For inclosing
part of the
common. (e)

*Same as the form, ante, 611, to the * 612, and then proceed as follows:]* with spades and other instruments, cut and dug a great part, to wit, 100 square yards of the turf of the said waste or common, and the turves, to wit, — cart loads of turves there then cut and dug, took and carried away; whereby &c. [*Damage, as ante, 613. See 7 East, 121.*]

For digging
turves.

See a form for keeping too many rabbits on a common, Lil. Ent. 62.

For destroying
common with
rabbits.

- DISTURBANCE OF COMMONS.** *Same as the form, ante, 611, to the * 612, and then proceed as follows:]*
- For taking excrement and dung off the common. (p) took and carried away from and off the said waste or common, and converted and disposed thereof to his own use, divers large quantities of excrement, manure and dung, to wit, [500] cart loads of excrement, [500] cart loads of manure, and [500] cart loads of dung, which, before and on the said several days and times had been dropped and made on the said waste or common by the cattle from time to time feeding and depasturing thereon, and which ought to have remained and continued thereon for the purpose of nourishing, manuring and increasing the grass and herbage there, whereby the said waste or common, and the grass and herbage thereof, were then greatly impoverished for want of the said excrement, dung and manure, which would otherwise have remained and continued on the said waste or common, and nourished and increased the grass and herbage thereof, and thereby the plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of pasture there, and could not nor can have or enjoy the same in so large, ample and beneficial a manner as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same.
- In putting heaps of dung, &c. on the common. *Same as the form, ante, 611, to the * 612, and then proceed as follows:]*
- put, placed and laid, and caused and procured to be put, placed and laid, divers, to wit, — heaps of dung and manure, in and upon the said waste or common, and wrongfully and injuriously kept and continued the said heaps of dung and manure so put, placed and laid as aforesaid, for divers long spaces of time, to wit, from the respective times of putting, placing and laying the same as aforesaid, until the commencement of this suit; whereby the grass and herbage of and upon the said common, which might and would have there grown and become good, wholesome and proper food for depasturing the commonable cattle of the plaintiff, then was hindered and prevented from growing; and whereby &c. [State the general damage, as ante, 613.
- For trespass on common with horses and carts. *As in the form, ante, 611, to the * 612, and then proceed as follows:]* with his feet, and the feet of his servants, in walking, and with the feet of divers, to wit, — horses, — mares and — geldings, and with the wheels of divers, to wit, — carts and — waggon, trod down, trampled upon, bruised, crushed, destroyed and spoiled the grass and herbage then growing and being in the said waste or common; whereby &c. [Damage, as ante, 613.
- For disturbance of common of turbary. (q) *Same as the form, ante, 611, to the * 612, omitting the statement of possession of land, (r) and then proceed as follows:]* of turbary in a certain waste or common, called &c., situate at &c., to cut, dig and take turf and peat in and upon the said waste or common, and to carry away the same for necessary fuel, to be spent, burned and consumed in and upon his said messuage, with the appurtenances, (s) every year, and at all times of the year, as occa-

(p) See 2 East, 154.

(q) See the forms, Willes, 619; 8 Wentw. 513, 597; and id. Index, xxx. li.

(r) Common of turbary is incidental to a messuage, and not to land; 4 Co. Rep. 37 a;

7 East, 121.

(s) It is necessary in general to state in the declaration that the turves were to be used in the house; 1 Lev. 231; Sid. 354; 7 East, 121.

sion hath required, as to his said messuage, with the appurtenances belonging and appertaining. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in this behalf, whilst he was so possessed of his said messuage, with the appurtenances, and entitled to such common of turbary as aforesaid, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly cut, dug, took and carried away, and caused to be cut, dug, taken and carried away, divers large quantities, to wit, [50] cart loads of the turf then growing and being in and upon the said common or waste. Whereby the plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of the said common of turbary there, and could not nor can have and enjoy the same in so large, ample and beneficial a manner as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same.

**DISTURBANCE
OF COMMONS.**

*Same as the form, ante, 611, to the * 612, omitting the word "common," and the statement of the possession of land, (u) and then proceed as follows:] and take reasonable estovers of the bushes and underwoods standing and growing upon a certain place, waste or common, called the —, and situate at &c. and to carry the same from thence to the said messuage, with the appurtenances, to be burnt, spent and consumed for necessary fuel therein, every year, at all seasonable times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage, with the appurtenances. Yet, &c. [Same as the preceding form, only instead of "turf," say "bushes and underwood," and instead of "common of turbary," say "common of estovers."*

For disturbance of common of estovers.(t)

DISTURBANCE OF WAYS.

**DISTURBANCE
OF WAYS.**

For that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed (y) of a certain messuage [and garden thereto belonging,] with the appurtenances. And, by reason thereof, (z) the plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way (a) from and out of the

For obstructing plaintiff's private right of way, appurtenant to a messuage and garden.(x)

(t) See the forms, 8 Wentw. Index, l. li.; Thomp. Ent. 377; 3 Wils. 456; Morg. Prec. 456, and the notes to the above form, which are applicable. See also *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1.

(u) *Ante*, 616, note (r).

(z) As to private ways in general, whether by grant, prescription, or of necessity, see 1 Saund. 323, n. 6; Com. Dig. Chimin. D.; 1 Taunt. 279; Harr. Land. & Ten. 565; see the forms, 8 Wentw. Index, lv. to lvii.; 1 Lutw. 19; 4 T. R. 794; 3 T. R. 766; 3 Lord Raym. 85; Morg. 333, 337, for not repairing a private way, and 2 Saund. 113, n. 1, 172 a, n. 1; Ld. Raym. 1096; *ante*, 612, note (r). As to the statement of the right, 1 Vent. 274; 2 Lev. 148; 3 Keb. 528; 3 Lev. 266; 1 Lutw. 120; 2 Lord Raym. 751, 1090; 3 Ld. Raym. 85. See a

form for obstructing a public way, 4 M. & Sel. 101; 16 East, 196; 3 M. & Sel. 472; Willes. 71; 2 Bing. 263; and see a form and law, *Bower v. Hill*, 1 Hodges' R. 45; 1 Bing. N. C. 549; *Bright v. Walker*, 1 Cr. M. & R. 211.

(y) This allegation is sufficient, without stating any prescriptive right; 2 Saund. 113 a; Lutw. 119; see also *ante*, 612, n. (r).

(z) This is in general a sufficient description of the right; *id. ibid.*; 2 Saund. 114 a; 1 Saund. 346, n. 2; *ante*, 612, note (r). But if the right of way be not by reason of possession, but by special agreement, &c. it would be improper; 4 East, 107; 6 East, 438; 15 East, 108; 3 Taunt. 24; and see a form, 5 B. & C. 221.

(a) The term "passage," it is said, is too general; *Yelv.* 163, 164; 1 Brownl. 216.

**DISTURBANCE
OF WAYS.**

Injury.

said [garden,] unto, into, through and over a certain [close,] in the parish aforesaid, (b) and from and out of the same unto and into [a certain wharf, or quay, of the plaintiff in the parish aforesaid, (c)] and so back again from the said [wharf, or quay,] unto and into, through, over and along the said [close,] and from and out of the same unto and into the said [garden] of the plaintiff for himself and his servants, on foot, (d) to go, return, pass and repass, every year, and at all times of the year, at his and their free will and pleasure, as to the said messuage and garden, with the appurtenances, of the plaintiff belonging and appertaining. (e) Yet the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst the plaintiff was so possessed of his said messuage [and garden,] with the appurtenances as aforesaid, to wit, on &c. (f) and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously (g) placed and erected, and caused to be placed and erected, divers large quantities of boards, planks and wood, in and across the said way, and put and placed, and caused and procured to be put and placed, divers other large quantities of wood and timber in the said way, and kept and continued the said boards, planks and wood, so placed and erected in and across the said way as aforesaid, and also the said other wood and timber in the same way as aforesaid, for a long space of time, to wit, hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the plaintiff by means thereof could not, during the time aforesaid, or any part thereof, nor can he now have or enjoy his said way, as he of

(b) Where the right of way is stated to be over a private close, &c. the local situation thereof should be stated; Noy, 9.

(c) In *Rouse v. Bardin*, 1 Hen. Bla. 353, Mr. Justice Wilson observed, "that in pleading a public way, it is not necessary to state either the *terminus a quo* or the *terminus ad quem*; but where it is a private way, it is necessary to state them, because private ways are given for particular purposes, and the justification must show that they were used for those purposes." It is therefore necessary, in a declaration of this nature, either to show that the way leads to a common highway, (8 East, 4; 2 Leon. 10; 2 Saund. 158 d; Com. Dig. Action on the Case for Disturbance, B. 1.) or if it lead to a private close, to state some interest of the plaintiff therein; Noy, 86; Latch, 160; Com. Dig. Action on the Case for Disturbance, B. 1; Vin. Ab. Chimin. H. pl. 14; Com. Dig. Chimin. D. 2. The word highway seems to be too uncertain a description of one of the *termini* of a private way; but if not demurred to it will be sufficiently proved by evidence of a public footway; 8 East, 4; Yelv. 163, cited 8 East, 6, n.; *sed quæry*, if not sufficient, see 2 Leon. 10; 2 Saund. 158 a. When it is doubtful whether the way may not have been extinguished by unity of seisin, it may be advisable to state the right of way to be "towards &c.;" 1 East, 377, 381; 1 B. & P. 371; and see form, *post*, 619; and see further as to the *termini* of the way in describing a public way; 3 Burn, J. 26th edit. 68.

(d) It should be shown whether the way be a cart-way, horse-way or foot-way; Yelv. 164; Com. Dig. Action on the Case for Disturbance, B. 1. Though in the case of a public way, the term "common highway" signifies a way for all manner of things; 2 Saund. 163 d; 8 East, 4; 1 Hen. Bla. 355. Evidence of user of a way with horses, carts and carriages for certain purposes does not necessarily prove a right of way for all purposes, but the extent of the right is a question for the jury; *Cowling v. Higginson*, 4 M. & W. 245.

(e) See the form in 1 Lat. 119. It is said that these words are improper, on the ground that a way is an easement, and not an appurtenant; Yelv. 159; 1 Bulst. 47; 1 Taunt. 205; 1 B. & P. 372; Com. Dig. Chimin. D. And in a declaration it appears not necessary to insert this allegation, and in some cases it would be improper; 4 East, 107; 6 East, 438; and see *ante*, 613, note (e); and a form, 15 East, 25.

(f) The day is not material.

(g) It is not necessary to state the means by which the way was obstructed; it is sufficient to say, *quod obstruxit* or *obstruxerit*, without saying how; 3 Leo. 13; Willes, 583; 1 B. & P. 180; Com. Dig. Action on Case for Disturbance, B. 1; Cro. Jac. 606; Lord Raym. 452; see the next count. In all cases for the disturbance of a way, the obstruction ought to be charged on the pleadings in the thing itself to which the party has a right; and if charged generally, the declaration would be bad; *Tebbutt v. Selby*, 1 N. & P. 718.

right ought to have done, and otherwise might and would have done, and hath been and is by means of the premises deprived of the use, benefit and advantage thereof.

DISTURBANCE
OF WAYS.

And whereas also the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances, and by reason thereof the plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said [messuage] of the plaintiff, unto, into, through and over a certain [close] in the county aforesaid, unto and into a certain common and public highway, (i) and so back again from the same common and public highway, unto, into, through and over the said close, and from thence into the said messuage of the plaintiff, for himself and his servants to go, return, pass and repass, on foot, every year, and at all times of the year, at his and their free will and pleasure, *as to the said messuage of the plaintiff, with the appurtenances belonging and appertaining.* (k) Yet the defendant, well knowing the said last-mentioned premises, but wrongfully and unjustly intending to injure the plaintiff in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst the plaintiff was so possessed of the said last-mentioned messuage, with the appurtenances, and so entitled to the said way as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously stopped up and obstructed the said last-mentioned way; and the plaintiff, by means thereof, could not, during the time aforesaid, nor can he have or enjoy his said last-mentioned way, as he of right ought to have done, and otherwise might and would have done, and hath been and is deprived of the use, benefit and advantage thereof.

Second count, for a way to a messuage from a highway, without stating the means of obstruction. (h)

Injury.

And whereas also the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances. And by reason thereof the plaintiff, during all the time aforesaid, ought to have had, and still of right out to have, a certain way from the said last-mentioned messuage of the plaintiff, towards a certain close in the parish aforesaid, and into, through and over the same, towards a certain common and public highway, in the county aforesaid, and into the same, and so back again from the same common and public highway towards the said close, and into, through and over the same, and from thence towards the said last-mentioned messuage of the plaintiff, and unto and into the same, for himself and his servants, to go, return, pass and

Third count, more general, merely stating the way to be towards &c.

(h) See the form, 1 Lutw. 119, and the notes to the preceding count. As to the effect of the word "other" in a second or subsequent count, see *Holford v. Dunnett*, 7 M. & W. 348, and *Deere v. Ivey*, 12 L. J. R., N. S., Q. B. 132.

(i) The term "highway" is sufficient; 2 Saund. 168 b, n. 4; 8 East, 4; Lutw. 119. The *terminus ad quem* may be laid to be a public highway, and will be proved by evidence of a public footway, and it is not ne-

cessary to state what description of highway; 2 Leon. 10; 2 Saund. 158 a; *sed quere*, 8 East, 4; *ante*, 618, note (c).

(k) If the house has been recently built, or it be doubtful whether the plaintiff be not entitled to the way in right merely of his close, then describe the right accordingly, or add a count to that effect; see *Frankham v. Earl Ferrars*, 6 Car. & P. 529; 1 Har. & Wol. 1; 4 Nev. & Man. 330.

DISTURBANCE
OF WAYS.

repass, on foot, every year, and at all times of the year, at his and their free will and pleasure. Yet the defendant, well knowing the premises, but wrongfully and unjustly intending to injure the plaintiff in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst the plaintiff was so possessed of the said last-mentioned premises, with the appurtenances, and so entitled to the said way as aforesaid, to wit, on &c. aforesaid, and on divers other days between that day and the commencement of this suit, wrongfully and injuriously stopped up and obstructed the said last-mentioned way; and the plaintiff, by means thereof, could not, during the time aforesaid, have or enjoy his said last-mentioned way, as he of right ought to have done, and otherwise might and would have done, and hath been and is deprived of the use, benefit and advantage thereof.

Case by reversioner, for permanently obstructing a way, by building thereon. (l)

For that whereas, before and at the time of the committing of the grievances hereinafter mentioned, a certain messuage and premises, situate in the county of S. were in the possession and occupation of E. F. as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff. And whereas for divers years before, and until the committing of the grievances hereinafter mentioned, there was and of right ought to have been and still of right ought to be, a certain way from and out of the said messuage and premises, so in the possession and occupation of the said E. F. unto, into, through, over and across a certain close and from thence unto and into a certain common and public highway and so back again from the said common and public highway, unto, into, through, over and across the said last-mentioned close, and from thence unto the said messuage and premises, for him the plaintiff and his tenants, occupiers of the said messuage and premises, and for others to go, return, pass and repass on foot, every year and at all times of the year, at his and their free will and pleasure, as to the said messuage and premises, with the appurtenances, belonging and appertaining. (m) Yet the defendant, well knowing the premises, but contriving and intending to injure and prejudice the plaintiff in his reversionary estate and interest of and in the said messuage and premises, whilst they were in the possession and occupation of the said E. F. and whilst the plaintiff was so interested therein as aforesaid, to wit, on the day and year aforesaid, and on divers other days between that day, and the commencement of this suit, wrongfully and injuriously and without the leave or license of the said E. F. or the plaintiff, and against his will, built and erected and caused and procured to be built and erected, divers large buildings (n) in and upon the said close and in and upon the aforesaid way, whereby the defendant did thereby greatly encroach upon and incumber the said way, and by means thereof the plaintiff and his said tenant, so being the occupiers of the said messuage and premises, could not, from the day and year first aforesaid, have and enjoy the aforesaid way in so ample and beneficial a manner as they of right ought to have done and still of right ought to do, but have been thereby greatly

(l) A reversioner may sue for an injury to his reversionary interest, if the injury be such as to affect it; see 4 Burr. 2141. See the notes to the form, *ante*, 589, 590.

(m) See as to the description of the way

and other observations, *ante*, 617, 618.

(n) The obstruction must be of such a nature as would naturally injure the plaintiff's reversionary interest; see *ante*, 589, 590.

injured and prejudiced in the use, benefit and enjoyment of the said way, and the same is *permanently* obstructed by reason of the premises, and thereby the plaintiff hath been and is greatly injured and prejudiced in his said reversionary estate and interest of and in the said messuage and premises, with the appurtenances.

**DISTURBANCE
OF WAYS.**

Kent.—For that whereas the plaintiff now is and for divers, to wit, five years last past, hath been the rector of the rectory of the parish church of Ightham, in the county of Kent, and as such rector during all the time aforesaid was and still is lawfully possessed of and entitled to all the tithes of corn, grain and hay yearly growing, renewing and proceeding upon and from a certain farm and lands in the possession of the defendant, situate in the said parish of Ightham, in the county aforesaid; and whereas also the plaintiff, as such rector as aforesaid, by reason of such his possession of the said tithes, during all the time aforesaid, of right ought to have had and used and still of right ought to have had and use, a certain way from a certain common and public queen's highway, in the parish aforesaid, through a certain gate standing and being upon the said farm and lands of the defendant, called Scatswood-gate, into, through and over a certain part of the said farm and lands of the defendant, to a certain other gate in and upon the said farm and lands, near adjoining to the farm-yard of the defendant, and thence through the said last-mentioned gate into, through and along a certain other part of the said farm and lands of the defendant, into and upon a certain close of the defendant called the Seven Acres, parcel of the said farm and lands, and so back again from the said close called the Seven Acres, through and along the said last-mentioned part of the said farm and lands, to the said last-mentioned gate near adjoining to the said farm-yard, and thence through the last-mentioned gate into and through and over the said first-mentioned part of the said farm and lands of the defendant, to the said first-mentioned gate called Scatswood-gate, and thence through the same gate into the said common and public queen's highway, to go, return, pass and repossess with his servants, horses, waggons and carriages for the purpose of gathering, collecting and carrying from and off the said farm and lands the tithes of the corn, grain and hay yearly growing and renewing upon the said farm and lands, to wit, at the parish aforesaid, in the county aforesaid; and whereas also, before the committing the obstruction and grievance next hereinafter mentioned, the tithe of the wheat growing and renewing upon a certain part, to wit, twenty acres of the said farm and lands, and then of great value, to wit, of the value of £50, had been duly set out and severed from the residue thereof, and just before the time of committing the said grievance and injury, had been put and loaded in and upon a certain waggon of the plaintiff for the purpose of carting and carrying away the same for the use of the plaintiff, to wit, at the parish aforesaid, in the county aforesaid; Yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure and aggrieve the plaintiff in this behalf, and to deprive him of the use, benefit, easement and advantage of his said way, and of the value of his said tithes so by him loaded in and upon the

By a rector for obstructing way to fetch off tithes. (o)

(o) See 2 New Rep. 466; 8 Wentw. Ind. 189; and see form and law, *James v. Dods*, 2 Cr. & M. 266; 4 Tyr. 101, S. C.

DISTURBANCE
OF WAYS.

Second count.

said waggon as aforesaid, whilst the plaintiff was so possessed as aforesaid of the said tithes, and whilst the defendant was so possessed of the said farm and lands, and after the said tithe had been put and loaded in and upon the said waggon, and the said waggon was then about to return therewith from the said farm and lands of the defendant, to wit, on the — day of —, wrongfully and injuriously stopped up, blocked up and obstructed, and then wrongfully and injuriously caused and procured to be stopped up, blocked up and obstructed the said way of the plaintiff, over the said farm and lands of the defendant, by then chaining up, locking up and fastening the said gate which was near adjoining the said farm-yard of the defendant, and kept and continued the same way so blocked up, stopped up and obstructed for a long space of time, to wit, from the day and year aforesaid until the commencement of this suit, by reason whereof the plaintiff was not only during all that time prevented from using the said way for the purpose of collecting, fetching, carting and carrying away from off the said farm and lands the tithes of the corn, grain and hay during that space of time growing and renewing upon the said farm and lands, but was forced and obliged to leave, and then actually did leave the said tithes of the wheat so before then actually put and loaded in his said waggon, in and upon the said farm and lands of the defendant, whereby the said last-mentioned tithes became and were wholly lost and destroyed and of no use or value to the plaintiff. And whereas also the plaintiff now is, and for divers, to wit, five years last past, hath been the rector of the rectory of the parish church of Ightham, in the county of Kent, and during all that time last aforesaid was and still is lawfully possessed of and entitled to all the tithes of corn, grain and hay yearly growing, renewing and proceeding upon and from a certain close called the Seven Acres, being part and parcel of a certain farm and lands of the defendant, situate within the said parish of Ightham, in the county aforesaid; and the plaintiff, as such rector as aforesaid, during all the time aforesaid, ought to have had and used, and still of right ought to have and use, a certain way from a certain common and public queen's highway, in the parish aforesaid, through a certain gate called Scatswood-gate, in and upon the said farm and lands in the occupation of the defendant, into, through, over and along a certain close or way of the defendant in and upon the said farm and lands, to a certain other gate near to the farm-yard of the defendant, and thence through the said gate by turning to the left hand into, through and along a certain other close or way of the defendant, being also part of the said last-mentioned farm and lands into the said close called Seven Acres, and so back again from the said last-mentioned close into, through and along the said last-mentioned way of the defendant to the said last-mentioned gate near to the farm-yard of the defendant, and thence through the same gate turning to the right into, through, over and along the said first-mentioned way of the defendant, to the said first-mentioned gate called Scatswood-gate, and thence through the same gate into the said common and public queen's highway, to go, return, pass and repass with his servants, horses, waggons and carriages for the purpose of gathering, collecting and carrying off the tithes of the corn, grain and hay yearly growing and renewing upon the said close, called Seven Acres; and whereas also, before the committing the grievance and obstruction next after mentioned, the tithe of the corn, that is to say, of the wheat before then growing and renewing upon the said close, called Seven

Acres, of great value, to wit, of the value of £100, had been set out and severed from the residue thereof, and just before the time of committing the said grievance and obstruction, had been put and loaded in and upon the waggon of the plaintiff, for the purpose of being carried away by the plaintiff. Yet the defendant, well knowing the said last-mentioned premises, but contriving and wickedly and maliciously intending to injure and aggrieve the plaintiff in this behalf, and to deprive him of the use, benefit and advantage of his said last-mentioned way and of the value of his said last-mentioned tithes of the said close called Seven Acres, whilst the plaintiff was so as aforesaid possessed of and entitled to the tithes of the said rectory of Ightham and whilst the defendant was so as aforesaid tenant and occupier of the said close called Seven Acres, to wit, on the same day and year aforesaid, wrongfully and injuriously blocked up, stopped up and obstructed the said last-mentioned way, by chaining up, locking up and obstructing the said last-mentioned gate near to the farm-yard of the defendant, and kept and continued the same way so blocked up, stopped up and obstructed as aforesaid for a long space of time, to wit, from the day and year aforesaid to the commencement of this suit, and thereby prevented the plaintiff from using the said last-mentioned way for the purpose of fetching, carting and carrying away the tithes of the corn during that space of time growing and renewing upon the said close called Seven Acres, and forced and obliged the plaintiff to leave in and upon the said farm and lands of the defendant the said last-mentioned tithes so by the plaintiff just before gathered and collected out of the said close called Seven Acres, and loaded and put in and upon the said waggon of the plaintiff, and the said last-mentioned tithes thereby became and were wholly lost and destroyed, and of no use or value whatever to the plaintiff. *[If the obstructions in removing the tithes amounted to a conversion, then a count in trover may be added.]*

**DISTURBANCE
OF WAYS.**

DISTURBANCE OF FERRIES.

For that whereas the plaintiffs, before and at the time of the committing of the grievances hereinafter in this count mentioned, were, and from thence hitherto have been, and still are entitled, to wit, as trustees for the Society of Free Watermen of the River Thames, residing at Greenwich, in the county of Kent, called the Isle of Dogs Ferry Society, to the fee-simple and inheritance (q) of an ancient ferry, called Potter's Ferry, for foot-passengers and goods belonging to such foot passengers, across the river

**DISTURBANCE
OF FERRIES.**

For disturbing
plaintiffs' an-
cient ferry. (p)

(p) See form and law, *Hussey v. Field*, 1 Gale, 165; Willes, 508; 8 Wentw. Index, lviii.; Com. Dig. Piscary, B.; 2 Saund. 114; and see form, 6 B. & C. 703; see also *Pim v. Curell*, 6 M. & W. 234. It seems sufficient to state that the plaintiff was in possession of the ferry; 6 B. & C. 703. No sum for payment of passage money need be stated; *id.* In this action it is sufficient for the plaintiff to prove that he was in possession of the ferry at the time the cause of action arose, 2 Y. & J. 285; and from an user of thirty-five years the jury may presume that a ferry had a legal origin. The owner of a ferry need not have the property in the soil on either side of the river; 6 B. & C. 703. Neglect of duty in the owner

of a ferry is no answer to an action for disturbance. If there be an exclusive ferry from A. to B. it does not prevent persons from going by any other boat from A. directly to C., though it lie near B., provided that it be not done fraudulently, and as a pretence for avoiding the regular ferry; 4 T. R. 666; Harr. Land. & Ten. 554.

(q) *Seem* that it is unnecessary to state the right so particularly, and that it would certainly suffice to declare on the possessory right by merely stating that the plaintiffs were of right entitled to an ancient ferry, called &c., as in the third count, *post*, 624, and 6 Bar. & Cres. 703.

DISTURBANCE
OF FERRIES.

Second count.

Third count.

Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the county of Middlesex, from and to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers and their goods over and across such ferry, in any boat or boats kept by or by the authority of them the plaintiffs for that purpose, certain reasonable freights or ferryages, to wit, two-pence for every person on foot; nevertheless the defendant, not being one of the free watermen aforesaid, but well knowing the premises, and contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, to wit, on the — day of —, in the year of our Lord —, and on divers other days between that day and the commencement of this suit, injuriously and unlawfully and against the will of the plaintiffs, carried and conveyed, in a certain boat of him the said defendant, divers foot-passengers for hire, over and across the said River Thames, and upon the said part of the same river where the plaintiffs had such ferry as aforesaid, and upon the said ferry of them the plaintiffs, by reason whereof the plaintiffs have lost and been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof and their right and title thereto. And the plaintiffs further say, that they so being entitled, to wit, as trustees for the said society, to the fee-simple and inheritance of the said ferry as aforesaid, (r) the defendant not being one of the free watermen as aforesaid, but well knowing the premises, and further contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, and whilst the plaintiffs were so entitled as trustees as aforesaid to the fee-simple and inheritance of the said ferry, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, injuriously and unlawfully, and against the will of the plaintiffs, carried and conveyed in a certain boat of him the defendant divers foot-passengers for hire, over and across the said River Thames, near to the said part of the same river, where the plaintiffs had such ferry as aforesaid, and near to the said ferry of them the plaintiffs; and by reason whereof the plaintiffs have lost and been deprived of divers other profits and emoluments which would have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof and their right and title thereto. And also for that whereas the plaintiffs, before and at the time of committing the grievances in this count mentioned, were and still are *lawfully possessed* (s) *of a certain ancient ferry*, with the appurtenances, upon and over the River Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the county of Middlesex, from and to Greenwich aforesaid, in the county of Kent aforesaid, for carrying and conveying, within the said last-mentioned ferry, all persons and their goods having occasion for the same, in boats kept by and by the authority of them the plaintiffs there for that purpose, taking for the same certain reasonable freights and ferryages, (t) to

(r) See the preceding note.

(s) That this is sufficient, see 6 B. & C. 703.

(t) This averment is not necessary; 6 B. & C. 703.

wit, two-pence for each person. Yet the defendant, well knowing the premises last aforesaid, but contriving to disturb and injure the plaintiffs in the peaceable enjoyment of their said last-mentioned ferry, heretofore, to wit, on &c., and on divers other times between that day and the commencement of this suit, unlawfully, injuriously and wrongfully carried and conveyed divers passengers, for hire, in a certain boat over and across the said river, and upon the said part of the said river where the plaintiffs had such ferry as last aforesaid, and over, upon, within and across the said last-mentioned ferry of the plaintiffs, and thereby they the plaintiffs lost divers great gains and profits which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof and in their right and title thereto. And the plaintiffs further say, that they the plaintiffs, so being possessed of the said last-mentioned ferry, with the appurtenances as aforesaid, the defendant, well knowing the premises last aforesaid, but further contriving and intending as last aforesaid, heretofore, and whilst the plaintiffs were so possessed of their said last-mentioned ferry, with the appurtenances as aforesaid, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, unlawfully, injuriously and wrongfully carried and conveyed divers passengers, for hire, in a certain boat of him the defendant, over and across the said river, and near to the said part of the said river where the plaintiffs had such ferry as last aforesaid, and near to the said last-mentioned ferry of the plaintiffs, and thereby they the plaintiffs lost divers other great gains and profits which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title thereto.

DISTURBANCE
OF FERRIES.

Fourth count.

DISTURBANCE OF PEWS.

DISTURBANCE
OF PEWS.

Commencement as ante, 13. The venue is local.] For that whereas the plaintiff, before and at the time of the committing of the grievance herein-after next mentioned, was, and from thence hitherto hath been and still is lawfully possessed of a certain messuage, with the appurtenances, situate in

For disturbance
of a pew. (u)

(u) For the forms of declarations for disturbance of seats in churches, see 5 B. & Ald. 356; 8 Wentw. 518; Morg. 340; Forrest's Exch. R. 14; 3 T. R. 659; 6 T. R. 296; 1 Lev. 71; 1 Sid. 203; 2 Lev. 193; 3 Lev. 73; 1 Wils. 326; 1 T. R. 428. As to the title, see 2 Saund. 175 c, d; Com. Dig. Action on Case for disturbance, A. 3. As to evidence, see 3 Campb. 288. A seat in a church may be annexed to a house either by faculty or prescription; per Buller, J., in *Griffith v. Matthews*, 5 T. R. 296. But extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of prescription at least, and it is doubtful whether they can do so by prescription; *Byerley v. Windus*, 5 B. & C. 1; 2 D. & Ry. 23; *Hallack v. University of Cambridge*, 1 G. & D. 100. This action does not lie unless the pew be annexed to a house or some other messuage in the parish; 5 B. & Ald. 356, and the cases there

collected on the subject; and see 1 Y. & J. 583. An action of trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, and the possession of the church being in the parson, 1 T. R. 428; but an action of trespass for breaking and entering a chapel, and destroying the pews, will lie at the suit of a perpetual curate of an augmented parochial chapelry even against the chapelwarden; 2 Y. & J. 265. In pleading a prescription to a pew, it need not be alleged that the party and his ancestors had always repaired it; the pew might never have required repair. This at most is matter of evidence only, *Lofft*, 423; even in an action against a stranger for disturbing plaintiff in his pew, but it is otherwise in a dispute with the ordinary; 1 Wils. 326; see 8 B. & C. 288; 2 M. & R. 318, S. C. As to right of burial, see 8 Bar. & Cres. 288; 2 M. & R. 318, S. C.; 1 B. & Adol. 122; 2 B. & Ald. 806.

**DISTURBANCE
OF PEWS.**

Injury.

the parish of —, in the county of —, and therein during all the time aforesaid inhabited and dwelt, and still doth inhabit and dwell, with his family; and by reason thereof he the plaintiff, during all the time aforesaid, until the time of the committing of the grievance by the defendant as hereinafter next mentioned, had, and still of right ought to have, for himself and his family inhabiting in the said messuage with the appurtenances, the use and benefit of a certain pew in the parish church of &c. aforesaid, to hear and attend divine service celebrated therein, as to the said messuage and tenement belonging and appertaining. Yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff, and to deprive him of the use and benefit of the said pew, whilst the plaintiff was so possessed of his said messuage, with the appurtenances, and dwelt and inhabited therein as aforesaid, and was entitled to the use and benefit of the said pew as aforesaid, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, unlawfully, and without the leave or license, and against the will of the plaintiff entered, and caused and procured divers other persons to enter and continue in the said pew during the celebration of divine service in the said church, and thereby greatly disturbed the plaintiff in the enjoyment of the said pew, and prevented him from having the use and benefit thereof in so full and ample a manner as he otherwise might and would and ought to have done, and also unlawfully tore, wrenched, broke and damaged the door of the said pew, and also unlawfully shut and fastened the door thereof, and kept the same so shut and fastened for a long space of time, to wit, hitherto, and thereby, during all that time, hindered and prevented the plaintiff and his family inhabiting in the said messuage, with the appurtenances, from sitting in and using the said pew for the purpose aforesaid, and whereby he the plaintiff could not during the time aforesaid have or enjoy the use of the said pew for himself and his family inhabiting the said messuage in so ample and beneficial a manner as he otherwise might and ought to do, and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, prohibiting more than one count on the same cause of action, it was usual to add a second count similar to the first, except that instead of the words "use and benefit," s.ry "the right, privilege, and liberty of sitting in the said pew," conclude, To the plaintiff's damage, &c.*]

**FOR DIS-
TURBANCE OF
A MARKET.**

For opening a new market, and thereby disturbing plaintiff's ancient market. (x)

FOR DISTURBANCE OF A MARKET.

For that whereas the plaintiff, before and at the time of the committing of the grievances next hereafter mentioned, to wit, on the [1st] day of [January] A. D. [1824], and from thence hitherto hath been and still is lawfully possessed of the manor of [Bradford] in the county of [York], and of a certain market to the said manor belonging and appertaining, that is to say, a certain market under and to be holden within the said manor, to wit, at

(x) As to disturbing a market, see the forms and law in 7 B. & C. 40; 9 D. & R. 863, S. C.; 5 B. & C. 363; 8 D. & R. 121, S. C.; 4 Bar. & Adol. 397; 2 Saund. 172; 1 B. & P. 400; Owen, 109; Cro. Jac. 43,

122; 3 Lev. 190; 2 Lutw. 1517; 6 East, 438; 8 Wentw. Index, lviii.; *De Rutsen v. Lloyd*, 5 A. & E. 456; *Bridgland v. Shapter*, 5 M. & W. 375; *Thompson v. Gibson*, 7 M. & W. 456.

[Bradford] in the said county of [York], upon every Thursday, for the buying and selling of all goods, wares and merchandizes then to be bought and sold, together with certain stallage and other profits and emoluments to such market belonging and appertaining, whereby great gains, profits and advantages, during all the time aforesaid, until the committing of the grievance hereinafter next mentioned, accrued to and were received by, and still of right ought to accrue to and be received by the plaintiff; Yet the defendant, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the plaintiff, and to deprive him of the profit and advantage of his said market, and to disturb him in the free enjoyment thereof, and of the emoluments arising therefrom, heretofore, to wit, on the same day and year aforesaid, and within the said manor of [Bradford,] without any lawful warrant or authority in that behalf, levied, kept, erected and held, and caused and procured to be levied, kept, erected and held a certain new market, once in every week, and continued the said market so newly levied, kept, erected and held, for a long space of time, to wit, from thence hitherto, whereby divers large quantities of goods, wares and merchandizes were, during all the time aforesaid, sold in the said market so newly levied, held, erected and kept, which otherwise would and of right ought to have been brought to the said market of the plaintiff, so holden there as aforesaid, during all the time aforesaid, to be there sold, to the great damage of the plaintiff, and the great nuisance of the market of the plaintiff, by reason whereof the plaintiff hath lost and been deprived of the stallage and other emoluments and profits of his said market, and also of other great gains, profits and advantages, which he otherwise would and of right ought to have had and derived from his said market. And whereas also, afterwards and before and at the time of the committing of the grievance next hereinafter mentioned, to wit, on the [1st] day of [January,] A. D. [1824,] the plaintiff was, and from thence hitherto hath been and still is, lawfully possessed of and in a certain market holden and to be holden at [Bradford] aforesaid, in the county aforesaid, upon every Thursday, for the buying and selling of all goods, wares and merchandizes, then to be bought and sold, together with certain stallages, profits and emoluments, to such last-mentioned market belonging and appertaining, whereby great gains, profits and advantages, during all the time last aforesaid, and until the committing of the grievance hereinafter next mentioned, accrued to and were received by, and still of right ought to accrue to and be received by the plaintiff. Yet the defendant, well knowing the premises last mentioned, but contriving and wrongfully intending to injure and aggrieve the plaintiff, and to deprive him of the profit and advantage of his said last-mentioned market, and to disturb him in the free enjoyment thereof, and of the stallage and other profits and emoluments arising therefrom, afterwards, to wit, on the same day and year aforesaid, within the town of [Bradford] aforesaid, and close and near adjoining to the place where the said market of the plaintiff was held, without any lawful warrant or authority in that behalf, levied, erected, kept and held, and caused and procured to be levied, erected, kept and held a certain other new market, held once in every week, and continued the said last-mentioned market so newly levied, erected, kept and held for a long space of time, to wit, from thence hitherto, whereby divers other large quantities of goods, wares and merchandizes were, during all the time last afore-

Second count.

DISTURBANCE
OF A MARKET.

Third count.

said, sold in the said market so newly levied, erected, kept and held by the defendant, which otherwise would and of right ought to have been brought to the said market of the plaintiff, so holden there as last aforesaid, during all the time last aforesaid, to be there sold, to the great damage of the plaintiff, and the great nuisance of the market of the plaintiff, and the plaintiff hath thereby lost and been deprived of the stallage and other emoluments of his said market, and also of other great gains, profits and advantages which he otherwise would and of right ought to have had and received from his said market. And whereas also, afterwards, and before and at the time of the committing of the grievance next hereinafter mentioned, to wit, on the [1st] day of [January,] A. D. [1824,] to wit, at [Bradford] aforesaid, in the county aforesaid, the plaintiff was, and from thence hitherto hath been, and still is lawfully possessed of and in a certain market holden and to be holden within the town of [Bradford] aforesaid, in the county aforesaid, in every week, and of certain stallage, profits and emoluments to such last-mentioned market belonging and appertaining, whereby great gains, profits and advantages, during all the time last aforesaid, and until the committing of the grievance hereinafter next mentioned, accrued to and were received by, and still of right ought to accrue to and be received by the plaintiff. Yet the defendant, well knowing the premises last mentioned, but contriving and wrongfully intending to injure and aggrieve the plaintiff, and to deprive him of the profit and advantage of his said last-mentioned market, and to disturb him in the free enjoyment thereof, and of the stallage and other profits and emoluments arising therefrom, afterwards, to wit, on the same day and year aforesaid, within the town of [Bradford] aforesaid, without any lawful warrant or authority in that behalf, levied, erected, kept and held, and caused and procured to be levied, erected, kept and held, a certain other new market, held once in every week, so near to the said place where the said last-mentioned market of the plaintiff was held, that by reason thereof divers other large quantities of goods, wares and merchandizes were, during all the time last aforesaid, sold in the said market so hereby levied, erected, kept and held by the defendant, which otherwise would and of right ought to have been brought to the said market of the plaintiff, so holden there as last aforesaid, during all the time last aforesaid, to be there sold, to the great damage of the plaintiff, who hath thereby lost and been deprived of the stallage and other emoluments of his said last-mentioned market, and also of other great gains, profits and advantages which he otherwise would and of right ought to have had and derived from his said market.

FOR DIS-
TURBANCE OF
FRANCHISES,
&c.For disturbance
of franchises,
tolls, offices, &c.DISTURBANCE OF FRANCHISES, &c.

For the precedents and mode of declaring for a disturbance, subtraction, or other injury to FRANCHISES, see 4 Mod. 423; 1 Show. 18; 8 Wentw. Index, 58. See a form of declaration for carrying on trade of alehouse-keeper within a borough, not being a burgess, 5 Bar. & Adol. 246. The stat. 11 G. 4 and 1 W. 4, c. 64, for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess; *Id. ibid.* See a form of declaration at the suit of a bailiff against a party for

executing a writ within his jurisdiction, 9 East, 330; and generally, Com. Dig. Action on the Case for Disturbance. For NOT GRINDING CORN at plaintiff's ANCIENT MILL, 2 Saund. 112, 113, note 1; 172, note 1; 8 Wentw. Index, 58; Dougl. 218; 2 B. & C. 827; 4 D. & R. 498, S. C.; 6 M. & Sel. 69. In such action it suffices to declare generally on the custom to grind; 6 M. & Sel. 69; and see as to the evidence, *id.* Of OFFICES, 10 Rep. 59 b; Cro. Eliz. 335; 8 Wentw. Index, 54; see a form of declaration in case for disturbance of an office as a bellman on sale of goods in a corporate town, *Jones v. Waters*, 5 Tyrw. 361.

DISTURBANCE
OF FRANCHISES,
&c.

V. ON STATUTES.

BY PARTY GRIEVED.

For that whereas heretofore, to wit, on &c., and for the space of [half] a year then last past, one J. H. held, used, occupied and enjoyed a certain messuage and tenements, with the appurtenances, as tenant thereof to the plaintiff, at and under a certain rent therefore then payable by the said

BY PARTY
GRIEVED.

On 8 Ann. c. 14,
against a sheriff
for taking goods
off premises,
which were
seized under a
fi. fa. without
first paying
plaintiff half a
year's rent
which was in
arrear. (y)

(y) See form, 8 Wentw. 446; Dougl. 666. See also *Rinley v. Ryle*, 1 Dowl. N. S. 660; 10 M. & W. 101; *Forster v. Cookson*, 1 G. & D. 61. In 1 Chit. Col. Stat. 664, will be found most of the following notes on this enactment.

In order to support the claim against the sheriff, a subsisting tenancy must be proved, and therefore where the landlord had brought an action of ejectment, and laid the demise before the seizure under the *fi. fa.*, it was held that the sheriff had no right to allow the landlord a year's rent; 5 B. & Ald. 88. The money claimed must be due as rent; see 6 B. & C. 524; 9 D. & R. 529; 2 C. & P. 294, S. C.; see also a form, 7 Bingh. 428. The occupation by the tenant must be proved, 7 Price, 690; but it will be for the sheriff to prove that the rent had been paid; *id.*

The act extends to an execution at the suit of a defendant for costs, notwithstanding the direction at the end of the section that the sheriff shall pay the plaintiff as well the rent as the execution money; 2 Wils. 140. But a commission of bankruptcy is not an execution within the meaning of this act; 15 East, 230. Goods taken on a *capias utlagatum* are within the act; Bunb. 5, 194, 269; 7 T. R. 264. So goods taken on a *pone per vadios*; 6 B. & C. 467; 9 D. & R. 609, S. C.

A bill of sale is a removal; Barnes, 211. The sheriff is bound to satisfy the landlord in the first instance; 4 Moore, 473. And an action lies, though only part of the goods be removed; *id.*; 2 B. & B. 67.

The statute only extends to the immediate landlord, not to a ground landlord; 2 Stra. 787. An executor or administrator is entitled to the benefit of the statute as to arrears accrued in the lifetime of the deceased; 1 Stra. 212. A trustee of an outstanding satisfied term in trust for mortgagees, and to attend

the inheritance, may sue; 4 Moore, 473; 2 B. & B. 67.

The act does not extend to rent which accrues during the continuance of the sheriff in possession; 1 M. & Sel. 245. And a sheriff taking corn in the blade under a *feri facias*, and selling it before rent due, is not liable to account to the landlord of the defendant, under the statute 8 Anne, for rent accruing subsequently to the levy and sale, although he has given notice, and though the corn be not removed from the premises until long afterwards, when a considerable proportion of rent has become due, the landlord's remedy in such case is by distress; 1 Price, 274. And the landlord of premises on which goods have been seized under an extent in aid is not entitled, under the 8th Anne, to call on the sheriff to pay twelve months' rent, due before the *teste* of the writ; 2 Price, 17. But this claim may be supported for fore-hand rent; 7 Price, 690. The landlord is entitled to his rent without any deduction for poundage; Stra. 643. But where the landlord takes the security of a third person for the rent at the time of the execution, the sheriff is discharged as to the landlord's claim for rent; 3 Campb. 24.

Only one year's rent is to be paid, although there be two executions; *semble*, 2 Stra. 1024; 2 B. & B. 362; 5 Moore, 97, S. C.; unless the goods be left on the premises an unreasonable time; 1 Price, 277; 1 M. & Sel. 711.

The bailiff of a liberty is subject to the provisions of the act; 1 Stra. 212.

In order to render the sheriff responsible for non-compliance with the act, there should be a demand for the rent before the removal, by the party entitled; and a demand by a person to whom administration is afterwards committed does not operate by relation; 2

BY PARTY
GRIEVED.

J. H. to the plaintiff for the same. (z) And whereas also heretofore, to wit, on the day and year aforesaid, a large sum of money, to wit, the sum of £—, for and on account of the rent so payable by the said J. H. to the plaintiff for the said messuage and tenements for one [half] year of the said tenancy, which ended at and upon that day and became and was due and payable, and continually from thence hitherto hath been and still is in arrear and unpaid. And thereupon heretofore and during the continuance of the said tenancy, to wit, on &c. the defendant then being sheriff of the said county, by virtue of and under pretence of a certain writ of our said lady the queen, called a [*feri facias*], before then issued against the said J. H. at the suit of H. W. and M. W. out of the court of our said lady the queen, before the queen herself, (a) and directed to the said sheriff of the county of —, took certain goods and chattels of the said J. H. then being in the said messuage and tenements, with the appurtenances, so in the tenure and occupation of the said J. H. as aforesaid, of great value, to wit, beyond the amount of the said arrears of rent so due and owing from the said J. H. to the plaintiff, that is to say, to the amount or sum of £—; and the plaintiff further says, that, after the taking of the said goods and chattels in the said messuage as aforesaid, and during the continuance of the said tenancy, and before the removal of the same therefrom under pretence of the said writ, that is to say, on the day and year last aforesaid, the plaintiff gave notice (b) to the defendant, so being sheriff as aforesaid, of the aforesaid rent so being due and in arrear to the plaintiff from the said J. H. as aforesaid, and then requested the defendant, as such sheriff, that the plaintiff might be paid his said rent, so due, in arrear and unpaid, as aforesaid, before the said goods and chattels, or any part thereof, should be removed from or out of the said messuage and tenements, with the appurtenances; Yet the defendant, so then being sheriff of the said county of —, well knowing the premises, but not regarding the duty of his said office, nor the statute in such case made and provided, but contriving and wrongfully and deceitfully intending to deceive and defraud and deprive the plaintiff of the said arrears of the said rent so due to him as aforesaid, and of his remedy for the recovery thereof, under colour and pretence of the said writ, on the day and year last aforesaid, and during the continuance of the said tenancy, and before the commence-

Stra. 97; see 3 Taunt. 400. And a sheriff is not bound to find out what rent is due to a landlord and pay it him, but the landlord must give him notice; 3 Taunt. 400. But no particular form of notice is necessary; 3 B. & Ald. 645; *id.* 440; 4 Moore, 473. And the Court, on motion, will order a year's rent out of the proceeds while in sheriff's hands to be paid to the landlord, though the sheriff had no notice of the rent being due till after removal; 3 B. & Ald. 440. But an action for money had and received cannot be sustained; 3 Campb. 260. In case of a removal contrary to the act, the landlord may maintain an action, and the want of alleging a demand is helped by verdict, 1 Stra. 212; 7 Price, 566; and it is not necessary to state in the declaration the particulars of the lease; but if they are stated, and there is any material variance, it is fatal; Dougl. 665. If

the execution is overreached by an act of bankruptcy and commission, the sheriff, in an action by the assignees, can only avail himself of payment to the landlord, by proving that it was made before notice of the commission issued; 15 East, 230.

(z) The particulars of the demise need not be stated; Dougl. 665.

(a) Stating the writ to have been sued out of the wrong court would be bad; 4 B. & C. 657; 7 D. & R. 123, S. C.; Ry. & Moo. C. N. P. 266, S. C. In 8 Wentw. 456, the judgment is stated; but this seems unnecessary, as it is not a judgment at the suit of the plaintiff, but of a third person, and therefore distinguishable from 1 Saund. 37.

(b) The omission of this is fatal, unless after verdict, when the averment of "well knowing the premises," &c. will suffice; 7 Price, 566.

ment of this suit, wrongfully, injuriously and deceitfully removed and carried away the said goods and chattels, so taken as aforesaid, from and out of the said messuage and tenements, with the appurtenances, without paying or satisfying the plaintiff the said arrears of the said rent so due and owing and in arrear to him as aforesaid, or any part thereof, contrary to the form of the statute in that case made and provided. And the plaintiff further saith, that he hath not at any time since been paid or satisfied the said arrears of the said rent or any part thereof, but the same, and every part thereof, is still due, in arrear and unpaid, from the said J. H. to the plaintiff, whereby the plaintiff hath been and is deprived of the benefit of a distress for the recovery and satisfaction of the said arrears of the said rent, and is in great danger of losing the same. To the damage, &c. [*As to a count in trover, see 7 Price, 691.*]

By PARTY
GRIEVED.

For that whereas certain persons, to wit, C. S. and G. S. heretofore, to wit, on &c. (d) sued and prosecuted out of the Court of our lady the queen, before the queen herself, against the now plaintiff, a certain writ of our said lady the queen, called a [*capias*] directed to the sheriff of —, by which said writ our said lady the queen commanded the said sheriff(e) to take, &c. [*state the capias, indorsement for bail and delivery to sheriff, as in a declaration on a bail bond, ante, 321, and then proceed as follows:*] took and arrested the now plaintiff by his body, and then had and detained him in his custody, as such sheriff, at the suit of the said C. S. and G. S. for the cause aforesaid, and continued in such custody until and after the committing of the grievance by the defendant as hereinafter next mentioned; and thereupon the now plaintiff afterwards, to wit, on &c. tendered and offered to the now defendant, so being sheriff as aforesaid, reasonable sureties of sufficient persons, to wit, E. F., I. K., L. M., &c. (f) the same being then responsible and sufficient persons, and then having, and each of them then having, sufficient within the county of — aforesaid, in which said county of — the now plaintiff was so arrested and so in custody as aforesaid, (g) and who then were willing and offered to become bail and sureties for the now plaintiff duly putting in bail in the said action, according to the exigencies of the said writ; Yet the defendant, not regarding his duty in that behalf as such sheriff as aforesaid, nor the statute in such case made and provided, but contriving and unjustly intending to injure, aggrieve and oppress the plaintiff in that behalf, then wrongfully and injuriously refused to accept the said sureties, so offered by the now plaintiff, as sureties for the now plaintiff's putting in bail, according to the exigency of the said writ, and wrongfully and injuriously then kept and detained him in his the now defendant's custody, under colour and pretence of the said writ, for a long space of time after the said bail were so tendered and offered as aforesaid, to wit, until the — day of —, in the year aforesaid, contrary to the form of the statute in such case made and provided; by means of which said premises, he

Against sheriff,
on stat. 23 H. 6,
c. 9, for refusing
sufficient bail.

(c)

(c) See 15 East, 320; 1 Lil. Ent. 71; 2 Saund 61 c. 5; and the statute, 1 Chit. Col. Stat. 42.

(d) The *teste* of the writ. This general statement seems sufficient; but see a more particular statement, *ante*, 321.

(e) Examine carefully with the writ.

(f) There were several tendered.

(g) The terms of the statute, 23 Hen. 6, c. 9, require that the bail tendered have sufficient property *within the county*, so as to enable the sheriff better to know their sufficiency.

BY PARTY
GRIEVED.

the now plaintiff was kept and detained in prison a great and unreasonable length of time, and during all that time suffered great pain in body and mind, and was hindered and prevented from performing and transacting his lawful affairs and business, and hath been and is greatly injured in his credit and circumstances, and also hath incurred the risk of becoming and being proceeded against as a bankrupt. *[In the fifth edition of this work, vol. ii. 622, here followed a second count more concise, but which since the pleading rules, Hilary Term, 4 W. 4, reg. 5, prohibiting more than one count on the same transaction, cannot properly be added. The third count there stated may, however, be found useful.]*

For not being
ready or having
any deputy
ready to accept
sufficient bail
which were
ready on behalf
of plaintiff.

And whereas also heretofore, and at the time of the committing of the grievance by the defendant as hereinafter mentioned, to wit, on the said — day of —, in the year aforesaid, the plaintiff had been and was in custody of the defendant, as such sheriff as aforesaid, by virtue of a certain writ of our said lady the queen, called a *capias*, at the suit of the said C. S. and G. S. and which said last-mentioned writ had been and was indorsed for bail for £—; and thereupon it became and was the duty of the defendant, as such sheriff as aforesaid, at all reasonable times afterwards, and whilst the said last-mentioned writ continued in force to be ready, or to cause and procure some person, duly authorised by him the now defendant as such sheriff as aforesaid, to be ready, within the said bailiwick of him the defendant as such sheriff, to let out of prison and out of the custody of him the defendant, as such sheriff as aforesaid, under and by virtue of the said last-mentioned writ, the now plaintiff, so in custody of the now defendant as last aforesaid, upon reasonable sureties of sufficient persons, having sufficient within the said county of —, where the plaintiff was so in custody as last aforesaid, and where he might be let to bail, as in the statute in such case made and provided, to observe the exigency of the said writ as thereby required. And the now plaintiff further saith, that afterwards, and whilst he continued in the custody of the now defendant, as such sheriff as aforesaid, and before the return of the said last-mentioned writ, to wit, on the — day of —, in the year aforesaid, the same then being a reasonable time in that behalf, he the now plaintiff was ready with reasonable sureties of sufficient persons, to wit, G. F. &c. the same being then responsible and sufficient persons having, and each of them having, sufficient within the county of — aforesaid, and the said last-mentioned persons were then willing to become bail and sureties for the appearance of the said R. M. now plaintiff, according to the exigency thereof, of all which said several premises the now defendant then had notice; Yet the now defendant, so being such sheriff as aforesaid, not regarding his duty as such sheriff, but contriving and unjustly intending to injure, oppress and aggrieve the now plaintiff in this behalf, was not, at all reasonable times after he so had the now plaintiff in his custody as aforesaid, and whilst the said writ was in force, ready, nor did cause or procure any person, duly authorized by him the defendant, to be ready, within the said bailiwick of him the defendant, as such sheriff as aforesaid, to let out of prison and out of the custody of the now defendant, as such sheriff as aforesaid, under and by virtue of the said last-mentioned writ, the now plaintiff, so in custody as last aforesaid, upon such reasonable sureties of sufficient persons, having sufficient within

the said county of —, to keep his day in such place as the said last-mentioned writ required, or otherwise to obey and observe the said writ according to the exigency thereof; but wholly omitted and neglected so to do, contrary to his duty in that behalf, and contrary to the statute in that case made and provided, and was not at the said time, when he the said plaintiff was so ready with the said sureties as aforesaid, and being such reasonable time in that behalf as aforesaid, ready to accept and receive such bail as aforesaid, or to let the now plaintiff out of his custody as aforesaid on such bail: and by reason of the negligence and improper conduct of the now defendant as such sheriff as aforesaid, the now plaintiff was kept and continued in custody and so imprisoned as aforesaid, for a long time after he was so ready, with such reasonable sureties as aforesaid, to be so let to bail as last aforesaid, to wit, from the said — day of — until the — day of —, in the year aforesaid, contrary to the form of the statute in such case made and provided; by means of which said premises the now plaintiff was kept and detained in prison a great length of time, and during all that time suffered great pain in body and mind, and was hindered and prevented from performing and transacting his lawful affairs and business, and hath been and is greatly injured in his credit and circumstances, and also incurred the risk of becoming and being proceeded against as a bankrupt.

By PARTY
GRIEVED.

See the form, Sabourin v. Marshall, 3 Bar. & Adol. 440. The statute Marlbridge, 52 Hen. 3, c. 21, extends to goods distrained for a poor rate, and the sheriff must replevy such goods on plaint; see 3 Bar. & Adol. 440.

Against a sheriff for refusing to replevy cattle or goods on tender of a replevin bond on a distress for poor rates.

For that whereas the now defendant, on &c., and long before, was, and from thence hitherto hath been and still is one of her majesty's justices assigned to keep the peace of our lady the now queen in the county of —, and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed within the said county. And whereas the now plaintiff, by the name and description of &c., was, on &c. aforesaid, convicted before the now defendant, so being such justice as aforesaid, upon the information of one J. W., of the stamp-office, gentleman, who prosecuted as well for our said lady the queen as for himself in that behalf, for that after the commencement of a certain act of parliament, made in the parliament of our lord the late King George the Third, holden at Westminster, in the 24th year of his reign, and intituled "An Act for granting to his Majesty certain Duties on Horses kept for the purpose of riding, and on Horses, and on Horses used in driving certain Carriages, in respect whereof any Duty of Excise is made payable;" and after the — day of — therein mentioned, to wit, on &c., the plaintiff, so living in — aforesaid, being within the weekly bills of mortality, did keep and use one gelding for the purpose of drawing a certain carriage, and that the plaintiff did not, within ten days after beginning to keep and use the gelding for the purpose aforesaid, give notice in writing at the office in London for the stamping and marking of vellum, parchment and paper, of keeping and using the same, and of the parish and place where he resided, and pay down the duty of 10s. imposed by the said act for keep-

Against a justice of the peace for refusing to take bail on a conviction before him, where plaintiff intended to appeal to the sessions. (h)

(h) See 3 B. & P. 551; 1 Burn, J. 26th edit. 308.

BY PARTY
GRIEVED.

ing and using the said gelding, according to the directions of the said act, but wholly neglected and failed so to do, and kept and used the same without giving such notice and without making such payments as aforesaid, contrary to the form and effect of the said act; by reason whereof, and by force of the said act, the plaintiff forfeited and became liable to pay the sum of £—— for his said offence, one moiety thereof to her said majesty, and the other moiety thereof, with full costs of suit, which costs of suit amounted to and were adjudged at the sum of £——, to the said J. W. the said informer; and the plaintiff avers, that he the plaintiff, after he had been so convicted as aforesaid, for the supposed offence aforesaid, by the defendant, so being such justice as aforesaid, and before the next general quarter sessions of the peace for the said county of Middlesex, to wit, on &c., finding himself aggrieved by the said conviction and judgment of the defendant, so being such justice as aforesaid, in that behalf given as aforesaid, intended and was desirous of appealing to the justices of the peace at the then next general quarter sessions of the peace for the said county of Middlesex, against the said conviction and judgment of the defendant, and therefore the plaintiff afterwards, to wit, on &c., applied to the defendant, so being such justice as aforesaid, and then gave notice to the defendant, and then offered to the defendant security of good and sufficient persons, to wit, J. M., of —— street, in the parish of ——, in the said county of Middlesex, as surety for the now plaintiff, and of C. B. of &c., in the said county, victualler, as another surety for the now plaintiff, the said J. M. and C. B. then being sufficient persons, and each of them then being sufficient in that behalf, to the amount of double the value of the penalty forfeited, whereof the plaintiff was so as aforesaid convicted, together with such costs as should be awarded in case such judgment should be affirmed, and then required the now defendant, so being such justice as aforesaid, to accept and take such security, in order that the now plaintiff might make and prosecute his said appeal to and before the said justices of the peace at the next general quarter sessions of the peace for the said county of Middlesex, according to the form of the statute in such case made and provided; and although it was then the duty of the now defendant, so being such justice as aforesaid, to have accepted and taken such security as aforesaid, Nevertheless the now defendant, not regarding the statute in that case made and provided, nor his duty in that behalf, but contriving and wrongfully intending unjustly to aggrieve and oppress the plaintiff in this behalf, and to prevent and hinder him from making his said appeal to the said justices of the peace of the then next general quarter sessions of the peace for the said county of Middlesex, against his duty as such justice of the peace as aforesaid, and contrary to the statute aforesaid and the laws of the land, absolutely refused to take or accept the security so offered as aforesaid, or any other security whatsoever, for the purpose aforesaid. By means whereof the now plaintiff was prevented and hindered from making and prosecuting his said appeal to the said justices of the peace at the next general quarter sessions of the peace for the said county of Middlesex, and from getting the said conviction quashed or reversed, and had his goods and chattels, of great value, to wit, of the value of £——, sold by virtue of the said conviction, and was otherwise very much prejudiced and oppressed, and was obliged to pay, and did actually pay, by means of the said sale of his said goods and chattels, a large sum of money, to wit, the sum of £——,

in satisfaction of the said conviction and forfeiture, and the costs and charges attending the levying thereof by virtue of the said conviction.

By PARTY
GRIEVED.

For that whereas heretofore, to wit, on &c. [*Here state the recovery of the judgment and writ to the sheriff, and levy under it, as directed ante, 353, and then proceed :*] Yet the now defendant, so being sheriff of the said county of — as aforesaid, not regarding his duty as such sheriff, nor the statute in such case made and provided, afterwards, to wit, on &c., by reason and colour of his said office of sheriff of the said county of —, wrongfully, illegally and oppressively had, received and took of and from the now plaintiff, for the serving and executing of the said execution, more and other consideration and recompense than there was or is by law allowed, limited or appointed in that behalf, that is to say, divers large sums of money, in the whole amounting to the sum of £—— more than and over and above the legal and reasonable consideration and recompense for serving and executing the said writ of execution, and for poundage, fees and expenses of the said execution, and on account thereof in that behalf demandable, due, and incurred over and above the said sum of £—— so indorsed to be levied as aforesaid, whereby the now plaintiff hath been and is damaged and aggrieved to the amount of the said sum of £——, contrary to the form of the statute in such case made and provided.

On stat. 28 Eliz. c. 4, against sheriff for extortion, at the suit of the plaintiff in the action. (i)

See commencement, ante, 15.] For that whereas within three calendar months next before the commencement of this suit, to wit, on &c., [*day of damage or about it,*] to wit, at the parish of —, in the hundred, [*wapentake, division,*] and county aforesaid, divers, to wit, [500] persons, being then un-

Against the inhabitants of a hundred, on the 7 & 8 Geo. 4, c. 31, where a building, machinery, and goods were destroyed by felonious rioters. (k)

(i) See form, 3 B. & C. 688; 5 D. & R. 495, S. C.; and see note (c), *ante*, 353, as to how a declaration for extortion should now be framed.

(k) The statute 7 & 8 Geo. 4, c. 31, repeals all prior statutes relative to the liability of hundredors for damage done by rioters, and by this statute it is enacted, "that if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop oast, barn or granary, or any building or erection used in carrying on any trade or manufacture or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining or working any mine, or any staitb, building or erection used in conducting the business of any mine, or any bridge, wagon way or trunk for carrying minerals from any mine, shall be feloniously demolished, pulled down or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compen-

sation to the person or persons damaged by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which at the same time shall be done by any such offenders to any fixture, furniture or goods whatever in any such church, chapel, house or other buildings or erections aforesaid." But by section 3, "no action can be maintained by virtue of that act for the damage caused by any of the said offences, unless the person or persons damaged, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged shall, within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognisance before him to prosecute the offenders when apprehended: provided also, that no person shall be enabled to bring any such action unless he shall commence the same within three calendar months after the commission of the offence." See the law and cases, 1 Chitty's Gen. Prac. 576 to 581; 2 Chitty's Arch. Prac. 7th edit. 842. The statute was extended to thrashing machines by 2 & 3 Will. 4, c. 72.

BY PARTY GRIEVED.	
Barn and fixtures.	lawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, with force and arms, unlawfully and feloniously demolished and destroyed a certain [barn] of the plaintiffs, situate and being in the parish aforesaid, and within the hundred [wapentake, division,] and county aforesaid, and the roof, doors, and door-cases of the said [barn] of the plaintiffs, affixed to and parcel thereof, being of great value, to wit, of the value of [£1000], and then also, with force and arms, unlawfully and feloniously
Machinery.	demolished and destroyed certain moveable machinery, to wit, [100] looms of the plaintiffs, of great value, to wit, of the value of [£500], prepared for the manufacture of [silk], and then at the same time, unlawfully and feloniously, with force and arms, demolished and destroyed divers quantities of fixtures, furniture and goods, to wit, &c. [<i>set them forth as in trover, or else according to the exact description</i>] of the plaintiffs, of great value, to wit, of the value of [£1000], then being in the said [barn], in contempt of her present majesty, and to the damage of the plaintiffs to a large amount, to wit, to the amount of [£500], and against the form of the statute in such case made and provided. And thereupon the said E. J. [<i>one of the plaintiffs, or if a servant, see form, post, 638,</i>] having knowledge of the circumstances of the said offence, within seven days after the commission of the said offence, and after such damage and injury was done to the plaintiffs as aforesaid, afterwards, to wit, on &c., [<i>the day he went before the magistrate,</i>] at the parish aforesaid, in the county aforesaid, did go before one J. P., Esq., then being a justice of the peace, assigned to keep the peace of our said lady the queen, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the West Riding of the said county, in the hundred [wapentake and division] aforesaid, and residing near and having jurisdiction over the place where such offence was so committed as aforesaid, and then submitted himself to the examination of the said J. P. so being such justice as aforesaid, on the oath of the said E. J. touching the circumstances of the said offence; and then became bound by recognizance before the said J. P. Esq. so being such justice, to prosecute the offenders when apprehended, (such offenders being then unknown,) whereof the inhabitants of the said hundred, [wapentake and division,] afterwards, to wit, on the day and year last aforesaid had notice. Whereby and by force of the statute an action hath accrued to the plaintiffs, being the persons damnified by the said offence, to recover against the said inhabitants of the said hundred, [wapentake and division,] full compensation for their damages by them sustained by such demolition and destruction of the said [barn,] roofs and doors, and by such demolition and destruction of the said machinery, fixtures, furniture and goods of the plaintiffs, then being in the said [barn] as aforesaid. Yet the said inhabitants, although often requested so to do, have not, nor hath either or any of them, at any time hitherto yielded any compensation, or made any satisfaction or amends to the plaintiffs for the said damages so by them the plaintiffs sustained as aforesaid, but to do this the said inhabitants of the said hundred, [wapentake and division,] have hitherto altogether neglected and refused and still do refuse, contrary to the form of the statute in that case made and provided. And whereas also, within three calendar months next before the commencement of this suit, to wit, on the day and year first aforesaid, to wit, at the parish of S. in the hundred, [wapentake and division,] and county aforesaid, divers, to wit, [500] persons, were then
Fixtures and furniture.	
Plaintiff submitted himself to examination before a proper justice within seven days.	
Entered into a recognizance to prosecute, &c.	
<i>Per quod actio accrevit, &c.</i>	
Second count.	

unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, and divers, to wit, [200] of the said persons engaged in and making part of the said last-mentioned riotous and tumultuous assembly then, with force and arms, unlawfully and feloniously demolished and destroyed a certain other [barn] of the plaintiffs, situate and being in the parish aforesaid, and within the hundred, [wapentake and division,] and county aforesaid, and the roof, doors and door-cases of the said last-mentioned [barn] of the plaintiff, affixed to and parcel thereof, being of great value, to wit, the value of £1000, and then at the same time unlawfully and feloniously, with force and arms, demolished and destroyed divers other quantities of fixtures, furniture and goods, to wit, fixtures, furniture and goods of the like number, quantity, quality, description and value as those in the said [first] count mentioned, of the plaintiffs, then being in the said last-mentioned [barn], in contempt of her present majesty and to the damage of the plaintiffs of a large amount, to wit, to the amount of [£500], and against the form of the statute in such case made and provided. And thereupon the said E. J. [*the plaintiff, or if a servant, state the fact accordingly, and see form, post, 638,*] having knowledge of the circumstances of the said last-mentioned offence, within seven days after the commission of the said last-mentioned offence and after such damage and injury were done to the plaintiffs as aforesaid, to wit, on the said — day of &c. [*day of his going before the justice*] did go before the said J. P. Esq. then being a justice of the peace, assigned to keep the peace of our said lady the queen, and to hear and determine felonies, trespasses and other misdemeanors committed in the West Riding of the said county, and in the hundred, [wapentake and division,] aforesaid, and residing near and having jurisdiction over the place where the said last-mentioned offence was so committed as aforesaid, and then submitted himself to the examination of the said J. P. so being such justice as aforesaid, touching the circumstances of the said last-mentioned offence, and then became bound by recognizance before the said J. P. Esq. so being such justice, to prosecute the offenders when apprehended, (such offenders being then unknown,) whereof the inhabitants of the said hundred, [wapentake and division,] afterwards, to wit, on the day and year last aforesaid had notice. Whereby and by force of the statute in such case made and provided, an action hath accrued to the plaintiffs, being the persons damnified by the said offence, to recover against the said inhabitants of the said hundred, [wapentake and division,] full compensation for their damages by them sustained by such demolition and destruction of the said [barn,] roofs and doors, and by such demolition and destruction of the said fixtures, furniture and goods of the plaintiffs, then being in the said last-mentioned barn as aforesaid. Yet the said inhabitants, although often requested so to do, have not, nor hath either or any of them, at any time hitherto yielded any compensation, or made any satisfaction or amends to the plaintiffs for the damages by them the plaintiffs sustained as aforesaid; but to do this the defendants and the other inhabitants of the said hundred, [wapentake and division,] have hitherto altogether neglected and refused, and still do neglect and refuse, contrary to the form of the statute in such case made and provided.

By PARTY
GRIEVED.

Commencement as ante, 15.] For that whereas heretofore and within three calendar months next before the commencement of this suit, to wit, on &c., For destroying
the goods of the

By PARTY
GRIEVED.
plaintiff in the
warehouse of
another person.
(1)

at &c, divers persons did unlawfully, riotously and tumultuously assemble together to the disturbance of the public peace, and being so assembled did then and there unlawfully and feloniously with force and arms demolish and destroy a certain warehouse there, to wit, the warehouse of one B. B. there situate and being, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity; and the plaintiff avers that the said offenders did then and there at the same time unlawfully damage and destroy to a large amount, to wit, to the amount of £500, certain furniture and goods of the plaintiff, to wit, [*specify them*] then and there being in the warehouse of the said B. B.; * and the plaintiff further saith, that he being the person damnified by the said last-mentioned offence, and having knowledge of the circumstances thereof, did, in pursuance of the said statute in such case made and provided, within seven days after the commission of the said offence, to wit, on &c., go before one of her majesty's justices of the peace residing near and having jurisdiction over the place where the said last-mentioned offence was committed, to wit, G. G. Esq., and did then in further pursuance of the said statute, state upon oath before such justice, that he did not know the names or name of the offenders or offender, or any or any one of them, and the said plaintiff did then in further pursuance of the said statute submit to the examination of such justice as aforesaid touching the circumstances of the said offence; and the said plaintiff did then in further pursuance of the said statute become bound by recognizance before such justice to prosecute the offenders when apprehended, whereof the inhabitants of the hundred aforesaid afterwards, to wit, on the day and year last aforesaid had notice. Yet the said inhabitants (although often requested so to do) have not nor hath any or any one of them at any time hitherto yielded full or any compensation to the said plaintiff for the damage so done as aforesaid, but to do the same have hitherto altogether neglected and refused and still do neglect and refuse, contrary to the form of the statute in such case made and provided.

The like, where
the property
was in the care
of a servant.

Proceed as in the last form to the asterisk, and then as follows:] And the plaintiff further saith, that A. B., at the time of the commission of the said last-mentioned offence, was the servant of him the plaintiff, and then had the care of the said furniture and goods so damaged and destroyed as aforesaid, and that the said A. B. did, in pursuance of the statute in such case made and provided, within seven days after the commission of the said last-mentioned offence, to wit, on &c., go before one of her majesty's justices of the peace residing near and having jurisdiction over the place where the said last-mentioned offence was committed, to wit, G. G. Esq., and did then in further pursuance of the said statute, state upon oath before such justice, that he the said A. B. did not know the names or name of the offenders or offender, or any or any one of them, and the said A. B. did then in further pursuance of the said statute submit [*as in the last precedent to the end, stating A. B. to have become bound instead of the plaintiff.*]

(1) See the sections of the statute, *ante*, framing the declaration. This and the following form were not in the last edition.

DECLARATIONS IN TROVER.

Commencement as ante, 13.] For that whereas the plaintiff, heretofore, to wit, on &c. was lawfully possessed, as of his own property, (b) of certain [cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money,] goods and chattels, to wit, [ten horses, ten mares, ten geldings, two bulls, ten cows, &c. (c) stating the different descriptions of the cattle,] and a certain indenture of release, (e) bearing date the — day of —, purporting to be made between E. F. of the one part and G. H. of the other part, and purporting to be a conveyance from the said E. F. to the said G. H. of certain tenements therein mentioned; and a certain other deed, purporting to be a mortgage of certain tenements by the said E. F. to the said G. H. and of a certain indenture of lease (f) bearing date &c. and made between one J. K. of the first part and one L. M. of the other part, by which said last-mentioned indenture the said J. K. demised to the said L. M. certain tenements therein mentioned, for a certain term therein also mentioned and yet unexpired; and a certain writing obligatory, commonly called a bond, sealed with the seal of one N. O. whereby the said N. O. became bound to the plaintiff in the penal sum of £100, and then still being in full force, [and a certain bill of exchange in writing, made and drawn by one E. F. upon and accepted by the defendant, bearing date heretofore, to wit, the — day of —, whereby the said E. F. requested the defendant, — months after the date thereof, to pay to the plaintiff or his order the sum of £—, and a certain other bill of exchange, accepted by the defendant, for the payment by the defendant of a certain sum of money, to wit, the sum of £—, at a certain day therein mentioned and now past; and a certain promissory note, in writing, made and drawn by one E. F. whereby the said E. F. promised to pay to the plaintiff or his order a certain sum of money, to wit, the sum of —, at a certain time therein mentioned, and now past; and divers, to wit, five notes of the Governor and Company of

DECLARATIONS
IN TROVER.

Common count
in trover, for
cattle, deeds,
bonds, bills and
notes, bank
notes, money
and goods. (a)
Cattle.
Deeds. (d)
Release.
Mortgage.

Bond.
Bills. (g)

Notes.

Bank notes.

(a) As to the action of trover in general, see *ante*, vol. i. 163; 2 Saund. 47, note; Bac. Ab. Trover, C. D. Action on the Case, Trover; *ante*, "Detinue," 428. See forms, 2 Lutw. 1537; 1 Rich. C. P. 134; 2 Rich. C. P. 161; Plead. Ass. 507, 509; and see a form against baron and feme for conversion by feme before marriage, 2 Rich. C. P. 162. See 3 B. & A. 685.

(b) As to this allegation, see 7 T. R. 394, 399; 2 Saund. 47 i, k. In Selw. N. P. 10th edit. 1367, n 8, it is said that the omission is aided by verdict, but not by judgment by default.

(c) As to the description of the property, see *ante*, vol. i.; 2 Stark. 247; 7 Taunt. 642. In trespass for taking "goods, chattels and effects," plaintiff may recover the value of severed fixtures, 4 B. & Ald. 206; but not

so if for taking "goods and chattels" only, *id* Unsevered fixtures are not recoverable in trover; 2 B. & C. 76; 3 D. & R. 255, S. C. But the word *fixtures* does not necessarily mean things affixed to the freehold, and therefore a declaration in trover for *fixtures* will be good after verdict; *Sheen v. Evans*, 7 Dowl. 335.

(d) It is not necessary to state the date of the deed; 1 Wills. 116; Bac. Ab. Trover, F. 1; Bul. N. P. 37; *Ld. Raym.* 276; *Salk.* 654.

(e) See this form of description held good to support "a lease and release," 1 Bing. 45; 7 Moore, 304, S. C.

(f) See the declaration in 3 Wood. Vin. Lec. 106, note (y).

(g) Damages, how calculated, see 3 Campb. 477; 1 Car. & P. 625; 3 Car. & P. 344.

DECLARATIONS IN TROVER.	the Bank of England, commonly called bank notes, for the payment of the sum of £5 each; and divers, to wit, twenty pieces of the current coin of this realm, called sovereigns [or, "half-sovereigns, crowns, half-crowns, shillings, &c."] and of a certain ship or vessel, with her boats, tackle, sails, furniture, stores and appurtenances; (i) and divers, to wit, twenty tables, twenty chairs, &c. [<i>specifying the goods, and avoiding any repetition of the same articles, and describing each as generally as possible, omitting the quality, as "mahogany, silver, &c." and if they be very numerous, then, to avoid the risk of omitting the specification of some articles, add "500 other articles of household furniture, 500 other articles of kitchen utensils, 500 other articles of wearing apparel, 500 other articles of farming utensils, and 500 other articles of garden utensils,"</i>] of great value, to wit, of the value of £——. (l) And being so possessed, the plaintiff afterwards, to wit, on the day and year [first] above mentioned, casually lost the said [cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, and money,] goods and chattels, out of his possession; and the same afterwards, to wit, on the day and year [first] aforesaid, came to the possession of the defendant by finding. Yet the defendant, well knowing the said cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and chattels, to be the property of the plaintiff, and of right to belong and appertain to him, but contriving and intending to deceive and defraud the plaintiff in this behalf, hath not as yet delivered the said cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and chattels, or any or either of them, or any part thereof to the plaintiff, although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, converted and disposed of the said cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and chattels, to his own use.* To the damage, &c.
Money, (h)	
Goods. (k)	
The loss.	
The finding.	
The conversion.	
Second count in trover.	[<i>If a second count in trover be inserted in the declaration for the same property, the description should not be repeated, but the declaration should be for "other cattle, goods and chattels, of the like number; quantity, quality, description and value, as those in the said [first] count mentioned."</i>] [<i>Conclude, To the plaintiff's damage, &c.</i>]
Statement of special damage.	<i>At the asterisk insert statement of special damage, if any, as thus:]</i> By means of which premises, and for want of the use of the said horses and of the said several articles which then were farming utensils, and could and might and otherwise would have been used by the plaintiff in ploughing, rolling, harrowing and sowing certain land in the possession of the plaintiff, with corn, grain and other seeds, he the plaintiff was then hindered and prevented from so doing, and thereby the said land remained and continued

(h) This has been the usual description; 2 Rich. C. P. 161. Money, in an indictment, is now described thus, "*with force and arms, at &c., thirteen pieces of the current coin of this realm, called sovereigns, of the value of thirteen pounds, of the monies of the said plaintiff, then and there being found, feloniously did steal, take and carry away.*" When trover lies for, and how to describe money, see 5 B. & Ald. 652; 1 D. & R.

282, S. C.

(i) See Morgan's Precedents for a form in trover for a ship, &c; 5 Bar. & Ald. 948, and 1 Cbit. Gen. Practice, 86, as to what is intended under the term *appurtenances* of a ship.

(k) As to the mode of describing them in general, see *ante*, vol. i.

(l) The property must be described to be of some value; 4 B. & Ald. 271.

uncultivated and unsown for a long time, to wit, hitherto, and thereby the plaintiff hath lost and been deprived of all the profits, benefits and advantages that he might and otherwise would have derived, acquired and received from so cultivating and sowing his said land with corn, grain and seed as aforesaid, and hath been and is by reason of the premises greatly injured and impoverished in his circumstances.

DECLARATIONS
IN TROVER.

Commencement as ante, 19.] For that whereas the said E. F. before he became a bankrupt, to wit, on &c., (n) was lawfully possessed, as of his own property, of &c., [*state the property as in the above form*] to wit, of the value of £——, and being so possessed, the said E. F. afterwards, and before he became a bankrupt, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession, and the same then came to the possession of the defendant by finding. Yet the defendant, well knowing the said goods and chattels to be the property of the said E. F. before he became a bankrupt, and of right to belong and appertain to the plaintiff as assignee as aforesaid, after the said bankruptcy, but contriving and intending to injure the said E. F. before he became a bankrupt, and the plaintiff as assignee as aforesaid, since the said bankruptcy, in this behalf, hath not, although often requested so to do, as yet delivered to them, or either of them, the said goods and chattels, or any or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, and afterwards, and since the said bankruptcy, (o) to wit, on the —— day of ——, A. D. ——, converted and disposed thereof to his own use. [*The following count is usually inserted when assignees sue in trover, and being for a different cause of action, is no infraction of Reg. Gen. Hil. T. 4 W. 4, reg. 5.*]

By assignees of a bankrupt. First count, on bankrupt's possession, and a conversion after the bankruptcy. (m)

And whereas the plaintiff, as such assignee, after the said E. F. became a bankrupt, to wit, on &c., was lawfully possessed of certain other goods and chattels, to wit, of the like number, quantity, quality, description and value, as the said goods and chattels in the said first count mentioned, as of the property of the plaintiff, as such assignee as aforesaid; and being so possessed thereof, the plaintiff afterwards, to wit, on &c. last aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same afterwards, to wit, on &c., last aforesaid, came to the possession of the defendant by finding. Yet the defendant, well knowing the said last-mentioned goods and chattels to be the property of the plaintiff as such assignee, and of right to belong and appertain to him as such assignee, but contriving, and fraudulently intending to injure the plaintiff as such assignee, hath not, although often requested so to do, delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof to the plaintiff, but hath hitherto wholly neglected and refused so to do; and afterwards, to wit, on &c., last aforesaid, converted and disposed thereof to his own use. To the damage of the plaintiff as such assignee as aforesaid of £——, and thereupon he brings suit, &c.

Second count, on the assignee's possession. (p)

(m) See a form, 1 Rich. C. P. 472. If there was a conversion before the bankruptcy, add a count accordingly, stating it.

(n) It is usual to insert a day before he became a bankrupt.

(o) This allegation will compel the plaintiff to prove a conversion after the bankruptcy; *Edwards v. Hooper*, 12 L. J. R., N. S., Ex. 304.

(p) 2 Rich. C. P. 161; Morg. 453.

DECLARATIONS
IN TROVER.

By the assignee of an insolvent debtor, on a possession and conversion before insolvent's petition.

Commencement as ante, 20.] For that whereas the said E. F. heretofore, and before the granting of any order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said E. F. according to the form of the statute in such case made and provided, and before the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, and before the plaintiff became assignee as aforesaid, to wit, on &c., was lawfully possessed, as of his own property, of certain goods and chattels, to wit, [*here enumerate the goods, &c.*] of great value, to wit, of the value of £—; and being so possessed thereof, the said E. F. afterwards, and before the granting of any such order by the Court for the Relief of Insolvent Debtors as aforesaid, and before the plaintiff became assignee as aforesaid, to wit, on &c., aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, and before the granting of any such order by the Court for the Relief of Insolvent Debtors as aforesaid, and before the plaintiff became assignee as aforesaid, to wit, on &c. aforesaid, came to the possession of the defendant by finding. Yet the defendant, well knowing the said goods and chattels to be the property of the said E. F., and of right to belong and appertain to him, but contriving and fraudulently, craftily and subtly intending to defraud and injure the said E. F. before the granting of any such order by the Court for the Relief of Insolvent Debtors as aforesaid, did not deliver the said goods and chattels, or any or either of them, or any part thereof to the said E. F., although often requested so to do, and afterwards,* and before the granting of any such order by the Court for the Relief of Insolvent Debtors as aforesaid, and before the plaintiff became assignee as aforesaid, to wit, on &c. aforesaid, converted and disposed of the said goods and chattels to his the defendant's own use, and he never hath delivered the same to the plaintiff, assignee as aforesaid.

Second count, on insolvent's possession, with a conversion after plaintiff was assignee.

*Same as the first count to the *, and then conclude thus:]* and after the granting of an order by the Court for the Relief of Insolvent Debtors for vesting the estate and effects of the said E. F., and after the plaintiff became assignee as aforesaid, and after the estate and effects of the said E. F. became vested in the plaintiff as such assignee as aforesaid, and before the commencement of this suit, to wit, on &c. converted and disposed of the said last-mentioned goods and chattels to his the defendant's own use.

Third count, on the assignee's possession, and a conversion afterwards.

And whereas also the plaintiff, as such assignee as aforesaid, afterwards, and after the granting of an order by the Court for the Relief of Insolvent Debtors, for vesting the estate and effects of the said E. F., and after the same became vested in the plaintiff as such assignee as aforesaid, and before the commencement of this suit, to wit, on &c., was lawfully possessed as of his property, as such assignee as aforesaid, of certain other goods and chattels, of the like number, quantity, quality, description and value, as the said goods and chattels in the said first count mentioned; and being so possessed thereof, the plaintiff afterwards, to wit, on the day and year last aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same afterwards, to wit, on &c., last aforesaid, came to the possession of the defendant by finding. Yet the defendant, well knowing the said last-mentioned goods and chattels to be the property of the plaintiff

as assignee as aforesaid, and of right to belong and appertain to him as assignee as aforesaid, but contriving and intending to deceive, defraud and injure the plaintiff as such assignee as aforesaid, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof to the plaintiff, although often requested so to do, and afterwards, to wit, on the day and year last aforesaid, converted and disposed of the said last-mentioned goods and chattels to his the defendant's own use. To the damage of the plaintiff as such assignee as aforesaid of £—; and thereupon he brings suit, &c.

DECLARATIONS
IN TROVER.

Commencement as ante, 20.] For that whereas E. F. in his life-time, to wit, on &c., was lawfully possessed of divers goods and chattels, to wit, &c. [*describe the goods as ante, 639,*] of great value, to wit, of the value of £—, as of his own property and being so possessed thereof, the said E. F. afterwards, in his life-time, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, came to the possession of the defendant by finding. Yet the defendant, well knowing the said goods and chattels to be the property of the said E. F. in his life-time, and of right to belong and appertain to the said E. F. in his life-time, and to the plaintiff as executor as aforesaid, after the decease of the said E. F., but contriving and intending to deceive and defraud the said E. F. in his life-time, and the plaintiff as executor as aforesaid, since the death of the said E. F. in this behalf, did not deliver the said goods and chattels, or any of them, or any part thereof, to the said E. F. in his life-time, nor hath he as yet delivered the same, or any of them, or any part thereof, to the plaintiff, executor as aforesaid, since the death of the said E. F. (although often requested so to do*) and the defendant afterwards, and in the life-time of the said E. F. to wit, on &c. aforesaid, converted and disposed of the said goods and chattels to his own use.

By an executor
for a trover and
conversion in
the life-time o.
the testator. (q)

When the trover was in the life-time of the testator, but the conversion after his death, the count runs as above to the statement of the conversion at the asterisk, and then as follows :] And the defendant afterwards, and after the death of the said E. F. to wit, on &c., aforesaid, converted and disposed of the said goods and chattels to his own use.

Second count,
on a trover in
life-time of tes-
tator, and con-
version after his
death. (r)

And whereas also the plaintiff, as executor as aforesaid, afterwards, and after the death of the said E. F. to wit, on &c. was lawfully possessed of divers other goods and chattels of the like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned, as of his property as such executor as aforesaid, and being so

Third count, for
trover, and
conversion after
testator's
death. (s).

(q) See Lil. Ent. 70; 1 Mall. 121. It is in general sufficient to insert in the declaration the above count and the next but one; see 2 Saund. 47 k; 10 East, 293; 2 Taunt. 116. Indeed, when the conversion has been since the death, the last count will suffice; 2 Saund. 116.

(r) This count, though sometimes added, see 4 T. R. 277, seems in no case necessary, and the next will suffice; see 10 East, 293; 2

Taunt. 116.

(s) See forms, Herne, 87; Latch, 253. The property of the goods draws to it a possession in law, therefore an executor may declare on his own possession "as executor," though in fact he never has had possession; 2 Saund. 47 k; 10 East, 293; 2 Taunt. 116. See *supra*, note (q); as to this count in general, see 2 Saund. 47 k.

DECLARATIONS
IN TROVER.

possessed thereof, the plaintiff afterwards, to wit, on &c., last aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same then came to the possession of the defendant by finding. Yet the defendant, well knowing the said last-mentioned goods and chattels to be the property of the plaintiff as such executor as aforesaid, and of right to belong and appertain to the plaintiff as such executor as aforesaid, but contriving and fraudulently intending to deceive and defraud the plaintiff as such executor as aforesaid in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any part thereof, to the plaintiff, (although often requested so to do,) and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and afterwards, to wit, on the day and year last aforesaid, converted and disposed of the said last-mentioned goods and chattels to his own use. [*Conclude, to the damage of the plaintiff, "as executor," and with the profert as ante, 22.*]

By an administrator. First count on intestate's possession. (t)

Commencement as ante, 22.] For that whereas the said E. F. in his life-time, to wit, on &c., was lawfully possessed, as of his own property, of divers goods and chattels, to wit, &c. [*describe the property as ante, 639.*] of great value, to wit, of the value of £——, and being so possessed thereof, the said E. F. afterwards, to wit, on the day and year aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, came to the possession of the defendant by finding. Yet the defendant, well knowing the said goods and chattels to be the property of the said E. F. in his life-time, and at the time of his death, and after his decease, of right to belong to the plaintiff as administrator as aforesaid, [to which plaintiff* after the death of the said E. F. to wit, on &c., aforesaid, administration of all and singular the goods, chattels, and credits which were of the said E. F. deceased, at the time of his death, who died intestate, by — by Divine Providence, [Archbishop of Canterbury, Primate of all England and Metropolitan,] in due form of law was granted ;] but contriving and fraudulently intending craftily and subtly to deceive and defraud the said E. F. deceased, in his life-time, and the plaintiff as administrator as aforesaid since the death of the said E. F. in this behalf, did not deliver the said goods and chattels, or any of them, or any part thereof, to the said E. F. in his life-time, nor hath he as yet delivered the same, or any of them, or any part thereof, to the plaintiff, administrator as aforesaid, since the death of the said E. F. (although often requested so to do.)* And the defendant afterwards, and in the life-time of the said E. F. to wit, on &c., aforesaid, converted and disposed of the said goods and chattels to his own use.

Grant of administration. (u)

Second count, on a trover in the life-time of intestate, and conversion after his death. (x)

When the trover was in the life-time of the intestate, but the conversion after his death, the count runs as above to the statement of the conversion at the asterisk, and then proceed as follows :] And the defendant afterwards, and after the death of the said E. F. to wit, on &c., converted and disposed of the said goods and chattels to his own use.

(t) As to the counts on the intestate's and the administrator's possession, see last note and note (g), *ante*, 643 ; and 2 Saund. 138, n. 2 ; by *baron* and *feme*, executrix or administratrix ; 1 Salk. 114 ; 1 Lil. Ent. 70 ;

Bac. Ab. Detinue, A.

(u) See statements of grant of administration, *ante*, 22 to 26, 77 to 80.

(x) See *ante*, 643, note (r).

And whereas also the said E. F. in his life-time, to wit, on &c., aforesaid, was lawfully possessed of divers other goods and chattels of the like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned, as of his own property, and being so possessed thereof, the said E. F. afterwards, to wit, on the day and year aforesaid, died so possessed thereof, after whose death, to wit, on the day and year last aforesaid, the said goods and chattels came to the possession of the defendant by finding, and afterwards, to wit, on &c., administration was granted to the plaintiff as aforesaid, [or if this be the first count, state the administration fully, as ante, 644.] Yet the defendant, well knowing the said goods and chattels to be the property of the said E. F. in his life-time, and at the time of his death, and to belong to the plaintiff as administrator as aforesaid after the death of the said E. F., but contriving and intending to defraud the plaintiff as administrator as aforesaid in this behalf, hath not as yet delivered the same, or any of them, or any part thereof, to the plaintiff, administrator as aforesaid, and afterwards, to wit, on &c., converted and disposed of the same to his own use, to the plaintiff's damage, as administrator as aforesaid, of £—, and therefore he brings suit, &c. [Add proferat as ante, 25.]

DECLARATIONS
IN TROVER.

Third count, on a trover, after the intestate's death, and before grant of administration. (y)

This count is similar to that at the suit of an executor, ante, 641, inserting the word "administrator," instead of "executor," and as the general property of the goods draws to it a possession in law, this count may be supported, though the administrator may never have had actual possession; 2 Saund. 47 k; ante, 643, note (s).

Fourth count, on possession of the administrator, and conversion after the death. (z)

Commencement as ante, 20 or 22.] For that whereas the defendant, within six calendar months before the commencement of this suit, took upon himself the administration of the estate and effects of the said E. F., deceased; and the plaintiff heretofore and in the life-time of the said E. F., to wit, on &c., was lawfully possessed, as of his own property, of certain goods and chattels, to wit, [here specify them] of great value, to wit, of the value of £—, and being so possessed thereof, the plaintiff afterwards, and in the life-time of the said E. F., deceased, to wit, on the day and year aforesaid, casually lost the same out of his possession, and the same afterwards, and in the life-time of the said E. F., to wit, on the day and year aforesaid, came to the possession of the said E. F. by finding; Yet the said E. F., well knowing the said goods and chattels to be the property of the plaintiff, and of right to belong and appertain to him, afterwards and within six calendar months before his the said E. F.'s death, to wit, on &c., converted and disposed of the said goods and chattels to his the said E. F.'s own use, to the damage of the plaintiff of £—, and therefore the plaintiff, by virtue of the statute in such case made and provided, brings his suit against the defendant as such executor [or "administrator"] as aforesaid.

Against an executor or administrator for a conversion by a testator or intestate within six months of his death. (a)

(y) Com. Dig. Administration, B. 10; 2 Rol. Ab. 554. See *Thorpe v. Stallwood*, 12 L. J. R., N. S., Q. B., 241.

(z) See form, *Herne*, 87.

(a) The 3 & 4 W. 4, c. 42, s. 2, gives this

action, see enactment, *ante*, vol. i. p. 79, 80. This form was not in the last edition, and see a new form at the suit of an executor for a trespass to the real estate of the testator, *post*, 663.

DECLARATIONS IN REPLEVIN.

DECLARATIONS
IN REPLEVIN.

Declaration in
replevin in
Q. B. and C. P.
for goods or
standing corn.
(a)

In the Queen's Bench, [or "Common Pleas."] (b)

On the — day of —, (c) in — Term, — Vict. and A. D. —.

— (to wit.) (d) C. D., the defendant in this suit, was summoned to answer A. B., the plaintiff in this suit, of a plea, wherefore he took the cattle, [or "the goods and chattels," or "the corn,"] of the plaintiff, and unjustly detained the same against sureties and pledges, until &c., and thereupon the plaintiff, by E. F. his attorney, complains. For that the defendant, on the — day of —, A. D. —, (e) in the parish of —, in the county of —, in a certain dwelling-house there, (f) [or *if on land*, "in a certain close there, called —," or "common there, called —," (g)] took the cattle, (h) [or "goods and chattels,"] to wit, — (i) of the plain-

(a) As to this action in general, *ante*, vol. i. Index. *Replevin*; and as to the declaration in replevin, see Wilkinson on Replevin; Com. Dig. Pleader, 3 K. 10; Bac. Ab. Replevin; 8 Went. Index, ccix.; 2 Saund. 194 a, 282, 310; Boote's Suit at Law, 237; Morg. 590; 2 Rich. C. P. 344, 347, 368; Plead. Assist. 463, 471, 475, 479.

(b) The Uniformity of Process Act, 2 W. 4, c. 39, does not extend to actions of *replevin* removed into either of the superior Courts.

(c) As to the title of the term, see *ante*, 11, note (f). After the removal of a replevin cause, the declaration must be intituled of the term in which the writ is returnable, or that of the appearance; 5 Taunt. 771; 1 Marsh. 341, S. C.

(d) The venue of this action is local, and the place is material and traversable; 1 Saund. 347, note 1; see *infra*, note (f').

(e) The precise day is not material. The plaintiff may, in the same declaration, count for several takings, part at one day and place, and part at another day and place; F. N. B. 68.

(f) The action of replevin requires more certainty in the description of the place where the distress was taken than that of trespass, the place being material and traversable, (Hob. 16; Willes, 475; 2 Wils. 354; 8 Wentw. 142, 144; 2 M. & P. 78;) and if the defendant plead *non cepit*, and the plaintiff cannot prove a caption, or that the defendant had the cattle, &c. in the place stated in his declaration, he will be nonsuited, (1 Stra. 507, 508; 2 Mod. 199; 1 Saund. 347, n. 1, *acc.*; 2 Wils. 354; Gilb. 3d edit. 166, 167; *semble contra*;) and if the place be omitted, the defendant may demur; 2 Wils. 354. See the form of demurrer, 8 Wentw. 142, 143; and it is not sufficient merely to state that the caption was made in a parish or town, but it is usual to add that the cattle, &c. were taken in a certain place there, called, &c.; Cro.

Eliz. 896; Hob. 16; Moore, 678; 1 Brownl. 186; 1 Sid. 9, 10, 20; Carth. 186; Willes, 475; 2 Wils. 354; 8 Wentw. 142, 144; and in a case, where the declaration alleged the taking to be "in the parish of A. in the county of Kent, in a certain close there," it was considered bad on special demurrer, for not setting out the name of the close or its abutments; 2 M. & P. 78. If the particular place be omitted, the objection will be aided by the defendant's pleading over, or after verdict; *id. ibid.*; Willes, 476. If the defendant lead or have the cattle, &c. through or in a close or place different to that in which they were originally taken, the plaintiff may state the caption to have been in either, though it is more usual to insert the place where the cattle were first taken; 2 Wils. 354; 1 Saund. 347, n. 1; Com. Dig. Pleader, 3 K. 13. If several cattle be taken, some in one place and some in another, it should be shown in the declaration how many were taken in each; Com. Dig. Pleader, 3 K. 10.

(g) It seems necessary to state the name of the close or its abutments; 2 M. & P. 78.

(h) If *standing corn*, &c. be taken under the 11 Geo. 2, c. 19, s. 8, the description will be as follows: "in a certain field there, called —, took the corn of the said plaintiff, to wit, — acres of standing wheat, there then growing and being, and divers, to wit, — cart loads of other wheat of the said plaintiff, there then also being, of great value, to wit, &c. *ut supra*." If fixtures be taken, say, divers "goods, chattels and effects;" see 4 B. & A. 206; 4 T. R. 504.

(i) The description and number of the cattle or goods taken should be stated with certainty: as to the degree of certainty, see 2 Saund. 74 b; Rep. temp. Hardw. 119; 2 Stra. 1015; Com. Dig. Pleader, 3 K. 10; Bac. Ab. Replevin; 7 Taunt. 642; 1 Moore, 386, S. C.; *ante*, vol. i. A declaration for taking divers "goods and chattels" of plaintiff,

tiff, (*k*) of great value, to wit, of the value of £——, (*l*) and unjustly detained the same, against sureties and pledges, until &c. (*m*) Wherefore the plaintiff saith that he is injured, and hath sustained damage to the amount of £——, (*n*) and thereupon he brings his suit, &c.

DECLARATIONS
IN REPLEVIN.

In the County Court of ——.

In the County Court } (to wit.) C. D. was summoned to answer A. B. of The like in a
of —— } a plea, wherefore he took the cattle, [or "the goods County Court:
and chattels," or "the corn,"] of the said A. B., and unjustly detained the (*o*)
same against sureties and pledges, until &c., and thereupon the said A. B.,
by E. F. his attorney, complains. For that the defendant on the —— day
of ——, A. D. ——, in the parish of ——, in the county of ——, and within
the jurisdiction of this Court, (*p*) in a certain dwelling-house there, [or if
on land, "in a certain close, called ——," or "in a certain common there,
called ——,"] took the cattle, or "goods and chattels," or "the corn,"] to
wit, &c. [*set them out with particularity*] of the plaintiff, of great value, to
wit, of the value of £——, and unjustly detained the same against sureties
and pledges, until &c. Wherefore the plaintiff saith that he is injured, and
hath sustained damage to the amount of [£50, (*q*)] and thereupon he brings
suit, &c.

without specification or enumeration, is bad for uncertainty, and though judgment pass by default for plaintiff, the defect is not cured by the statute of jeofails, 4 Anne, c. 16; 7 Taunt. 642; 1 Moore, 386, S. C.

(*k*) The property must be correctly stated, and several persons having a distinct interest cannot join; Com. Dig. Pleader, 3 K. 10; ante, vol. i. 183.

(*l*) It is not necessary in replevin in the *detinuit*, which is now the usual form of action, to state the price or value of the cattle or goods; see the reason, 2 Saund. 320, note 1; *aliter*, if the declaration be in the *detinet*, Com. Dig. Pleader, 3 K. 10.

(*m*) This is the proper form when the cattle have been replevied; Com. Dig. Pleader, 3 K. 10. If the place where the cattle were

first taken be doubtful, it has been the practice here to insert another count, stating the caption to have been in any place where it can be proved the defendant *had* or *led* the cattle.

(*n*) Any sum sufficient to cover the amount of the damages really sustained.

(*o*) See forms, 2 Rich. C. P. 346; Co. Ent. 314 b., and the notes to the last form, which are applicable.

(*p*) As to the necessity for this allegation, see Co. Ent. 314 b; 2 Rich. C. P. 346; 1 Saund. 74, n. 1.

(*q*) In replevin by *plaint* the sheriff may hold plea in his County Court to any amount, though above forty shillings, by virtue of the statute of Marlbridge; 2 Inst. 139, 312; 2 Rich. C. P. 347.

DECLARATIONS IN TRESPASS.

COMMENCE-
MENT AND CON-
CLUSION.

COMMENCEMENT AND CONCLUSION.

Commencement and conclusion in Q. B., C. P. or Exchequer. In the Queen's Bench, [or "C. P.," or "Exchequer of Pleas."] The — day of —, A. D. —.

—, (to wit.) (a) A. B., (the plaintiff in this suit,) by — his attorney, complains of C. D., (the defendant in this suit,) who has been summoned to answer the plaintiff in an action of trespass. For that (b) the defendant on the — day of —, in the year of our Lord —, (c) with force and arms, &c. made an assault, (d) &c. [here state the trespass according to the facts, and

(a) In trespass to persons or to personal property the venue is transitory, unless in actions against justices of the peace, constables, &c.; *ante*, vol. i. Index, tit. *Venue*; 21 Jac. 1, c. 12. But in trespass to real property the venue is local, and in such an action, if there have been any removal of a personal chattel, it was usual, before the pleading rules Hil. T. 4 W. 4, reg. 5, to add a count *de bonis asportatis*, in order to avoid the danger of misdescription in the first count; 1 T. R. 479.

(b) The word "*whereas*," or "*wherefore*," the defendant committed the trespass, would in Q. B. be bad on special demurrer; *ante*, vol. i.; 2 Salk. 636; 1 Stra. 621; Com. Dig. Pleader, C. 86; Andr. 282. But when the proceedings were by original, or if in C. P. the writ used to be set out at length, the count-part may be aided by the prior recital of the supposed writ, and even a special demurrer could not then be supported; *id. ibid.*; 1 Wils. 99; Barnes, 452; 2 Wils. 203. But Reg. Gen. Hil. T. 2 W. 4, r. 4, directs that long recitals of the writ shall be abandoned.

(c) In trespass for an assault, a declaration charging "that the defendant, on such a day, and on divers other days and times, &c. made an assault," would be bad on special demurrer, as one assault cannot be made on different days; 6 East, 391, 395. Though in trespass for debauching a daughter, or for crim. con., the rule is otherwise; 6 East, 391; see *post*, 652, 653. And if the declaration state that the defendant on divers days, &c. assaulted the plaintiff, it would not, it seems, be bad. In trespass to lands, or for cutting down or carrying away trees, or for killing hares, &c. it may be stated that the defendant committed the trespasses on divers days and times, but trespass cannot be laid of loose chattels with a *continuando*, Salk. 638, 639; Bul.

N. P. 86; though it may "*on divers days and times*;" 3 Bla. Com. 212; 1 Ld. Raym. 240; Com. Dig. Pleader, 3 M. 10; 1 Saund. 24, n. 1; *ante*, vol. i. Index, tit. *Time*. Formerly it was usual to declare with a *continuando*, as in 1 Saund. 24; 2 Rich. C. P. 423; but now it is more usual in trespass to land to state, "that the defendant, on such a day, in such a year, and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. committed the trespasses," and the plaintiff may give in evidence any number of trespasses committed during the specified time. If only one day be mentioned, the plaintiff will not be permitted to give evidence of more than one act of trespass, and where the trespasses are stated, as above, to have been committed on divers days and times between such a day and such a day, if the plaintiff intend to give evidence of repeated acts of trespass, he must confine himself to the time in the declaration, and therefore it is in general advisable, in trespass to real property, to lay the first day so far back as to be certainly anterior to the first act of trespass; however, as the precise day is not material in trespass, either to the person, personal or real property, the plaintiff may succeed upon the trial as to any one single act of trespass, though committed prior to the time mentioned in the declaration; Bul. Ni. Pri. 86; 1 Saund. 24, n. 1; 2 Saund. 5, n. 3; Co. Lit. 283 a; Com. Dig. Pleader, C. 19; 1 Stark. 351; *ante*, vol. i. tit. *Trespass*. If there were several trespasses, plaintiff should state them, for if the declaration avers a single act of trespass, which defendant justifies, there can be no new assignment; 7 Taunt. 156.

(d) A trespass should be stated to have been committed *vi et armis*, Com. Dig. Pleader, 3 M. 7; but the omission will be aided unless

as in the subsequent forms, and conclude as follows:] And other wrongs (e) to the plaintiff then did, against the peace of our lady the now queen (f) and to the damage of the plaintiff of £—, (g) and thereupon he brings suit, &c.

COMMENCE-
MENT AND CON-
CLUSION.

Before the pleading rules Hil. T. 4 W. 4, reg. 5, it was usual in trespass as well as other actions, after stating the cause of action, whether an assault or false imprisonment, or other forcible injury, with great particularity, to add one or two other counts more general. But now that rule prohibits more than one count for the same cause of action, and varying counts are inadmissible.

Second or sub-
sequent counts.

I. TO PERSONS.

ASSAULT AND BATTERY.

ASSAULT AND
BATTERY.

Commencement, ante, 648.] For that (i) the defendant, on &c. (k) with force and arms, (l) &c. assaulted (m) and beat the plaintiff; and then with great force and violence (n) seized and laid hold of the plaintiff by his nose; (o) and then plucked, pulled and tore divers large quantities of hair from off the head of the plaintiff; and then with a stick, and with his fists, gave and struck the plaintiff a great many violent blows and strokes on and

For an assault, spitting in face, pulling nose and hair, beating with sticks and fists, pulling down, throwing down, kicking and tearing clothes. (h)

the defendant demur specially, 2 Saund. 81, n. 1; *ante*, vol. i. Index, tit. *Vi et Armis*. When the declaration states a wrong which is the subject of an action of trespass, it is a good count in trespass after verdict, although it contains no allegation of *vi et armis*, and is in point of form framed in case for the consequential injury; *Hudson v. Nicholson*, 5 M. & W. 437.

(e) As to the *alia enormia*, see *ante*, vol. i. Index, tit. *Alia Enormia*; Cro. Jac. 664.

(f) The declaration in trespass should be *contra pacem*, Com. Dig. Pleader, 3 M. 8, but the omission is aided unless the defendant demur specially; *ante*, vol. i. Index, tit. *Contra Pacem*.

(g) Any sum sufficient to cover the amount of the damages, which it may be probable the jury will give.

(h) In using this and the other precedents in trespass, only such parts of them as are really applicable to the particular case should be inserted in the declaration, for it is very injudicious to state a more serious or injurious assault or battery than really occurred and can be proved; see note (o), *infra*; see the forms 9 Wentw. Index, iii. to ix.; and observe the notes to the forms, *ante*, 648. The principal *formal* allegations necessary to be attended to in framing a declaration for an assault or other trespass, are, 1st. The statement of the time when the trespass was committed. 2dly. The insertion of the words *vi et armis*. 3dly. The *venue* or place where the injury was committed, but which since the pleading rules Hil. T. 4 W. 4, is only inserted in trespass to *real* property. 4thly. That the

matter injured was the *property* of the plaintiff, and its *value*. 5thly. The insertion of the words "*alia enormia*." 6thly. The words "*contra pacem*;" and 7thly. The conclusion *ad damnum*, &c. In other respects the declaration in trespass should be a *full* and accurate statement of the injuries in the order in which they were committed, and of all the consequent *damages*; and no allegation should be inserted, unless there be a probability of its being proved in evidence.

(i) The word "*whereas*" would be improper, see *ante*, 648, note (b).

(k) On "*divers days and times*" would not be improper in this case, where the word "*assaulted*" is used, *ante*, 648, note (c); see 6 East, 395. If there were several trespasses, plaintiff should state them; for if the plaintiff in his declaration avers a single act of trespass which defendant justifies, there can be no new assignment; 7 Taunt. 156; *Stammers v. Yearstey*, 10 Bing. 35. As to the utility of a second count, see 1 Campb. 473. The unnecessary introduction of several counts is censured, 1 Bla. Rep. 270; and now is restrained by Reg. Gen. Hil. T. 4 W. 4, reg. 5.

(l) *Supra*, note (d).

(m) This may in some cases be preferable to "*made an assault*," see observations in 6 East, 396; *ante*, 648, note (c).

(n) Insert declaration *vi et armis*, for a *menace per quod*, &c. 2 Lutw. 1428; Regist. 104; 27 Ass. 11; 3 Bla. Com. 119, 120, n.

(o) State only such acts of trespass as can be proved; an over statement, unsupported by evidence, affords ground for ridicule on the part of defendant's counsel.

ASSAULT AND BATTERY.

Damage, that plaintiff became bruised and ill, unable to transact his business, and was put to expense about his cure.(r)

about divers parts of his head, arms and body; and also then with great force and violence shook and pulled about the plaintiff, and cast and threw him down to and upon the ground, and then violently kicked him, and gave and struck him a great many other blows and strokes, [and also then, (p) with great force and violence, rent, tore and damaged the clothes and wearing apparel, to wit, one coat, one waistcoat, one pair of breeches, one cravat, one shirt, one pair of stockings and one hat, of the plaintiff, (q) of great value, to wit, of the value of [£20,] which he then wore]. By means of which said several premises the plaintiff was then greatly hurt, bruised and wounded, and became and was lame, sore and disordered, and so remained and continued for a long time, to wit, hitherto, during all which time the plaintiff thereby suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted, and also thereby the plaintiff was then forced and obliged to, and did necessarily incur and pay, lay out and expend a large sum of money, to wit, the sum of £—, in and about endeavouring to be cured of the bruises, wounds, soreness, lameness and disorder aforesaid, so occasioned as aforesaid.

A count for a common assault.(s)

For that the defendant, on &c. with force and arms, &c. assaulted the plaintiff, and then beat, bruised, wounded and ill-treated him, insomuch that his life was thereby then greatly despaired of, (t) and other wrongs, &c. [*The conclusion is to be as ante*, 649.

For firing a loaded pistol at plaintiff, and wounding him thereby, &c.(u)

For that the defendant, on &c. [*day of assault or about it,*] with force and arms, &c. assaulted the plaintiff, and then beat, bruised, wounded and ill-treated him, and shot off and discharged a pistol, then loaded with gunpowder and leaden bullets, which said pistol, so loaded, he the defendant then held at and against the plaintiff, and thereby and therewith shot, struck and wounded the plaintiff in so grievous a manner that his life was, by means thereof, then greatly despaired of, and by reason of such wounding the plaintiff then became lame, sick and disordered, and continued so lame, sick and disordered for a long time, to wit, from thence hitherto, and was, during all that time, thereby rendered incapable of following and transacting his necessary affairs and business by him during that time to be done, &c. [*Conclude as usual, as ante*, 649.

(p) If there were a substantive and independent injury to *personal* property, it was formerly advisable to state such injury in a distinct count, in order to entitle the plaintiff to full costs, 7 East, 825; Tidd's Pr. 9th ed. 964; but since the 3 & 4 Vict. c. 24, this is unimportant.

(q) A property or possession in the plaintiff must be stated; Com. Dig. Pleader, 3 M. 9.

(r) As to the statement of the special damage, *ante*, vol. i. As to the words "wounding and mayhem," see 1 Ld. Raym. 176; 3 Salk. 115, S. C.; 1 Wils. 5.

(s) If there have been several assaults at different times, for which the plaintiff intends

to proceed, distinct counts should be added for each assault; 1 Saund. 299, n. 6; 1 Campb. 473. But otherwise it is not necessary to insert a count for a common assault, for if the plaintiff prove any part of a special count, he will be entitled to a verdict *pro tanto*, though he fail in proving the residue; Rep. temp. Hardw. 121; 2 Saund. 74 b.

(t) This is the usual form of the count for a common assault, though there have been no battery, see 1 Saund. 14, n. 3; but the words in italics should be omitted where the party was but slightly injured.

(u) The right of action would be merged in the felony, if the defendant *maliciously* shot at plaintiff.

Commencement and conclusion as ante, 648, 649.] For that the defendant, on &c. with force and arms, &c. assaulted the plaintiff in and on board of a certain ship or vessel called the —, then on the high seas, and then with great force and violence struck and knocked the plaintiff down to and upon the deck of the said ship or vessel, and then with his fists, and also with a certain rope, gave and struck the plaintiff a great many violent blows and strokes; and also then, without the license or consent and against the will of the plaintiff, put and placed the plaintiff into irons, and then without any reasonable or probable cause whatsoever kept and continued the plaintiff so in irons and imprisoned as aforesaid for a long time, to wit, for — hours then next following. By means, &c. [*State the damage according to the fact, which may be as in the form, ante, 650.*]

ASSAULT AND BATTERY.

For battery, &c. on board a ship.(x)

For that the defendant, on &c. with force and arms, &c. assaulted the plaintiff, he then being a parishioner and inhabitant, paying scot and bearing lot in the parish of —, in the county of —, and then being about to enter into the vestry-room of and within the said parish, to consult, treat, deliberate and give his vote in a vestry of the inhabitants and parishioners of the said parish, assembled in the said room to treat and deliberate upon and transact certain affairs and business of and concerning the public good and advantage of the said parish, and then pushed and shoved the plaintiff from the said vestry-room, and hindered and prevented the plaintiff from attending and being present at the said vestry assembled in the said vestry-room as aforesaid, whereby the plaintiff was totally hindered, prevented and excluded from attending and being present at the said vestry, and also from consulting and giving his vote there, as such parishioner and inhabitant of the said parish, of and concerning divers important matters and affairs which concerned the public good and advantage of the said parish. [*The second count, before the rule of Hil. T. 4 W. 4, reg. 5, was for a common assault, as ante, 650.*]

For forcibly excluding plaintiff, who was a parishioner and inhabitant, from the vestry-room on a meeting about parish affairs, whereby he was prevented from consulting and giving his vote thereon.

For that the defendant, on &c. with force and arms, &c. assaulted the plaintiff, and then hindered and prevented the plaintiff from entering into a certain building, wherein a certain congregation of persons, dissenting from the church of England, commonly called Quakers, was then assembled for exercising religion, and which it was then lawful for the plaintiff to enter, and then beat and ill-treated the plaintiff, and imprisoned him, and kept and detained him there imprisoned for a great length of time.

For preventing plaintiff from entering a Quaker's meeting-house during the exercise of religious worship.(y)

BATTERY OF WIFE.

Commencement as ante, 19.] For that the said E. on &c. with force

BATTERY OF WIFE.

By husband and wife against husband and wife, for a battery of one wife by the other.(z)

(x) Observe the notes to the forms, *ante*, 648 to 650. This declaration should be framed according to the facts.

(y) As to the offence of disturbing meeting-houses, see 1 Burn, J. Dissenters.

(z) Observe the notes to the forms, *ante*, 648 to 650. The different trespasses are to be described according to the facts, and may

be stated as in the form, *ante*, 649, note (h). Care must be taken to declare only for the personal injury and suffering of the wife, and not to include any statement of an injury, which, in point of law, only affected the husband and not the wife, such as a statement of the battery of the husband, or loss of her service, or expence in her cure, &c. See 1 Salk.

BATTERY OF
WIFE.

and arms, &c. then being the wife of the said C. D., assaulted the said C., then and still being the wife of the said A. B., and then beat, bruised, wounded and ill-treated her, and other wrongs to the said C. (a) then did, against the peace of our lady the queen, and to the damage of the said A. B. and C. (b) his wife, of £——. And thereupon they bring suit, &c.

By husband
alone for the
battery of his
wife, *per quod*,
&c. (c)

Commencement as ante, 648.] For that the defendant, on &c., with force and arms, &c. assaulted E. F., then and still being the wife of the plaintiff, and then violently beat, kicked, bruised, and ill-treated (d) the said E. F., so then being the wife of the plaintiff as aforesaid, insomuch that the said E. F. by means of the premises then became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, whereby the plaintiff during all that time lost and was deprived of all the comfort, benefit and assistance of the said E. F. his said wife, in his domestic affairs, which he might and otherwise would have had; but thereby also the plaintiff was then forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £——, in and about the endeavouring to heal and cure the said E. F. his said wife, of the sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid, and other wrongs to the plaintiff then did, against the peace of our lady the queen, and to the damage of the plaintiff of £——, and thereupon he brings suit, &c.

FOR CRIMINAL
CONVERSATION.

For criminal
conversation *vi*
et armis. (e)

FOR CRIMINAL CONVERSATION.

Commencement as ante, 648.] For that the defendant, on &c., and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. assaulted and ill-treated E., then and still being the wife of the plaintiff, and then debauched and carnally knew her,

119; Com. Dig. Plead. 2 A.; and *Jackson and wife v. Matravens*, Michaelmas term, 26 Geo. 3, vol. xxi. MSS. 379; and *ante*, vol. i. 83; however, the statement of matters in aggravation will in some cases be aided after verdict; 1 Salk. 119.

(a) This allegation appears proper, though *alia enormia eis intulit* is good; Cro. Jac. 664; Com. Dig. Pleader, 2 A. 1.

(b) *Ad damnum ipsorum* is proper; Com. Dig. Pleader, 2 A. 1; and *ante*, vol. i.

(c) Observe the notes to the forms, *ante*, 648 to 650. In this declaration no statement of the personal sufferings of the wife should be included, but the plaintiff should proceed merely for the consequential damage, and he may include counts for a battery, or any other trespass to himself, or to his personal or real property; *ante*, vol. i. 83.

(d) The trespasses are to be described according to the fact, and may be stated as *ante*, 649, n. (h).

(e) See the points relating to this action in Selw. N. P. tit. Adultery; Bul. N. P. 26, 7th edit.; Bac. Ab. Marriage; 3 Bla. Com.

139. The defendant may change the venue; see 10 East, 32. In actions of crim. con. it has always been the practice to bring trespass or case indiscriminately; *Chamberlain v. Haslewood*, 5 M. & W. 517. The action, however, is in effect in case, 6 East, 387, 251, because, 1st, The wrong complained of is not immediate, but consequential, the gist of the action not being the supposed assault on the wife, but the consequent corruption of the body and mind of the wife; 6 East, 389. 2dly, That the plaintiff may declare with a *quod cum*, which is improper in trespass; 2 Salk. 636; 1 Stra. 621. 3dly, That the injury may be stated to have been committed "on divers days and times, &c." which is improper in trespass for an assault; 6 East, 391, 395. 4thly, That the plea of the statute of limitations is not guilty within six years, 2 Burr. 753; 6 East, 387, and not as in trespass, for an assault within four years; 2 Salk. 420. And lastly, that the plaintiff, before the late stat. 3 & 4 Vict. c. 24, was entitled to full costs, though he did not recover 40s. damages; 3 Wils. 319; 1 Salk. 206; 2 Ld.

whereby the plaintiff, for a long space of time, to wit, from the day and year first aforesaid, hitherto, hath wholly lost and been deprived of the comfort, fellowship, aid and assistance of his said wife in his domestic affairs, which he during all that time ought to have had, and otherwise might and would have had, and other wrongs to the plaintiff then did, against the peace of our lady the queen, and to the damage of the plaintiff of £—, and thereupon he brings suit, &c.

FOR CRIMINAL
CONVERSATION.

DEBAUCHING DAUGHTER.

DEBAUCHING
DAUGHTER.

Commencement as ante, 648.] For that the defendant heretofore, to wit, on &c., with force and arms, &c. assaulted, debauched and carnally knew one E., then and from thence hitherto being the daughter and servant of the plaintiff, whereby the said E. then became pregnant, &c. [*Proceed to the end, as in the declaration in case, ante, 484, and conclude as in trespass, ante, 649.*]

For debauching
a daughter and
servant. (f)

BATTERY OF SERVANT.

BATTERY OF
SERVANT.

Commencement as ante, 648.] For that the defendant, on &c., with force and arms, &c. assaulted E. F., then and still being the [daughter and] servant of the plaintiff, and then beat, bruised, wounded and ill-treated the said E. F., insomuch that by means thereof the said E. F. then became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto; during all which time the plaintiff lost and was deprived of the service of his said [daughter and] servant, and of all the benefit and advantage which might and would otherwise have arisen and accrued to him from such service. (h) [*Conclusion as ante, 649.*]

By a master, for
the battery of
his servant per
quod, &c. (g)

FALSE IMPRISONMENT.

FALSE
IMPRISONMENT.

Commencement as ante, 648.] For that the defendant, on &c. with force and arms, &c. assaulted the plaintiff, and then seized and laid hold of him, and with great force and violence pulled and dragged him about, and gave and struck him a great many violent blows and strokes, (k) and also then forced and compelled him to go from and out of a certain dwelling-house into divers public streets, and then forced and compelled him to go in and along divers public streets and highways to a police-office, and then imprisoned the plaintiff, and kept and detained him in prison, without

For an assault,
and compelling
plaintiff to go
through public
streets to a po-
lice-office, and
for false impri-
sonment. (i)

Raym. 831. When it may be doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away or harbouring the wife, it may be advisable to add counts for such injuries, and which may be framed as in the form in Willes, 578 to 580; and it may be advisable in that case to frame the count as *ante*, 483.

(f) See the forms and notes, *ante*, 484, and 2 New Rep. 476; 2 M. & Sel. 436. The first count may be in *trespass* for entering dwelling-house, and there debauching the daughter, with a second count as above.

(g) Observe the notes to the form, *ante*, 648 to 650, and to the form, *ante*, 484, for

debauching a daughter; a person cannot declare for the battery of his child merely in the character of a parent; *ante*, vol. i. 69. If the plaintiff were put to any expense in medical attendance, &c. state such damage as in the form *supra*; and see Sir T. Raym. 259.

(h) See the statement of special damage in the case of *Hodsol v. Stallebras*, 11 A. & E. 301, where it was holden that future damages might be recovered.

(i) Observe the notes to the form, *ante*, 649.

(k) Describe the trespasses according to the facts, which may be as *ante*, 649.

**FALSE
IMPRISONMENT.**

any reasonable or probable cause whatsoever, for a long time, to wit, for — hours [or days] then next following, contrary to law and against the will of the plaintiff, whereby the plaintiff was then not only greatly hurt, bruised and wounded, but was also thereby then greatly exposed and injured in his credit and circumstances. [*It was usual to add the following common count for false imprisonment, and a count for a common assault, as ante, 650; but now the declaration should be confined to one count, unless separate injuries can be proved. Conclude as ante, 649.*]

Common count
for false imprisonment generally. (l)

For that the defendant, on &c., with force and arms, &c. assaulted the plaintiff, and then beat, bruised and ill-treated him, and then imprisoned him, and kept and detained him in prison without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of — hours then next following, contrary to law, (m) and against the will of the plaintiff. [*Add a count for a common assault, as ante, 650, and conclude as ante, 649.*]

II. TO PERSONAL PROPERTY.

**TO CATTLE,
GOODS, &c.**

For chasing and driving off a common plaintiff's sheep, with special damage. (n)

TO CATTLE, GOODS, &c.

Commencement as ante, 648.] For that the defendant, on &c., and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. drove, chased and hurried the sheep, ewes and lambs, &c., to wit, — sheep, — ewes, and — lambs of the plaintiff, of great value, to wit, of the value of £—, then depasturing and being in and upon a certain waste or common, called —, in the parish of —, in the county of —, (o) and then chased and drove the said sheep, ewes and lambs from and off the said common to divers places to the plaintiff unknown, whereby the plaintiff was then not only put to great trouble and expense, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about endeavouring to find his said sheep, ewes and lambs; but also divers thereof, to wit, — sheep, — ewes, and — lambs of great value, to wit, of the value of £—, then died; and others thereof, to wit, — sheep, — ewes, and — lambs of great value, to wit, of the value of £—, then became and were wholly lost to the plaintiff, and the residue of the said sheep, ewes and lambs then became and were greatly damaged and lessened in value.

Second count,
for chasing
sheep or other
cattle generally. (p)

And also for that the defendant, on &c., with force and arms, &c. chased and drove about other the cattle, to wit, — other sheep, — other ewes,

(l) See the notes to the last form and to the form in 1 Saund. 76.

(m) The common conclusion has been contrary to the laws and customs (in the plural) of this realm; but any allusion to laws in the plural, and to any supposed customs, is loose and untechnical.

(n) See forms, 9 Went. Index, ix. Observe the notes to the forms, ante, 648 to 650.

(o) This count is local, and will compel the defendant to confine his justification, if any, to chasing from off the particular common. The next count, (which is transitory, 1 Saund. 220,) used to be added, and would be sufficient without the more special count.

(p) See forms, 9 Went. Index, ix.; Plead. Assist. 488; and observe the notes to the forms, ante, 648 to 650; 1 Saund. 220.

and — other lambs, of the plaintiff, of great value, to wit, of the value of £—, whereby the said last-mentioned sheep, ewes and lambs, being of the value aforesaid, became and were greatly damaged, lessened in value and spoiled. [State the damage to the cattle according to the fact, and which may be as in the last form, and if there be any evidence to support it, it was usual, before Reg. Gen. Hil. T. 4 W. 4, reg. 5, to add a count de bonis asportatis, as below.

To CATTLE,
Goods, &c.

Commencement as ante, 648] For that the defendant, on &c., with force and arms, &c. seized, took and distrained a certain cow, [or "certain goods and chattels, to wit, &c."] of the plaintiff of great value, to wit, of the value of £—, and then impounded the said cow, [or "goods and chattels,"] and kept and detained the same so there impounded for a long time, to wit, for the space of — days then next following, whereby the plaintiff, for and during all that time lost and was deprived of the use and benefit of his said cow, [or "goods and chattels,"] and thereby the same then became and were greatly damaged, lessened in value, and spoiled. [Add a count de bonis asportatis, as follows.

For an illegal
distress. (q)

And also for that the defendant, on the day and year aforesaid, with force and arms, &c. seized, took and drove, [or "led," or if inanimate property, say, "carried away,"] a certain cow, [or "certain goods and chattels, to wit, &c."] [or if fixtures be taken, say, "certain goods, chattels and effects," enumerating them as in trover, ante, 639; but if the goods or cattle have been stated in a prior count, then say, "divers cattle, goods and chattels of the plaintiff, of the like number, quantity, quality, description and value, as the said cattle, goods and chattels, in the said first count mentioned, then found and being of the plaintiff of great value, to wit, of the value of £—, and converted and disposed of the same to his own use. [Conclude with the alia enormia, &c. as ante, 649.

Common count
de bonis asportatis. (r)

Commencement as ante, 648.] For that the defendant, on &c., with force and arms, &c. shot off and discharged a certain gun, then loaded with gunpowder and shot, at and against a certain dog of the plaintiff of great value, to wit, of the value of £—, and thereby and therewith then so greatly shot, hurt and wounded the said dog, that by reason thereof the said dog, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died. [If the mode in which the defendant injured the dog, &c. be doubtful, state the injury more generally, as follows:—And also for that the defendant, on the day and year aforesaid, with force and arms, &c. so greatly hurt and wounded a certain other dog of the plaintiff, of great value, to wit, of the value of £—, that by reason and on account thereof

For shooting a
dog, &c. (s)

Second count.

(q) See forms, 9 Wentw. Index, viii. ix.; Plead. As. 486; Morg. 637; and observe the notes, ante, 648 to 650. When no rent was due or no trespass committed, so that the distress was illegal in its inception, trespass is sustainable; but otherwise, case for an irregular distress is preferred, ante, 533, &c.

(r) Observe the notes, ante, 648 to 650. See 3 & 4 Vict. c. 24, as to the present law

of costs.

(s) See forms, 9 Wentw. Index, ix.; 1 Saund. 82; and observe the notes, ante, 648 to 650. It may be stated that the defendant assaulted the cattle or other animal, but this is not usual; Barnes, 452; 3 Leon. 28; 2 Rich. C. P. 435. Plea thereto, see 11 East, 568.

TO CATTLE,
GOODS, &c.

the same dog afterwards, to wit, on the day and year aforesaid, died, and other wrongs, &c. [*Conclude as ante*, 649.

Trespass for running defendant's cart against plaintiff's horse and killing it.

For that the defendant, on &c. [*day of injury, or about it,*] with force and arms, &c. drove a certain cart, with great force and violence, upon and against a certain horse of the plaintiff of great value, to wit, of the value of £—, and thereby then with one of the shafts, and with other parts of the said cart of the defendant, so greatly pierced, cut, hurt, lacerated and wounded the said horse of the plaintiff, that by reason thereof the said horse, being of the value aforesaid, afterwards, to wit, on &c. aforesaid, died. And other wrongs, &c. [*Conclude as ante*, 649.

TO CARRIAGES.

For running a carriage against the plaintiff's, whereby he was thrown out, and his carriage damaged, and he was put to expense in repairing it, and in medicines, &c. (t)

TO CARRIAGES.

Commencement as ante, 648.] For that the defendant, on &c. with force and arms, &c. drove a carriage, to wit, a curricule, which the defendant was then driving in and along the queen's highway, with great force and violence upon and against a certain other carriage, to wit, a chaise of the plaintiff of great value, to wit, of the value of £—, and in which said chaise the plaintiff was then lawfully riding (u) in and along the said queen's highway, and thereby then greatly broke to pieces, damaged and spoiled the said chaise of the plaintiff. And by means of the premises, he the plaintiff was then cast and thrown with great force and violence out of his said chaise to and upon the ground, and by means of the premises he was then and afterwards forced and obliged to, and did necessarily incur, lay out and expend a large sum of money, to wit, the sum of £—, in and about the repairing and amending the damage so done to the said chaise as aforesaid, and also by means of the premises the plaintiff then became and was greatly bruised, hurt and wounded, and sick, sore, lame and disordered, and so remained and continued for a long time, to wit, for the space of — then next following, and during all that time suffered and underwent great pain, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done, performed and transacted; and was also thereby forced and obliged to incur, pay, lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about endeavouring to be cured of the sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid. [*Conclude as ante*, 649.

For seizing and detaining plaintiff's cart and horse, and converting a halter.

Commencement as ante, 648.] For that the defendant, on &c., with force and arms, &c. stopped and seized a certain horse and cart of the plaintiff of great value, to wit, of the value of £—, and kept and detained the same from the plaintiff for a long time, to wit, for the space of — then next following, and then seized and took from and off the head of the said horse a certain halter of the plaintiff, to wit, of the value of £—, and then carried away the same, and converted and disposed thereof to his own use. [*Formerly a count de bonis asportatis was added as ante*, 655.

(t) See form, 3 East, 593. Observe the forms and notes, *ante*, 648 to 650. The injury and the damage should be stated precisely according to the facts. As to when trespass is

the proper form of action see *ante*, vol. i. p. 144, note (t).

(u) An immaterial averment; 1 Moore, 407.

To SHIPS, &c.

To SHIPS, &c.

Commencement as ante, 648.] For that the defendant, on &c. with force and arms, &c. seized and took a certain barge of the plaintiff of great value, to wit, of the value of £——, and in which said barge or vessel the plaintiff then intended and was about to carry and convey certain goods, chattels and merchandize, for certain freight and reward to be therefore paid to him, and then carried away the said barge or vessel, and kept and detained the same from the plaintiff for a long space, to wit, hitherto, and converted and disposed thereof to his own use, and thereby the plaintiff was hindered and prevented from carrying and conveying the said goods, chattels and merchandize as aforesaid, and thereby lost and was deprived of all the profits, benefit and advantage which might and would otherwise have arisen and accrued to him therefrom. [*Formerly a count de bonis asportatis was added as ante, 655. Conclude as ante, 649.*]

For seizing and detaining plaintiff's barge. (x)

For that the defendant, on &c., with force and arms, &c. impressed, seized, took and carried away one E. F., then being the apprentice and servant of the plaintiff, and also a mate of a certain sloop or vessel, called ——, whereof the plaintiff then was master and part owner, and unlawfully kept and detained the said E. F., so being the apprentice and servant of the plaintiff and mate of the said sloop or vessel as aforesaid, from and out of the service of the plaintiff, without the license or consent and against the will of him the plaintiff, for a long space of time, to wit, for the space of —— then next following, whereby the plaintiff for and during all that time lost and was deprived of the service of the said E. F. and of all the profit, benefit and advantage, which might and otherwise would have arisen and accrued to him from such service; and also thereby the said sloop or vessel was for and during all that time hindered and prevented from proceeding on a certain voyage she was then prepared for and about to make, and the plaintiff was also thereby forced and obliged to and did necessarily lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £——, in and about the obtaining the liberation and regaining the service of the said E. F., so being the apprentice and servant of the plaintiff and mate of the said sloop or vessel as aforesaid.

By the master and part-owner of a ship, for impressing the mate of her, who was also his apprentice, whereby the vessel was hindered from proceeding on a voyage, and plaintiff obliged to expend money in obtaining the mate's liberation. (y)

For that the defendant, on &c., with force and arms, &c. seized and took the boat of the plaintiff of great value, to wit, of the value of £——, then floating and being in the river of ——, in &c., and moored and fastened with a certain rope of the plaintiff, and then unmoored and unloosened the said boat from the said place she was so then moored and fastened to as aforesaid, and thereby put and set the said boat adrift in the said river of —— there, whereby the said boat was damaged, broken to pieces and spoiled, and the plaintiff lost the whole use, profit and advantage of his said boat for a long space of time. [*Second count de bonis asportatis as ante, 655, was formerly added.*]

For setting a barge adrift upon the river Thames, whereby the same became much damaged.

(x) See forms, 9 Wentw. iv. v.; Plead. Ass. 487, 489, 503, 510; 2 Rich. C.P. 420; and see a form where matter of aggravation is stated, 2 M. & S. 77; and observe the

notes, ante, 648, 649.

(y) As to the right of action, see 5 East, 39.

To SHIPS, &c.

For navigating
a vessel against
plaintiff's ves-
sel, and conse-
quent damage.

For that the defendant, on &c. with force and arms, &c. navigated a certain ship or vessel upon and against a certain other ship or vessel of the plaintiff, of great value, to wit, of the value of £1000, and by and with the said first-mentioned ship or vessel so violently struck against the said ship or vessel of the plaintiff, that the same then became and was greatly broken to pieces, damaged and injured, insomuch that the same, by reason of the premises, then sank, and became and was of no use or value to the plaintiff; and by reason thereof divers goods and chattels of the plaintiff, then being on board his said ship or vessel, of great value, to wit, of the value of £2000, then became and were wholly lost to the plaintiff, and thereby the plaintiff then sustained and incurred great trouble and expense, to wit, an expense of £1000, in endeavouring to cause and procure his said ship or vessel and the said goods on board thereof to be saved. (z)

**III. TO REAL
PROPERTY.****To HOUSES, &c.**

For trespass in
dwelling-house,
breaking open
doors, and seiz-
ing goods
therein. (a)

III. TO REAL PROPERTY.**To HOUSES, &c.**

Commencement as ante, 648.] For that the defendant on &c. and on divers other days and times (b) between that day and commencement of this suit, with force and arms, &c. broke and entered a certain dwelling-house of the plaintiff, situate and being in the parish of —, in the county of —, (c) and then made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long time, to wit, for the space of — days then next following, and then forced and broke open, broke to pieces and damaged divers, to wit, — doors (d) of the plaintiff, of and belonging to the said dwelling-house, with the appurtenances, and broke to pieces, damaged and spoiled divers, to wit, — locks, — staples and — hinges, of and belonging to the said doors respectively, and wherewith the same were then fastened, and of great value, to wit, of the value of £—. And also during the time aforesaid, to wit, on the said — day of —, with force and arms, &c. seized and took divers goods and chattels, to wit, [*describe the goods, &c. as in trover, ante, 639.*] of the plaintiff, (e) then being found and being in the said dwelling-house, and being of great value, to wit, of the value of £—, and carried away the same, and converted and disposed thereof to his own use. By means of which said several premises the plaintiff and his family were, during all the

Damage.

(z) As to actions for injuries to ships, see *ante*, vol. i. 142 to 144. And see declarations in case for negligence in navigating vessels, *ante*, 530.

(a) See the forms, 9 Wentw. Index, xv. and the notes to the forms, *ante*, 648, 649. The trespasses and the damages are to be stated according to the facts, and the formal points to be attended to are as *ante*, 649, note (i). Several counts should not be unnecessarily introduced; 1 Bla. Rep. 270.

(b) See forms, 9 Wentw. 106. Where the trespass was only on one day it should be laid

accordingly; 2 Rich. C. P. 420; and see *ante*, 648, note (c), and 648, note (h); 1 Saund. 24 a.

(c) A misdescription in the situation of the house might be fatal, and preclude the plaintiff from recovering; 1 Moore, 161; 2 Moore, 587; 8 Taunt. 639, S. C.

(d) This in substance charges the defendant with breaking open an outer door, and if he plead a justification, it must be framed accordingly; *vide* 11 Moore, 40.

(e) See *Pritchard v. Long*, 11 Law Jour. Rep., N. S., Ex. 306, as to this allegation.

time aforesaid not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff, but also the plaintiff was during all that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business. [*A count for an expulsion, ut infra, if applicable to the facts, might be added; and before the pleading rules, Hil. T. 4 W. 4, reg. 5, it was usual to add a count de bonis asportatis, as ante, 655; but now the declaration had better be confined to one count, unless there have really been separate injuries. Conclude as ante, 649.*]

And also for that the defendant on &c. with force and arms, &c. broke and entered a certain other dwelling-house of the plaintiff, and then ejected, expelled, put out and amoved the plaintiff and his family from the possession, use, occupation and enjoyment of the said last-mentioned dwelling-house, and kept and continued them so ejected, expelled, put out and amoved for a long space of time, to wit, from thence hitherto; whereby the plaintiff, for and during all that time, lost and was deprived of the use and benefit of his said last-mentioned dwelling-house. [*Conclude as ante, 649.*]

Count for a common expulsion. (f)

Commencement as ante, 648.] For that after the making of a certain act of parliament, made at a parliament holden at Westminster, in the county of Middlesex, in the reign of Henry the Sixth, late King of England, intituled, "The Duty of Justices of Peace, where Land is entered upon or detained with Force," and at the time of the committing of the grievances by the defendant as hereinafter next mentioned, the plaintiff was seised (that is to say) in his demesne as of fee, (h) of and in a certain dwelling-house [or "close, called —," according to the fact, (i)] with the appurtenances, situate in the parish of —, in the county of —, and the plaintiff being so seised thereof, the defendant not regarding the said statute, heretofore, and after making of the said statute, and whilst the plaintiff was so seised, to wit, on &c. with force and arms, &c. broke and entered the said messuage, [or "close," &c.] of the plaintiff, and then in a forcible manner put out and disseised the plaintiff thereof, and in a forcible manner and with strong hand kept and continued the plaintiff so put out and disseised for a long space of time, to wit, from thence, hitherto, and &c. [*Here several trespasses on the land at common law were stated, but it was thought that they ought to be omitted, on the ground that treble damages cannot be given under the statute for any damage subsequent to the forcible entry; a third count, however, was added, to enable the plaintiff to try that point. It was also thought that the action for a forcible entry can only be supported by a freeholder, which opinion is confirmed by the case in 8 B. & Cres. 409.*] By means whereof the plaintiff, for and during the time aforesaid, lost and was deprived of the profits, benefits,

On the statute 8 Hen. 6, c. 9, for a forcible entry and detainer. (g)

(f) The action of trespass to recover damages for an ouster is usually adopted instead of an action of ejectment, where the plaintiff's title is doubtful, or where the term has expired since the ouster, or is likely to expire before the action is commenced.

(g) See forms, 9 Wentw. Index, xxiv.; Co. Ent. 46 a. The counts for a forcible entry

should only be inserted in cases of a very violent nature. This count can only be supported by a freeholder; 8 B. & C. 409.

(h) That this is necessary to support this count, see 8 B. & C. 409.

(i) If a close, set out the name or abutments as post, 662.

To Houses, &c. and advantages which might and otherwise would have arisen and accrued to him from the possession, use, occupation and enjoyment of his said messuage. And other wrongs to the plaintiff then did, in contempt of and against the peace of our said lady the queen, and against the form of the statute in such case made and provided. And to the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Second count,
on possession
generally. (k)

And also, for that the defendant after the making of the said act of parliament, to wit, on &c. aforesaid, with force and arms, &c. and with strong hand, and against the form of the statute in such case made and provided, broke and entered a certain other messuage [or "close,"] of the plaintiff, and then in a forcible manner put out, disseised, dispossessed and expelled the plaintiff therefrom, and in a forcible manner and with strong hand kept and continued him the plaintiff so put out, disseised, dispossessed and expelled therefrom for a long space of time, to wit, from thence hitherto. By means, &c. [as in the first count to the end. A count for trespass at common law, and for a common expulsion, as ante, 659, were added in the original declaration before the pleading rules, Hil. T. 4 W. 4, reg. 5.]

Declaration for
building upon
and heightening plaintiff's wall, and thereby weakening plaintiff's wall, and obstructing light and air, and rendering dwelling-house unpleasant for occupation.

See *Wells v. Ody*, 2 *Crom. M. & Ros.* 128.

To Land, &c.

For trespass in closes [stating their names] breaking open gates and locks, with cattle eating grass, &c. and with carts, damaging grass, and subverting soil, cutting down and carrying away hay and corn, cutting down trees, and carrying away the wood, damaging hedges, and filling up ditches, and encumbering the closes with buildings, &c. (l)

To Land, &c.

Commencement as ante, 648.] For that the defendant, on &c. and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. broke and entered divers, to wit, three closes of the plaintiff, situate in the parish of —, in the county of —, (m) that is to say, a certain close called —, a certain other close called —, and a certain other close called —, (m) and then forced and broke open,

(k) See the form, Co. Ent. 46 a. The form of a second count on the plaintiff's possession as tenant from year to year was inserted in prior editions of this work, but the case in 8 B. & C. 409, shows that this action is not maintainable except by a freeholder.

(l) Observe the notes to the forms, *ante*, 648, 649, and the forms, *post*, and the law, *ante*, vol. i. Index, tit. "Trespass;" and see 9 *Wentw. Index*, xv. &c.; 1 *Rich. C. P.* 133; 2 *Id.* 421; *Plead. Ass.* 76, 397, 488, 490, 491, 497, 502. The trespasses should always be described according to the fact, and in the order in which they occurred.

(m) Before the pleading rules, Hil. T. 4 Will. 4, it was considered to be in general advisable to set out the abutments or names of the closes, when they could be ascertained with certainty, so as to avoid the necessity for a new assignment and the consequent greater prolixity and useless pleadings. Those rules now expressly enjoin that "in actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name or abutments or other description,

in failure whereof the defendant may demur specially." It will be observed that, although this rule is imperative in requiring some particularity in local description, so as to identify the intended close and distinguish it from others, yet it gives the plaintiff an option of one of three modes of description, as, 1st, name; 2nd, abutments in the plural; or 3d, other description. With respect to name, if that description be preferred, great care in spelling the exact name as it will be afterwards proved, should the defendant put it in issue by pleading not guilty, must be observed. As to the proper description of a strip of land added to a field known by a particular name, see *Brownlow v. Tomlinson*, 1 M. & G. 484. A description of a close by two abutments is sufficient, *North v. Ingemells*, 9 M. & W. 249, but particularity is very essential; see *post*, 662, note (n). In *Lempriere v. Humphrey*, 4 Nev. & Man. 638; and 1 Har. & Woll. 171, a declaration describing the close as abutting "on the south, towards a certain highway in the parish of H., in the county of Sussex; towards the north, on a certain land;

broke to pieces, damaged and spoiled divers, to wit, — gates of the plaintiff of great value, to wit, of the value of £—, then standing and being in the said closes, and the locks, staples and hinges, to wit, — locks, — staples and — hinges of the plaintiff of great value, to wit, of the value of £—, respectively affixed to the said gates, and with which the same were then respectively locked and fastened, and with feet in walking trod down, trampled upon, consumed and spoiled the grass and corn of the plaintiff of great value, to wit, of the value of £—, there then growing and being, and with cattle, to wit, horses, mares, geldings, cows, oxen and sheep, eat up and depastured the grass and corn of the plaintiff of great value, to wit, of the value of £—, then growing and being in the said closes, and with divers other horses, mares, geldings, sheep and cattle, and also with the wheels of divers carts, waggons and other carriages, crushed, damaged and spoiled other the grass and corn of the plaintiff of great value, to wit, of the value of £—, there then also growing and being, and with the feet of the said horses, mares and geldings, and with the wheels of the said carts, waggons and other carriages, tore up, subverted, damaged and spoiled the earth and soil of the said closes; and also then mowed and cut down the grass and corn of the plaintiff then growing in the said closes, and then seized, took and carried away the hay and corn, to wit, — cart loads of hay and — cart loads of corn of the plaintiff of great value, to wit, of the value of £—, off and from the said closes, and converted and disposed thereof to his own use; and also then cut down, prostrated and destroyed the trees and underwood, to wit, — oaks, — ash trees, — elms, &c. [according to the fact] and — other trees, and — acres of the underwood of the plaintiff of great value, to wit, of the value of £—, and the timber, wood, branches and bushes thereof, coming and arising, to wit, — loads of timber, — cart loads of wood, — cart loads of branches and — cart loads of bushes of the plaintiff of great value, to wit, of the value of £—, took and carried away and converted and disposed thereof to his own use; and also then broke down, prostrated and destroyed a great part, to wit, — perches of the hedges and — perches of the fences of the plaintiff, of and belonging to the said closes respectively; and also then cast and threw divers large quantities of earth, stones and rubbish into divers, to wit, — ditches of the plaintiff, of and belonging to the said closes

To Land, &c.

on the east, on premises in the occupation of the plaintiff; and on the west, towards certain premises in the occupation of the defendant, and situate in the pariah of H.," was incorrect, because the proper description by abutments is "on" or "upon," so as to exclude any intervening land, *id. ibid.*; but as the defendant did not demur specially or plead not guilty, but pleaded his seisin of the close, it was held, that he was precluded from objecting to the description which his plea had admitted and adopted. From the same case it seems, that in cases of doubt, the use of the word "towards," in describing an abutment, unless demurred to, may give the plaintiff an advantage, or at least avoid the risk of variance; *id. ibid.* It seems, that the identity of the close, when there are several of the same name or

abutments, may be fixed by the trespass itself, as where a wall thereon standing has been pulled down, or where pigs or other cattle have committed damage; *Bond v. Downton*, 9 Legal Observer, 69. In *Roberts v. Karr*, 1 Taunt. 495, Heath, J., said "abutments have never been construed very strictly; thus, if premises be described as abutting on a house to the east, it may be the north-east or south-east;" see quotations in *Lempriere v. Humphrey*, 1 Harr. & Woll. 171. But in 1 Starkie Evid. 374, 384, it is stated that failure in proof of one point of the abutments is fatal. See further as to abutments, *Cocker v. Crompton*, 1 Bar. & Cres. 489. And as to what is an ambiguity and what a variance in description by abutments, see *Walford v. Anthony*, 8 Bing. 75, and *Webber v. Richards*, 1 G. & D. 114.

To LAND, &c. respectively, and thereby and therewith then choked and filled up the same; and also then put, placed and erected, and caused to be put, placed and erected, divers, to wit, — shambles, — stalls, — booths and — tables in and upon the said closes, and kept and continued the said shambles, stalls, booths and tables so there put, placed and erected, without the leave or license and against the will of the plaintiff, for a time, to wit, from the said — day of — in the year aforesaid hitherto; and thereby and therewith, during all the time aforesaid, greatly incumbered the said closes respectively, and hindered and prevented the plaintiff from having the use, benefit and enjoyment thereof in so large and ample a manner as he might and otherwise would have done. [*Where there has been an expulsion, it may be described in the same count or in a separate count as a distinct injury, as ante, 659; and where there has been a removal of property severed from the realty, a count de bonis asportatis may be added, as ante, 655, but taking care that there be not two counts for the same injury.*]

The like, setting out the name of the close or its abutments.(n)

For that the defendant, on &c., and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. broke and entered a certain close of the plaintiff, called —, situate and being in the parish of —, in the county of — [or if it be described by abutments,(o) omit the name of the close, and state the abutments, according to the facts, and which may be as follows:] abutting on the east, on a certain close in the possession of E. F.; on the west, on a certain field called —; on the north, on &c.; and on the south, on &c., and then &c. [Describe the trespasses according to the fact, which may be as in the former precedent.

For cutting down and carrying away trees.(p)

[Commencement as ante, 648.] For that the defendant, on &c., and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. felled, cut down, prostrated and destroyed the trees and pollards, to wit, — oaks, — ash trees, — elms, — other trees and — pollards of the plaintiff of great value, to wit, of the value of £—, then growing and being in and upon certain lands in the county of —, and took and carried away the same and converted and disposed thereof to his own use. [Conclude as ante, 649.

(n) In order to avoid the necessity for a new assignment, in case the defendant should plead *liberum tenementum*, it is, since Reg. Gen. Hil. T. 4 Will. 4, V. *Trespass*, necessary to state the name of the close or its abutments, or other description; see *ante*, 660, n. (m); 1 Saund. 299 a, b, c; 2 Bla. Rep. 1089; 2 D. & R. 719. In case of a description by abutments care must be taken that the description correspond precisely with the facts, for otherwise the plaintiff may be nonsuited on this count; 1 T. R. 479; Bul. N. P. 89; 1 Taunt. 496; 2 Roll. 678; 2 Star. Evid. 1436. A description of a close by two abutments is sufficient; see *North v. Ingamells*, 9 M. & W. 249; 1 Dowl. P. C., N. S., 151, S. C. As to what a variance, see *Roscoe*, 308, 309; 1 Moore, 161; 2 Campb. 4; *Webber v. Richards*, 1 G. & D. 114. And what is an ambiguity and not a variance, *Welford v. Anthony*, 8

Bing. 75.

(o) See as to proof of abutments, Bul. N. P. 89; 2 Rol. Ab. 678; 1 Taunt. 496; *Webber v. Richards*, 1 G. & D. 114; law as to stating abutments, 4 Nev. & Man. 638.

(p) It is usual, where the facts will support the allegation, to declare as well for the trespass on the close as for cutting down the trees, (see a form, 2 Rich. C. P. 452, but the title is there improperly stated,) but where the land has been demised, and the trees were excepted in the lease, the above count is most proper. But see *Rolls v. Rock*, 2 Selwyn, N. P. 1287, that the land also where the trees grow was impliedly excepted, and therefore trespass *quare clausum frangit* would be proper; 1 Saund. 322, n. 5; 7 T. R. 13. What trees are included in the exception, see 16 East, 316.

For that the defendant, on &c., with force and arms, &c. broke and entered a certain close, called —, [or “abutting on,” &c. *as ante*, 662,] situate &c., and then put, placed and laid, and caused and procured to be put, placed and laid, divers large quantities of wood, to wit, — cart loads of wood, — cart loads of boughs and — cart loads of rubbish in and upon the said close, and kept and continued the said wood so there put, placed and laid, without the leave or license and against the will of the plaintiff, for a long time, to wit, from the respective times of putting, placing and laying the same as aforesaid, until the commencement of this suit, and thereby and therewith, for and during those respective times, greatly incumbered the said close, and hindered and prevented the plaintiff from having the use, benefit and enjoyment thereof. [*Second count for an expulsion, as ante*, 659. *Conclude as ante*, 649.

To Land, &c.

For breaking close and laying quantities of wood there, by which the close was greatly incumbered.

For that the defendant, on &c., with force and arms, &c. broke and entered a certain coal-mine or vein of coals, called —, [or “abutting on,” &c. *as ante*, 662,] of the plaintiff, situate &c., and dug out of the said coal-mine or vein of coals of the plaintiff, divers large quantities, to wit, 500 tons of coals, 500 tons of culm and 500 loads of other materials of the plaintiff of great value, to wit, of the value of £—, and took and carried away the same, and converted and disposed thereof to his own use. [*Before the pleading rules, Hil. T. 4 W. 4, reg. 5, it was usual to add a second count de bonis asportatis, as ante*, 655. *Conclude as ante*, 649.

For digging in a coal-mine, and carrying away coals therefrom.

For that the defendant, on &c., with force and arms, &c. broke and entered the close of the plaintiff, called —, [or “abutting on,” &c. *see ante*, 662,] situate in the county of — aforesaid, and then with shovels, pickaxes and other iron instruments dug up, turned up and subverted the earth and soil, to wit, — acres of the earth and soil of the said close of the plaintiff, and then dug, made and sunk divers mines, pits, shafts and holes, to wit, — mines, — pits, — shafts and — holes of great breadth and depth, to wit, each of the breadth of — feet, and of the depth of — feet, in the said close of the plaintiff there, and from and out of the said mines, pits, shafts and holes so dug, made and sunk as aforesaid, then raised, dug and got divers large quantities of earth, soil, stones, lead ore, copper ore, *lapis caliminaris*, and other ore of the plaintiff, to wit, 500 cart loads of earth, 500 cart loads of soil, &c. then being of great value, to wit, of the value of £—, and the same so raised, dug and got from and out of the said mines, pits, shafts and holes, he the defendant then seized, took and carried away, and converted to his own use. [*Conclude as ante*, 649.

For digging mines, raising ore and taking and converting it to his own use.

Commencement as ante, 20.] For that the said E. F. died within one year next before the commencement of this suit, and the defendant heretofore and

By an executor for an injury to the real estate of the testator.

(9) The 3 & 4 Will. 4, c. 42, s. 2, enacts, that an action of *trespass* or *trespass on the case* may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person committed in his life-time, for which an action might have been maintained by such person,

so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person. *See ante*, vol. i. 79, 80. *See form against an executor under the same statute, ante*, 645.

(9)

DECLARATIONS IN TRESPASS.

TO LAND, &c.

in the life-time of the said E. F. deceased, and within six calendar months before his death, to wit, on &c., with force and arms, &c. broke and entered the close of the said E. F., called —, [*describe the trespasses as in the preceding forms, and conclude as follows:*] against the peace of our lady the now queen, and to the damage of the plaintiff, as such executor as aforesaid, of £—, and thereupon, by virtue of the statute in such case made and provided, he brings suit, &c. [*Add profert as ante, 22.*]

FOR MESNE
PROFITS.

Declaration in
trespass for
mesne profits.
after a reco-
very in eject-
ment. (q)

FOR MESNE PROFITS.

Commencement as ante, 648.] For that the defendant heretofore, to wit, on &c., (r) with force and arms, &c. broke and entered — messuages, &c. [*the premises have been usually described as in the declaration in ejectment in which judgment was obtained (s)*] of the plaintiff, and ejected, expelled, put out and amoved the plaintiff from his possession and occupation thereof, and kept and continued him so expelled and amoved for a long space of time, to wit, from the day and year aforesaid until and upon, &c. [*the day on which possession was obtained*] and during that time took and had and received, to the use of him the defendant, all the issues and profits of the said tenements, being of great yearly value, to wit, of the value of £—; and during that time caused and procured great waste, damage, deterioration and injury to the said messuage and buildings and land, and excessively and irregularly cropped and damaged the said land, and used the same in an unhusband-like and untenable and improper manner. Whereby the plaintiff, during all the time aforesaid, not only lost the issues and profits of the said tenements, with the appurtenances, but was deprived of the use and means of cultivating the same, and was forced and obliged to and did necessarily lay out and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about the recovering of the possession of the said tenements, with the appurtenances, and his estate and interest in the same tenements and premises have become and are greatly injured and deteriorated in value. And other wrongs, &c. [*Conclude as ante, 649.*]

Damage. (t)

(q) See the precedents in *Run. Ejectm.* 2d edit. (1819); 2 Rich. C. P. 440; *Plead. Assist.* 503. As to this action in general, and the parties by and against whom it may be brought, see fully, *ante*, vol. i. 215 to 219, and Index, tit. *Mesne Profits*.

(r) This is usually the day of the ouster laid in the declaration in ejectment, but the day is not material, though not laid under a videlicet, *Ive v. Scott and another*, 9 Dowl. P. C. 993; and where the plaintiff's right of possession and the defendant's unlawful entry were anterior to that time, it is advisable to insert an earlier day, according to the fact, though the defendant, by pleading the statute of limitations, would preclude the plaintiff from recovering more than six years mesne profits. The omission of the statement in the declaration of the time of entry, and continuance of the expulsion, will be aided after a

judgment by default, or on general demurrer; 13 East, 407. If the statute of limitations be pleaded, plaintiff cannot recover beyond six years profits; *Bul. N. P.* 88. This action may in some cases be supported against a person who had not the actual occupation; see *Doe v. Harlow*, 12 A. & E. 40.

(s) If closes be stated, *semble*, they must be described by name, or abutments, or other description, since *Reg. Gen. Hil. T.* 4 W. 4.

(t) In this action the plaintiff may recover in damages the value of the occupation of the premises, together with the costs of the action of ejectment, and if any particular damage, waste or injury to the premises were committed by the defendant, it should be stated specially, and such statement may be as in the precedent, *ante*, 660, 661; and see further as to what damage is recoverable, *ante*, vol. i. p. 218, 219.

FOR HUNTING, &c.

FOR HUNTING,
&c.

For that the defendant, on &c., and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. broke and entered divers, to wit, — closes of the plaintiff, that is to say, a certain close called — close, and a certain other close called [*or if not by name then each close must be described by abutments, as ante, 662,*] and then with feet in walking, and with feet of divers horses and dogs, trod down, trampled upon, crushed and spoiled the grass and corn of the plaintiff then growing and being in the said closes, and then being of great value, to wit, of the value of £5, and then, with the said horses and dogs, and with guns, hunted and searched in the said closes for hares, pheasants, partridges and other game, and then killed upon and seized, took and carried away from and off the said closes, divers, to wit, — hares, — pheasants, — partridges, and — conies, of the plaintiff(x) of great value, to wit, of the value of £— then being in and upon the said closes, and converted and disposed thereof to his own use. And also for that the defendant, on &c. aforesaid, with force and arms, &c. seized, took and carried away divers, to wit, — other dead hares, — other dead pheasants, — other dead partridges, and — other dead conies of the plaintiff of great value, to wit, of the value of £—, and converted and disposed thereof to his own use. And other wrongs to the plaintiff then did, against the peace of our lady the queen, and to the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Trespass at common law for breaking close and killing game. (u)

Second count, for carrying away game.

For that the defendant, on &c., with force and arms, &c. broke and entered, with hounds and other dogs, the closes, to wit, one close called &c., one other close called &c., one other close called &c., one other close abutting on &c. [*state abutments, as ante, 662*] of the plaintiff, and with feet in walking, and with the feet of the said hounds and other dogs, trod down, consumed and spoiled the grass and corn, to wit, wheat and oats of the plaintiff of the value of £—, there then growing, and the tame deer, to wit, — tame deer of the plaintiff of the value of £—, then being in the said closes, with the said hounds and other dogs hunted, chased and pursued, insomuch that one of the said deer of the plaintiff, of the value of £—, was then seized, caught, destroyed and killed, and thereby wholly lost to the plaintiff, and the residue of the said deer were then thereby greatly terrified and affrighted, and ran away from the said closes, and wandered and strayed thereout to places unknown, and at a great distance, and became very much

For breaking plaintiff's close with a pack of hounds, and hunting his tame deer, killing one, and driving another out of the closes, whereby plaintiff was put to expense in recovering it.

(u) The 4 & 5 Will. 3, c. 23, s. 10, against inferior tradesmen for hunting, &c. was repealed by 2 Will. 4, c. 32, which gives penalties recoverable by information and conviction, and to be paid to the overseers of the poor or other parish officer, in aid of the county rate; but leaving the occupier to his common law private remedy by action of trespass, unless the conviction was obtained at his instance. In this action it would seem that the defendant is liable for people who follow him and his hounds over plaintiff's grounds, 1 Stark. 351; 3 C. & P. 32; which, though decisions on 4

& 5 Will. 3, c. 29, yet seem to apply also to the common law remedy. See form, Lil. Ent. 444; and for trespassing in a chase or free warren, see Chitty's Game Law, 1st edit. Appendix, 147.

(z) This is sufficient, though game may be *feræ naturæ*, the plaintiff by reason of his possession of the land having a local property therein, Lord Raym. 260; Godb. 174; and the same rule prevails as to fish taken in a several fishery, Cro. Car. 553, 554; but see Lil. Ent. 449.

FOR HUNTING, &c. injured, weakened, hurt, depreciated and lessened in value; and the plaintiff was put to much labour, trouble, costs and expenses in and about the seeking for, finding and recovering the said last-mentioned deer.

The 4 & 5 W. & M. chap. 23, sect. 10, was repealed by 7 Geo. 4, chap. 32, and 1 & 2 Will. 4, chap. 32; and as to petty offences to *fisheries* and fish, particular criminal and summary remedies are provided by 7 & 8 Geo. 4, chap. 29 and 30, but the *common law remedy continues*.

FOR FISHING, &c.

First count, for fishing in plaintiff's close covered with water. (y)

FOR FISHING, &c.

Commencement as ante, 648. *The venue is local*.] For that the defendant, on &c., and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. broke and entered the close of the plaintiff, covered with water, (x) called — [or "abutting on" &c., see *description by abutments*, ante, 662,] and then fished in the said close for fish, and the fish, to wit, (a) — salmon, — trout, — pike, — carp, — tench, — perch, — roach, and — eels of the plaintiff (b) of great value, to wit, of the value of £—, there then found and being, caught and took and carried away the same, and converted and disposed thereof to his own use. And also for that the defendant, on the day and year first aforesaid, and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. broke and entered the several fishery of the plaintiff, in a certain river called —, situate in the parish of—, in the county of—, and then fished in the said fishery for fish, and the fish, to wit, &c. [*enumerate as in preceding form*, (d)] of the plaintiff, there then found and being, of great value, to wit, of the value of £—, caught, took and carried away, and converted and disposed thereof to his own use. And also for that the defendant, on &c., and on

Second count, for fishing in plaintiff's several fishery. (c)

Third count, for fishing in plaintiff's free fishery. (e)

(y) See forms, 9 Went. Index, xxiv.; Chitty's Game Law, Appendix, 159; and for fishing in an oyster fishery, *id.* 161; and see form in 2 Hen. Bla. 182; 1 Campb. 309. As to the law, see Com. Dig. Piscary; Co. Lit. 122 a, note 7; 2 Bl. Com. 89; 2 Salk. 637; 4 T. R. 437. As the owner of the soil is *prima facie* entitled to the fishery therein, it is frequently advisable to insert this count; Co. Lit. 126 b, n. 1. Formerly a declaration in trespass for breaking close and taking his fish, &c. without stating the number of fish, &c. taken, was demurrable, and even bad after verdict; 5 Rep. 34 b; 11 East, 576. But this omission, it should seem, would now be holden to be cured after verdict, either at common law, Cro. Jac. 435, or by the statute of jeofails, 16 & 17 Car. 2, c. 8; and after a general demurrer or judgment by default by statute 4 Ann, c. 16, s. 1, and even if the action were merely for taking the plaintiff's fish; but if the declaration were for breaking the close, as well as for taking his fish, without specifying their number or kind, it seems it would be good even on a special demurrer, because breaking the close is considered as the principal ground and foundation of the action, and taking the fish as matter of aggravation only; 2 Salk. 643; 3 Wils. 292; 2

Saund. 74, note 1. If the sea, or an arm of the sea, by gradual and imperceptible progress encroach upon the land of a subject, the land thereby covered with water belongs to the crown; *Re Hull and Selby Railway Co.* 5 M. & W. 327.

(x) This is the mode of describing the right to a pond, &c. where the plaintiff is entitled to the land under the water; Co. Lit. 4 b; Yelv. 143.

(a) Insert a sufficient number of each description of fish that may probably have been taken. As to the statement of the number, see *supra*, n. (y).

(b) As to the allegation of the property in the fish, see *ante*, 665, n. (x); and Cro. Car. 563; Lil. Ent. 449.

(c) See a different form, Lil. Ent. 449.

(d) But see *supra*, n. (y).

(e) It is doubtful whether trespass lies for fishing in a free fishery, and therefore a verdict should not be taken unnecessarily on this count; Co. Lit. 127 b, notes to 122 a, n. 7; 2 Bla. Com. 39; 2 Salk. 637; Fitz. N. B. 88. In 3 Mod. 97, Lil. Ent. 419, it was held bad after verdict; but see Carth. 286. In 2 H. Bla. 182, no objection was taken to this count, and see 6 Bac. Abr. 684.

divers other days and times between that day and the commencement of this suit, with force and arms, &c., in the free fishery of the plaintiff, in the parish aforesaid, in the county aforesaid, fished, and the fish, to wit, &c. For Fishing,
&c.
Fourth count,
for catching
plaintiff's fish
generally.
[as in the form supra,] there found and being, of great value, to wit, of the value of £——, caught, took and carried away, and converted and disposed thereof to his own use. And also for that the defendant, on &c. aforesaid, and on divers other days and times between that day and the commencement of this suit, with force and arms, &c. took and carried away other the dead fish, to wit, &c. *[as in the form supra,]* of the plaintiff, there then found and being, of great value, to wit, of the value of £——, and converted and disposed thereof to his own use. *[Conclude as ante, 649.]*

DECLARATIONS IN EJECTMENT.

DECLARATIONS
IN EJECTMENT.

Observations on Declarations in Ejectment in general.—The 2 Will. 4, c. 39, extends only to process in *Personal* actions, and does not extend to *Real* or *Mixed* actions, and consequently not to actions of Ejectment, and the ancient rules and forms still prevail with a very few exceptions as regards the pleadings. It has therefore been decided that the *title* of the *term*, and the commencement and conclusion of a declaration in ejectment as heretofore used are still to be observed; *Doe d. Fenn v. Roe*, 3 M. & Scott, 370; *Doe d. Gillett v. Roe*, 3 M. & Scott, 376; 1 Crom. M. & Ros. 19; 4 Tyr. 649, S. C.; 1 Bing. N. C. 253; 1 Dowl. 4; *Doe d. Evans v. Roe*, 2 Adol. & El. 11. In *Q. B.* and *C. P.* the declaration may still *suppose an original writ* to have been issued, and in the commencement state the defendant to have been *attached* to answer the plaintiff; for although the proceedings by *bill* have in personal actions been abolished, yet in *ejectment* the plaintiff still has the option of framing his declaration as in proceedings by *bill*. In the Exchequer it is still proper to *commence* the declaration in *Ejectment* as if the plaintiff were *debtor* to the queen, and to *conclude quo minus*, and which is the *only* proper form in that Court, as a declaration upon a supposed original would be improper, that writ never having been returnable in that Court. It is still proper to intitule the declaration served on the tenant in possession as of the *preceding term*, although antecedent to the day of the demise in the body of the declaration. In declarations on a supposed original in *Q. B.* or *C. P.*, the Reg. Gen. Hil. T. 2 Will. 4, reg. IV. orders that the *recital* of such supposed original writ shall only state it concisely, as “that the defendant was attached to answer the said John Doe of a plea of trespass and ejectment,” since which rule the declaration by supposed original omits the writ part, which, when there were several demises, rendered a declaration very prolix with repetitions. In all other respects the form of declaration and proceedings continue the same as heretofore, excepting that under the 1 Will. 4, c. 70, s. 36, if the title has accrued during an issuable term, the declaration may be specially intituled of a day in such term, and after the accruing of such title, see *post*, 669, n. (b); and that in proceedings against a tenant under 1 Geo. 4, c. 87, the notice at the foot then requires the tenant not merely to *appear*, but also to enter a recognizance with two sureties, as required by that act.

ON A SINGLE DEMISE.

In the Queen's Bench, [or "Common Pleas."]

— Term, — Vict. (b)

— (c) (to wit.) Richard Roe (d) was attached to answer John Doe (d) of a plea of trespass and ejectment. (e) And thereupon the said John Doe, by E. F. his attorney, complains for that one A. B., (f) on the — day of —, in the year of our Lord —, (g) at the parish of —, in the county

ON A SINGLE
DEMISE.

Declaration by
original in Q. B.
or C. P. on a
single de-
mise. (a)

(a) In Q. B. it is most usual to proceed in ejectment by declaration on a *supposed original writ*; Adams, 2d edit. 180. See the form in Q. B. by *bill, post*, and see forms in C. P. on single and double demises, 1 Rich. C. P. 305 to 310; 2 *Id.* 309, 313. As to the amendment of declarations in ejectment, see Tidd's Prac. 9th edit. 1206, 1207, and Chitty's Archb. Prac. 7th edit.

(b) Though in general a declaration must not be intitled of a term anterior to the cause of action, yet in *ejectment* it is otherwise, and the demise and ouster are frequently laid after the term of which the declaration against the casual ejector is intitled, and no objection can be taken, because the nominal defendant cannot demur, and the real defendant, if he appear, must, by the terms of the consent rule, accept a declaration against *himself* of the subsequent term, and plead only the general issue; see 1 Rich. C. P. 311; Adams, 2d edit. 181, 182; see 1 Ventr. 135. The omission of a title of a term is immaterial; Adams, 2d edit. 181, 182; Tidd 9th edit. 1204; see 1 Ventr. 135. No advantage can be taken, though intitled of a wrong term, provided the tenant has sufficient notice given to him to appear; 2 Chitty's Rep. 172; Tidd, 9th edit. 1204; *see vide* Barnes, 186. In proceeding under the 1 Will. 4, c. 70, s. 36, in ejectment by landlord against tenant, where the tenancy expires, or the right of entry accrues in or after Hilary or Trinity Terms, the declaration must be intitled specially; and see the form, *post*.

(c) The venue is local, and even after verdict, if the venue were laid in a wrong county, it would be doubtful whether the plaintiff could obtain possession; 7 T. R. 588.

(d) Any names may be adopted for these nominal parties, but the common names, John Doe, for the supposed plaintiff, and Richard Roe, for the casual ejector, are *preferable*. Though usual, it is not necessary to insert the supposed addition of the defendant, the statute 1 Hen. 5, c. 5, not extending to declarations; 3 B. & P. 399. As to a mistake in stating two different names, viz. the *tenant* was attached to answer, and afterwards using the name "Richard Roe," see 1 Chitty's Rep. 573 a.

(e) Must commence and conclude as usual, *Doe d. Gillett v. Roe*, 1 Crompt. M. & Ros. 19; 8 M. & Scott, 376, S. C. But Reg. Gen. Hil. T. 2 Will. 4, reg. 4, orders that the supposed original writ shall not be recited at length, but as above.

(f) This is to be the person who is the real plaintiff, and who had the *legal* estate

and *right of possession* at the time of the supposed demise, 7 T. R. 47, and if there be any doubt in whom the legal right of possession was vested, or if parties interested be tenants in common, several counts on the several demises of each of the different persons should be inserted, as in the following forms; and see Adams' Ejectm. 1st edit. 36, and 177 to 180; Selw. N. P. 10th edit. tit. *Ejectment*. If the right of entry be in husband and wife in right of the wife, the demise may be alleged to be by husband and wife, Cro. Jac. 617, or by husband alone, *Id.* 332. The lessor's name should be spelt properly, a variance would, it should seem, be fatal; Cro. Eliz. 776. When a pauper has been left in possession of premises by the overseers of a parish, the demise should be laid by the overseers for the time being when the ejectment is brought, if the pauper has done any act recognizing a holding under them; but otherwise by the overseers who let him into possession, or the last set of overseers whom he has acknowledged as his landlords; 14 East, 488; 3 Campb. 447, S. C. In a case where a declaration in ejectment by *churchwardens and overseers* contained two sets of counts, one describing them by their *office* without their *names*, and the other by their *names* without their *office*, it was held that the objection, if any, was cured after verdict; 2 D. & R. 708; and see stat. 59 Geo. 3, c. 12, s. 17; 10 B. & Cres. 885; 6 Car. & P. 525. As to the necessity of having the lessor's consent to have his name used, see 2 Chitty's Rep. 170, 171; 3 Taunt. 440.

(g) Care must be taken to insert some day after the lessor's right of entry commenced; 2 East, 257; 5 East, 132; Bul. Ni. Pri. 105; 2 Wils. 274; 2 Stra. 1087; Run. Ejectm. 2d edit. (1819); 4 T. R. 680; Selw. Ni. Pri. 10th edit. tit. *Ejectment*; Adams' Ejectm. 1st edit. 180. It is better to lay the day as far back as possible, with a view to the recovery of *mesne profits*; Bul. Ni. Pri. 87. When at the suit of the assignees of a bankrupt, the demise must be laid on some day after the date of the *appointment*, and when at the suit of the assignee of an insolvent debtor, some day after the date of the *vesting order*. In the case of copyhold, the demise may be laid between surrender and admittance; 16 East, 208, 211. Where an entry is necessary in order to avoid a fine, the demise must be stated to have been made subsequent to the entry; 13 East, 489; 7 T. R. 433, 737. A demise by administrator may be laid before administration granted, provided it be after the death, 2 Selw. N. P. 4th edit. 682; and

ON A SINGLE DEMISE.	of —, demised to the said John Doe the &c. [<i>here is to be introduced the statement of the premises for the recovery of which the action is brought. The pleader will select such parts of the following descriptions as may be really applicable to his case, inserting a sufficient number of houses, acres, &c. to cover the real quantity, and will take care not to use the word tenements, (h) or other uncertain description of the premises, (h)</i>] the manor of —, in the county of —, containing divers, to wit, — messuages, — acres of arable land, &c. [<i>describe the land as below, (k)</i>] with the rights, members, and appurtenances to the said manor belonging; and also into the rectory of the parish-church of —, in the county aforesaid, and also all and singular the tithes (m) of corn, grain, hay, wood, grass, wool, lambs and calves arising, growing,
A manor. (i)	
A rectory and tithe. (l)	

an executor may lay a demise before probate granted; 2 W. Bla. 694. A demise by heir on day of death of ancestor is good; 3 Wils. 274. With respect to tenants at will, the demise should be laid after the time when possession was demanded; therefore where possession had been demanded on the 5th of October of a tenant at will, and an ejectment being brought, the demise was laid on the 1st of October, it was held bad, the tenancy not having been determined until after the day of the demise laid in the declaration; 4 T. R. 680. In ejectment on a forfeiture of a lease containing the usual clause of re-entry, and a covenant generally to repair, with a further and independent covenant, within three months after notice, to repair the defects pointed out in the notice, the demise may be laid before the expiration of the three months; 2 Campb. 520; 1 Moore, 89; 7 Taunt. 385, 8. C. In ejectment on the 4 Geo. 2, c. 28, s. 2, the day of the demise laid in the declaration need not be after the service of the declaration; 3 B. & C. 752; 5 D. & R. 711, 8. C.

The demise also should be laid when the possession of the defendant was unlawful; 18 East, 210, 212; 11 East, 56. If the right of possession accrued a considerable time before the commencement of the action, it is usual to insert two sets of counts; the first on a demise immediately after the right of possession accrued, and an ouster immediately following; and the second upon a demise just before the commencement of the action and another ouster; see the form, *post*.

(h) For what an ejectment will lie, and what is a sufficient description, see Runn. Ejectment, 2d edit. (1819); Selw. N. P. 4th edit. 663, 683; Adams' Ejectment, 1st edit. 21 to 35; Harr. Landl. and Ten. 788 to 794; 1 C. & P. 123. In 2 C. & P. 430, it was held that an ejectment does not lie for dower before it has been assigned. The term "*tenement*" in the descriptive part of the declaration would be improper, because ejectment in general lies only for corporeal hereditaments, and the term "*tenement*" includes incorporeal estates, 2 Bla. Com. 17; and an ejectment for a messuage and tenement was holden bad after verdict; 1 East, 441; 2 Stra. 191; *sed vide* 1 T. R. 11; 2 Saund. 44, n. 3. But notwithstanding this, the defendant will not in general be able to take advantage of such an error in description, for the Court will give

leave to the plaintiff, after verdict in ejectment for a messuage and tenement, to enter the verdict according to the judge's notes, for the messuage only (pending a rule nisi to arrest the judgment for uncertainty) without obliging the lessor of the plaintiff to release the damages, 1 East, 441; 8 East, 357; and in a case where judgment in ejectment for a messuage and tenement was entered up generally for the plaintiff, it was held no ground for reversal on error; 8 B. & C. 70; and see 1 M. & P. 330. An ejectment will lie for a close, 11 Rep. 55; Cro. Jac. 435, &c. especially if other words be added, rendering the description certain, as to the property being an *incorporeal hereditament*, it will be sufficient; see 3 Mod. 98; Cowp. 349; Cro. Jac. 435. A church or chapel must be described as a messuage; 11 Rep. 26 a; Esp. N. P. 528; Sty. 101; Salk. 256. In 8 East, 357, the Court gave leave to amend; and see Adams' Ejectment, 1st edit. 28, n. (w); 1 Chitty's Rep. 537, n.; 1 M. & P. 330; Tidd, 9th edit. 1207.

(i) Ejectment lies for a manor generally; Latch, 61; Lil. R. 301; Runn. Ejectment, 2d edit. (1819); Adams' Ejectment, 1st edit. 32; but see Sel. N. P. 4th edit. 665.

(k) It is said that ejectment is not sustainable for a manor, without describing the quantity and nature of the land therein; Latch, 61; Lil. R. 301; Hetl. 146; Selw. N. P. 4th edit. 665; but see Adams' Ejectment, 1st edit. 32.

(l) Ejectment will lie for a rectory, consisting of a church, glebe lands and tithes, on the principle that it resembles a manor, the church being compared to the mansion-house, the glebe lands to the demesnes, and the tithes to the service; 8 B. & C. 25; 2 M. & R. 104, 8. C. Ejectment lies for tithes alone, by statute 32 Hen. 8, c. 7, s. 7; Toller, 19; Cro. Car. 301; see Runn. Ejectment, 2d edit. (1819); Selw. N. P. 4th edit. 664. As to this description, see Bul. N. P. 99; Cro. Car. 301; 11 Rep. 25; Dyer, 84, 116 b; 1 Rol. Rep. 66, 68; Adams' Ejectment, 1st edit. 32, 33. The quality of the tithes must be stated; 11 Rep. 25, 26; 1 Rol. Rep. 68; see Adams, 3d edit. 29. See form, stating a demise by deed, *post*.

(m) Ejectment lies for tithes without the rectory; 1 Cro. Car. 301.

renewing, increasing and happening within the said parish of —, and within the bounds, limits and titheable places of the said rectory; and also into — (n) messuages, — cottages, — barns, — stables, — coach-houses, — out-houses, — yards, — gardens, — orchards, — acres of arable land, — acres of meadow land, — acres of pasture land, — acres of wood land, — acres of land covered with water, and — acres of other land, with the appurtenances, (p) situate and being in the parish (q) of — aforesaid, in the county of — aforesaid, with common of pasture thereunto belonging and appertaining, (r) to have and to hold the same to the said John Doe and his assigns from thenceforth (s) for and during and unto the full end and term of — (t) years from thence next ensuing and fully to be complete and ended. By virtue of which said demise the said John Doe entered (u) into the said tenements, (x) with the appurtenances, and became and was thereof possessed for the said term, so to him thereof granted as aforesaid. And the said John Doe, being so thereof possessed, The ouster.

ON A SINGLE DEMISE.

Messuages, building and land. (o)

Common of pasture.

Plaintiff's entry.

The ouster.

(n) Insert the number and quantity throughout, sufficient to include the property sought to be recovered. There is no objection to stating more than enough; Cro. Eliz. 13. If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land by name, without mentioning the building, except it is said where the building is a *messuage*, and then, perhaps, it ought to be particularly described; 1 Burr. 133, 144.

(o) It should be stated whether pasture or meadow land, &c.; Cowp. 346; 11 Rep. 55; Adams' Ejectment, 1st edit. 31. A description of "*land*" generally means arable land; Salk. 256; Runn. Ejectment, 123, 129. As to describing land by a provincial description, see Harrison's Landl. & Ten. 791.

(p) Appurtenances, 2 Bla. C. 17, n. 3.

(q) If the tenements lie in *different parishes*, it has been usual to enumerate the whole as lying in *one parish*, and to repeat the description of the like tenements as lying in the other parish, but it seems sufficient to describe the whole as lying "in the parishes of — and —;" see Cro. Eliz. 465; 3 Lev. 384; 1 Burr. 623; 6 Burr. 2673; Adams' Ejectm. 1st edit. 187. But it would not do to say, "in the parishes of A. and B. or one of them;" 7 Mod. 457; and see 4 Taunt. 671. Where the premises were described as being in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury-on-Trym and Westbury-on-Severn, it was held that this was not a fatal variance; 5 M. & S. 326. So where the premises were stated as being in Farnham, and they were proved to be in Farnham Royal, it was held this was not a fatal variance, unless it could be shown that there were two Farnhams; 13 East, 9. So where the premises were stated as being in the parish of St. Luke, in the county of Middlesex, and there are two parishes of St. Luke in that county, the one St. Luke, Chelsea, and the other St. Luke, Old-street, or more commonly called St. Luke, Middlesex, it was held not to be a variance; 1 Y. & J. 492; and see 1 Moore, 161. But where premises were stated as being in the united parishes of St. George the Martyr and

St. George's Bloombury, and were proved to be situated in St. George's Bloombury only, the variance was held to be fatal, although the parishes were united by act of parliament for the purpose of a joint provision for the poor; 2 Campb. 274; 6 Esp. 128, S. C. The omission of a vill or parish was supposed to be aided after verdict, 1 Burr. 623; 2 Bla. Com. 706; *quære* if necessary to state it at all, and see 4 Taunt. 671. But in *Doe d. Rogers v. Bath*, 2 Nev. & Man. 440, it was considered that in ejectment the omission of all local description of the tenement demised is error, though the county and the vill in which the demise was made were stated in the declaration, and the county was stated in the margin. The Court however, pending a rule nisi to arrest judgment on the ground of such error, allowed the plaintiff to amend the declaration and issue on payment of the costs of both rules; *id. ibid.*

(r) Ejectment lies for *common appurtenant*, when claimed, together with the land to which it belongs; Stra. 54; Runn. Ejectment, 2d edit. (1819); Adams' Ejectment, 1st edit. 22. As to ejectment for a *cattle-gate*, see Rep. temp. Hardw. 167.

(s) It saves a repetition of days to say "from thenceforth," but if another day be inserted, then it is usually the day before that of the demise.

(t) The number of years stated is immaterial, it is usual to insert *seven* years, if the demise be recent, but a sufficient number of years should be inserted, so as certainly to extend beyond the time when final judgment may be obtained; Skin. 161; Runn. Ejectment, 2d edit. (1819); 3 T. R. 18; Bul. N. P. 106; Adams' Ejectment, 1st edit. 183; Selw. N. P. 4th edit. 682; Cro. Eliz. 13, 469, 535. The Court will allow an amendment to enlarge the term even after verdict; see Selw. N. P. 5th edit. 704, note; Carth. 3; Cowp. 841; 1 Sch. & Lef. 81, note a.

(u) It is not necessary to allege any time of entry; 2 Rol. Rep. 466; Latch, 199.

(x) The words "said tenements" here have reference to the previous particular description, and therefore are not in this place untechnical or objectionable.

ON A SINGLE
DEMISE.

the said Richard Roe afterwards, to wit, on the day and year aforesaid, [or "on the — day of —, (y) in the year aforesaid,"] with force and arms, &c. entered into the said tenements, (z) with the appurtenances, in which the said John Doe was so interested in manner and for the term aforesaid, which is not yet expired, and ejected him the said John Doe out of his said farm, (a) and other wrongs* to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lady the queen; wherefore the said John Doe saith that he is injured, and hath sustained damage to the value of £50, and therefore he brings his suit, &c. [At the foot of the declaration a notice to appear must be subscribed in general as in the next form, but when against a tenant, under 1 Geo. 4, c. 87, the second form is to be adopted.]

Notice to appear
thereto, in com-
mon cases. (b)

Messrs. C. D., I. K. and L. M. [the tenant or tenants in actual possession. (c)]

I am informed that you or some or one of you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next — term [or if the premises lie in London or Middlesex, "on the first day of next — term," (d)] in her majesty's Court of Queen's Bench, wheresoever &c. [or in the Common Pleas, "in her majesty's Court of Common Bench at Westminster,"] by some attorney of that Court, and then and there, by rule of the same Court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this — day of —, A. D. —.

Your's, &c.

RICHARD ROE. (e)

(y) The ejectment or ouster should be stated to have been after the commencement of the supposed demise, and it is not unusual, though unnecessary, to mention a particular day; Cro. Jac. 311; Selw. 4th edit. 683.

(z) In ejectment for a moiety, the words "said tenements" were held here sufficient; Cro. Eliz. 286.

(a) The term "farm" as here used is merely descriptive of the *leasehold interest*, (Latin, *firmarius*), and does not mean a farm in the ordinary acceptation of that term, and equally applies to houses as land; see 2 Bla. Com. 319.

(b) In proceedings in ejectment under 1 Geo. 4, c. 87, the notice is different from the above form. As to these proceedings, see Tidd, 8th edit. 525, and Chitty's Archb. 7th edit.

(c) The notice should be directed to the tenant by his name; 1 Chit. Rep. 215 a; Adams, 2d edit. 202; 1 Moore, 113; 2 Chit. Rep. 179. It is best to insert both the christian and surname of tenant, 1 Chit. Rep. 573 a; but a misnomer of the occupier or intended defendant is immaterial, *Doe d. Folkes v. Roe*, 2 Dowl. 567; *Doe d. Frost v. Roe*, 3 Dowl. 563. It is usual to prefix the names of all the tenants to such notice, but this is not necessary; it suffices to direct it to the indi-

vidual tenant who is served; 7 T. R. 477; 5 Moore, 73. In 6 M. & Sel. 203, a rule was refused to set aside the service of a declaration in ejectment, on the ground that notice to the tenant in possession was addressed to him by a *wrong christian name*; for this would in effect be to allow a plea in abatement in ejectment for a misnomer. In ejectment against joint-tenants, all their names should be inserted, otherwise it would be irregular; 10 Moore, 493, *sed quere*.

(d) In a country cause, the notice should be to appear in or of the ensuing term generally, [and now, since the rule, E. T. 2 Geo. 4, whether such term be issuable or not, see Tidd, 8th edit. 524,] but in London or Middlesex on the first day of the term (meaning the first day in full term); Selw. N. P. 640; 2 Str. 1049. As to decisions on the form, &c. of this notice, see Tidd, 9th edit. 185, &c.; Chitty's Archb. 7th edit.

(e) Strictly this should be the name of the casual ejector, but where the notice was signed in the name of John Doe, the nominal plaintiff, the Court refused to set aside the judgment; 3 T. R. 351. It is not necessary that there should be a date to the notice; per Patteson, J. in *Doe v. Roe*, 2 Ad. & El. 12.

Mr. C. D. [*the tenant or tenants in actual possession.*]

ON A SINGLE
DEMISE.

Take notice, that you are hereby required to appear in her majesty's Court of Queen's Bench, [*or "Common Pleas,"*] at Westminster, on the first day of next — term, [*or, in country causes, "in next term,"*] then and there to be made defendant in this action of ejectment, and then to enter into a recognizance, by yourself and two sufficient sureties, in such sum as to the said Court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in this action, if the said Court shall so order.

Notice to appear under proceedings, on 1 Geo. 4, c. 87. (f)

Your's, &c.

JOHN NOKES [*the landlord.*]

Mr. C. D. [*the tenant or tenants in actual possession.*]

The like in another form. (g)

Take notice, that in pursuance of the statute made and passed in the first year of the reign of his late majesty King William the Fourth, intituled "An Act for enabling Landlords more speedily to recover Possession of Lands and Tenements unlawfully held over by Tenants," you are hereby required to appear in the Court of Queen's Bench at Westminster, on the first day of next — term, [*or, in country causes, "in next term,"*] there to be made defendant in this action, and to find such bail, if ordered by the said Court, and for such purposes as are in the said act specified.

Your's, &c.

JOHN NOKES [*the landlord.*]

In the Queen's Bench [*or "Common Pleas."*]

— the — day of — [*the day next after the day of the ouster in the declaration*], in the — year of the reign of Queen Victoria.

Ejectment on 1 Will. 4, c. 70, s. 36. (h)

— (to wit.) Richard Roe was attached to answer John Doe, &c. [*proceed as in other declarations in ejectment. The notice to appear thereto will be the same as in other cases, except that it should require the tenant to appear and plead within ten days from the receipt hereof.*]

ON DOUBLE DEMISES.

ON DOUBLE
DEMISES.

In the Queen's Bench [*or "Common Pleas."*]

— term, — Vict.

— (to wit.) Richard Roe was attached to answer John Doe of a plea of trespass and ejectment, and thereupon the said John Doe, by Y. Z. his attorney, complains, For that one A. B. on &c., at the parish of —, in the county of —, demised to the said John Doe the manor of &c. [*same as declaration, ante, 670, to the end of the ouster, 672, and then as follows.*]

Declaration by original on two demises with one ouster. (i)

Second demise. (k)

(f) The notice is sufficient if signed "A. B. agent for the plaintiff," requiring the tenant to appear and give bail for such purposes as are specified in the statute, without going on to state those purposes in detail; *Doe dem. Beard v. Roe*, 1 M. & W. 360.

(g) See the preceding note (f); and see form, Chitty's Arch. Forms, 4th edit. 384.

(h) See Tidd's Supplement, 216. See also a form there of the record in such an ejectment.

(i) When to insert two or more demises, see ante, 670, in notes. Most of the notes to the preceding form are here also applicable; see form, 1 Rich. C. P. 309.

(k) Many cases arise in which it is advisable to declare even on three distinct demises, with distinct ousters, immediately following each, viz. the first stating a demise immediately after the lessor of the plaintiff's right first accrued, and for a supposed term of twenty-one years; a second for fourteen years,

ON DOUBLE DEMISES. also, for that one G. H., on the said — day of —, in the — year aforesaid, at the parish aforesaid, in the county aforesaid, demised to the said John Doe a certain other *(l)* manor [*describe the premises as in the first count, introducing the word "other" (l) before the enumeration of each description of property, and proceed as in form, ante, 670, and then as follows :*] to have and to hold the said tenements, with the appurtenances *secondly* above mentioned, to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of — years, from thence next ensuing and fully to be complete and ended. By virtue of which said several demises the said John Doe entered into the said several tenements first and secondly above mentioned, with the appurtenances, and became and was possessed thereof for the said several terms so to him thereof respectively granted as aforesaid. And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, first and secondly above mentioned, in which the said John Doe was so interested in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms. And other wrongs, &c. [*as in the form, ante, 672, and with the like notice to appear.*]

Plaintiff's entry into both sets of premises.

The ouster.

In the Queen's Bench, [or "Common Pleas."]

— Term, — Vict.

The like on two demises with two ousters. (m) — (to wit.) Richard Roe was attached to answer John Doe of a plea of trespass and ejectment. And thereupon the said John Doe, by Y. Z. his attorney, complains, For that one G. H., *(n)* on the — day of —, *(o)* in the — year of the reign of our said lady the queen, at the parish aforesaid, in the county aforesaid, demised to the said John Doe certain tenements, with the appurtenances, that is to say, the manor, &c. [*enumerate the premises according to the facts, as ante, 670, and then proceed as follows :*] to have and to hold the same to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of — *(p)* years from thence next ensuing and fully to be complete and ended. By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted, and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the same day and year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, in which the said John Doe was so interested in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm. And also for that the said G. H., on the — day of —, in the — year of our Lord —, *(q)* at the parish

Count part, first demise.

First entry and ouster.

Second demise.

made about six years before the commencement of the ejectment; and the *third* stating a very recent demise for seven years, and after a demand of possession.

(l) As to the propriety of this word see 2 Stra. 908. The word *other* seems immaterial; 2 Stra. 1180; 1 Wils. 1.

(m) As to the use of this declaration, see *ante*, 670, note *(g)*. Most of the notes to the form, *ante*, 666, are here also applicable.

(n) The party legally entitled to recover

the possession.

(o) Some day immediately after the right of possession first accrued.

(p) The first demise is usually for a longer term, as twenty-one or fourteen years.

(q) This is usually to be some day after the right of the lessor of the plaintiff accrued, and just before the service of the declaration and after a demand of possession and an ouster.

aforesaid, in the county aforesaid, had demised to the said John Doe certain other tenements, with the appurtenances, that is to say, the manor of ——— [describe the premises according to the facts, as ante, 670, but introducing the word "other" before every enumeration, and then proceed as follows:] to have and to hold the same to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of seven years from thence next ensuing and fully to be complete and ended. By virtue of which said last-mentioned demise, the said John Doe then entered into the said last-mentioned tenements, with the appurtenances, and became and was thereof possessed for the said last-mentioned term so to him thereof granted as aforesaid, and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year last aforesaid, with force and arma, &c. entered into the said tenements, with the appurtenances, lastly above mentioned, in which the said John Doe was so interested in manner and for the term last aforesaid, which is not yet expired, and ejected the said John Doe from his said last-mentioned farm. And other wrongs, &c. [as in the form, ante, 672, to the end, and with the like notice to appear.

ON DOUBLE
DEMISES.

Second entry
and ouster.

If there be several persons entitled to the possession, the demise or demises stated in the declaration must be joint or several, as their title will warrant.

The like on a demise by tenants in common, joint-tenants, parceners, &c.

If the lessors of the plaintiff be *tenants in common*, the declaration must allege a several demise by each of their undivided shares, or by each of the entirety. In the latter case the form will be as ante, 674. (r) In the former case the declaration should at least contain as many separate counts as there are tenants in common, (*id. ibid.*) In a case where a *joint* demise by two tenants in common was stated instead of separate demises, the judge not only held the objection fatal, but refused leave to amend during the trial under 3 & 4 Will. 4, c. 42, s. 23; *Doe dem. Poole v. Errington*, 3 Nev. & Man. 646. But tenants in common may join in an *actual* lease to a third person, and then the declaration may state a single demise by such lessee; *id. ibid.*; Selw. N. P. 4th edit. 683; Bul. N. P. 107; Cro. Jac. 166; 2 Wils. 232.

By a tenant in common.

The demises by tenants in common of the undivided share of each are to be the same as ante, 674, but describing the share thus, "one undivided moiety or half part, the whole into equal moieties to be divided of and in," and the second count will be as ante, 674, on the demise of the other tenant in common, inserting the same words. However, under a count for an entirety, or for a moiety, an undivided moiety or third, or other proportion, may be recovered; 1 Burr. 326; 3 Lev. 334; 1 Sid. 229; 1 Esp. Rep. 360, *et supra*; and see 1 Wils. 1; 2 Stra. 1180.

Form of counts when on demises of tenants in common.

If the lessors of the plaintiff be joint-tenants or parceners, the declaration usually states a joint demise by all to John Doe, the nominal plaintiff. It is not, however, compulsory upon joint-tenants or co-parceners to join in a

By a joint-tenant or parcener.

(r) As to joint tenants and tenants in common, see 11 East, 289; 12 East, 39, 67, 61, 221; 1 Esp. Rep. 360; Adams, 1st edit. 178, 179. As to co-heirs or co-parceners, 5 East, 182.

ON DOUBLE
DEMISES.

demise in an action of ejectment, and they may declare upon separate demises by each, it having been decided that ejectment will lie on their several demises for the recovery of the whole premises, although the joint tenancy is severed by the separate letting; 3 Campb. 190. So one joint-tenant may maintain ejectment on his single demise for his own share of a copyhold descending by custom to all the children equally of the tenant last seised; but it will be considered as a severance of the tenancy; 12 East, 39, 57; 3 Taunt. 120. Churchwardens and overseers of the poor may join in a demise of the parochial property vested in them by 59 Geo. 3, c. 12; *Doe dem. Hiley v. Jackson*, 10 Bar. & Cress. 885; *Doe dem. Higgs and others v. Cockell*, 6 Car. & P. 525.

By a lessor or
superior land-
lord against les-
see.

Where by an under-lease power was reserved on non-payment of rent, "*to the second lessors and the first or original lessor*" to enter; it was held that the demise was properly laid to be by the lessors alone, and that it need not be a joint demise by the lessors and the original lessor; 4 Bingh. 276.

When by deed
formerly.

If the ejectment be brought by a *corporation aggregate*, by an *infant*, or for *tithes*, formerly it was considered necessary to state that the demise was by deed, Carth. 390; Cro. Jac. 613; but now that is considered unnecessary, see Ld. Raym. 136; Carth. 390; Sell. Prac. 2d edit. c. 14, sec. 2, A. and sec. 3, D.; Adams, 1st edit. 184 to 186, *acc.*; Selw. 4th edit, 683, *contrâ*. If, however, a demise by deed be stated it need not be proved; 1 Esp. Rep. 199.

Ejectment for
tithes, stating a
demise by deed.
(s)

That the said E. F., in the year of our Lord —, on &c., at &c. [*venue*] by a certain indenture then made between the said E. F. of the one part, and the said John Doe of the other part, one part of which said indenture sealed with the seal of the said E. F. the said John Doe brings here into Court, the said E. F. demised to the said John Doe certain tenements, hereditaments and premises, with the appurtenances, to wit, [*here enumerate description of tithes, as ante, 679,*] to have and to hold the same unto the said John Doe and his assigns from thenceforth for and during and unto the full end and term of seven years from thence next ensuing and fully to be complete and ended. By virtue of which said last-mentioned demise, the said tenements, hereditaments and premises then and there became and were vested in the said John Doe for the said term, the said John Doe entered into the said demised tenements, hereditaments and premises, with the appurtenances, and was possessed thereof for the said term so to him thereof granted as aforesaid. And the said John Doe being so possessed, the said defendant afterwards, to wit, on &c. aforesaid, with force and arms, &c. entered into the said tenements, hereditaments and premises, with the appurtenances above mentioned, in which the said John Doe was interested in manner and for the term aforesaid, and which is not expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lady the queen.

(s) As to stating the demise of tithes by deed, *ante*, 670, note (l), and *supra*. It need not be stated to have been by deed; 1 Lord Raym. 136; Carth. 399.

BY BILL IN QUEEN'S BENCH.

In the Queen's Bench.

By BILL.

— Term, — Vict.

Declaration by
bill in Q. B. (t)

— (to wit.) John Doe complains of Richard Roe, being in the custody of the keeper of the Queen's Prison, for that G. H. [*the lessor of the plaintiff,*] on the — day of —, A. D. —, at the parish of —, in the county of —, demised to the said Joe Doe — messuage, &c. [*enumerate as ante, 670,*] with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, to have and to hold the same to the said John Doe and his assigns from thenceforth for and during and unto the full end and term of — years, from thence next ensuing and fully to be complete and ended. (u) By virtue of which said demise, the said John Doe then entered into the said tenements, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, in which the said John Doe was so interested in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm,* and other wrongs to the said John Doe then and there did, against the peace of our said lady the queen, and to the damage of the said John Doe of £50; and thereupon he brings suit, &c.

Plaintiff's entry
and the ouster.

The notice to appear is to be precisely as ante, 672, omitting the words "wheresoever, &c." and saying "in her majesty's Court of Queen's Bench at Westminster." Notice to appear.

IN THE EXCHEQUER.

In the Exchequer of Pleas.

IN THE
EXCHEQUER.

— Term, — Vict.

The like in the
Exchequer. (x)

— (to wit.) John Doe, a debtor to our sovereign lady the now queen, cometh before the barons of her majesty's Exchequer at Westminster, on — the — day of — [*the last day of the term preceding the time of service of the ejectment*] in the same term, by — his attorney, and complains by bill against Richard Roe, present here in Court the same day, of a plea of trespass and ejectment of farm. For that, &c. [*as in the preceding form, concluding as follows:*] To the damage of the said John Doe of £50, whereby he is the less able to satisfy our said lady the queen the debts which he owes to her majesty at her said Exchequer; and thereupon he brings suit, &c.

(t) It is not usual to proceed in Q. B. by bill. Many of the notes to the form, *ante*, 669, are also here applicable.

(u) If it be advisable to insert several demises with only one ouster, the second and other demises are here to be stated as follows:—"And also, for that the said G. H., on the — day of —, in the year of the reign aforesaid, at &c. aforesaid, demised to

the said John Doe — other messuages, &c." [*describing them as in the first count, and then stating the entry and ouster in the plural number.*] If several distinct ousters should be necessary, state the first demise, entry and ouster, as far as the * *infra*, and then insert the second demise, entry and ouster.

(x) Most of the notes to the form, *ante*, 669, are also here applicable.

IN THE
EXCHEQUER.

Notice to ap-
pear thereto.

ON A VACANT
POSSESSION.

On a vacant
possession. (y)

The notice to appear is to be precisely as ante, 672, with the exception of the words, "in the Office of Pleas of her majesty's Court of Exchequer, at Westminster."

ON A VACANT POSSESSION.

The declaration in ejectment on a vacant possession is the same as in other cases, (*see the forms, ante, 669,*) except that the plaintiff and defendant, as well as the lessor of the plaintiff, are in this case the *real* parties; as for instance, A. B. the actual lessee of the premises, should be the plaintiff, in lieu of John Doe, C. D. (a real ejector) the defendant, in lieu of Richard Roe, and E. F. (the party entitled to possession) the lessor of the plaintiff, and the party who executed the actual lease, and instead of the common notice at the end, substitute the following:

Notice to ap-
pear thereto. (z)

Mr. —

Take notice, that unless you appear in her majesty's Court of Queen's Bench at Westminster, in next — term, [*or if in London or Middlesex, "the first day of next — term,"*] at the suit of the above named plaintiff A. B. and plead to this declaration in ejectment, judgment will be thereupon entered against you by default. Dated, &c.

Your's, &c.

J. K. plaintiff's attorney.

To Mr. G. H. [*the wrongful occupier.*]

(y) Imp. Prac. 6th edit. 572, 7th edit. 627, 8th edit. 616; and other forms, Tidd's Forms, 721, 722, 723. See also T. Chitty's Forms, 5th edit.

(z) Impey, K. B. 8th edit. 616; see another form in Tidd's Forms, 723, where the notice in a country cause is stated to be "*within the first eight days of next — term.*"

INDEX

TO

THE SECOND VOLUME.

- ABANDONMENT** (see title *Policy*.)
statement of, in action on policy, 153
- ABATEMENT**,
commencement of declaration in second action, after plea in, for non-joinder, 16
- ABSTRACT**,
declaration in assumpsit for not delivering of, on sale of estate, 209, 211
- ABUTTALS**,
necessity for statement of, 660, note (m), 662, note (n)
of *locus in quo*, stated in a declaration, 662
- ACCEPTOR** (see *Bill of Exchange*.)
declaration against, 100 to 109
for non-acceptance of a bill, 125, 126
acceptance *supra* protest stated, 130, 131
acceptance of one part of foreign bill stated, 128
case against, for cancelling acceptance, 510
assumpsit by accommodation acceptor for not indemnifying, 232
the like by maker of accommodation note, 234
- ACCOMMODATION**,
assumpsit by accommodation acceptor, for not indemnifying, 232
by accommodation maker of a note, for not indemnifying, 234
- ACCOUNT**,
assumpsit for not rendering, 252 to 254
against person employed to settle debt, 254
against an attorney for not accounting for monies received, 254, 283
debt against surety of agent for not accounting for goods, 318
- ACCOUNTANT**,
assumpsit by, for his services, 61
- ACCOUNT STATED** (see *Accord and Satisfaction*.)
assumpsit upon, prescribed form, 34, 65
by and against surviving partners, 66 to 68
by and against husband and wife, 68, 69
by assignees of a bankrupt, 70 to 72
by and against executors, 73 to 77
by and against administrators, 77 to 80
debt upon, 292

ACTION, NOTICE OF, 1 to 4 and notes

ACT OF PARLIAMENT (see *Statute.*)

AD DAMNUM,
form of conclusion, 13

ADJUSTMENT,
statement of, in declaration on a policy, 153

ADMINISTRATION, LETTERS OF (see *Administrators.*)
statement of grant of, in general, in assumpsit, 25, 77, 78
the like, with the will annexed, 23, 24, 78, 79
in debt on bond, 331
in trover, 644
profert of, 25, 77

ADMINISTRATOR (see *Executor.*)
commencements of declarations by and against.
by, in suit removed from Inferior Court, 11
in Q. B., C. P. or Exchequer, 22
against an administrator, 23
a surviving administrator, *ib.*
husband and wife, wife being administratrix, *ib.*
administrator *de bonis non*, with the will annexed, *ib.*
administrator *durante minore ætate*, 24
administrator, limited until original will or copy thereof be brought
into the Archbishop's Court, *ib.*
against an administrator, *ib.*
surviving administrator, 23
husband and wife, wife being administratrix, *ib.*
administrator *de bonis non*, with the will annexed, *ib.*
conclusion and profert, 25
where declaration contains a count on a note, &c. 77, 79
statement of grant by the Vicar General of Chester, 25
profert by a surviving administrator, 25, 77
administrator *de bonis non* of an administrator, 26
the like with will annexed, *ib.*
administrator with the will annexed, *ib.*
costs, liability to, 74, note (u)
assumpsit,
by, on promises to intestate, 77
conclusion where declaration contains a count on a bill or note,
&c. *ib.*
on promises to plaintiff as administrator, *ib.*
breach of, and statement of grant of administration, 77, 78
by administrator *durante minore ætate*, 78
a surviving administrator, *ib.*
an administrator *de bonis non*, with will annexed, *ib.*
by husband and wife, administratrix before marriage, *ib.*
the like, where she became administratrix after marriage, *ib.*
on a note indorsed by administrator of payee of a bill against ac-
ceptor, *ib.*
the like against drawer, *ib.*
against, on promises by intestate, 79
conclusion where declaration contains a count on a bill or note, &c. *ib.*
an administrator *durante minore ætate*, &c. *ib.*
on promises by defendant as administrator, *ib.*
a surviving administrator, *ib.*
an administrator *de bonis non*, 23, 79
husband and wife, administratrix before marriage, 80
the like, where she became administratrix after marriage, *ib.*

ADMINISTRATOR—*(continued.)*

- on promissory notes, by and against (see *Promissory Notes.*)
- bills of exchange (see *Bills of Exchange.*)
- debt by an administrator of obligee, 331
 - against ditto, 332
- covenant by administrator on an indemnity deed, *ib.*
- trover by, 644
 - against, 645
- trespass by, for injury to real estate of intestate, 663

ADMITTANCE TO COPYHOLD,
pleaded, 424**ADULTERY** (see *Criminal Conversation.*)**ADVERTISEMENTS,**

- assumpsit for, 64
- assumpsit on, to reward the discovery of a felon, 190
- the like, at suit of a constable, 191

AGENT (see *Bailee. Broker. Factor.*)

- declarations,
 - on a bill drawn by, 102
 - indorsement of bill by, 106
 - on a policy made by, 132
- assumpsit *by*,
 - for commission, 60
 - on a policy, 132
- against*,
 - for not accounting, 252
 - the like more general, on an executed condition, 254
 - against agent for not accounting for goods consigned at different times for sale, *ib.*
 - for selling on credit, 255, 256, 257
 - for not selling for ready money, 256
 - for not obtaining a good bill, *ib.*
 - for not using due care in sale of goods, *ib.*
 - on promise to be responsible on *del credere* commission, 257
 - for selling on credit to person who became insolvent, *ib.*
 - for not accounting for produce of bill defendant had to get discounted, *ib.*
 - debt against surety, on a bond conditioned for agent's accounting for goods delivered to him to sell, 318
 - case against, for misconducting a distress, 503
 - case for misrepresenting the character of, whom plaintiff was about to employ, 524

AGISTMENT OF CATTLE,

- assumpsit for, 49
 - for horse-meat and stabling, &c. 48
- eatage of grass, 47
- corn, &c. sold, *ib.*

AGREEMENT (see *Assumpsit. Covenant.*)

- declaration in assumpsit upon, stating it formally, 215, 243
- statement of mutual promises, 166

ALE-HOUSE KEEPER (see *Innkeeper. Public House.*)

- case against, for carrying on trade of, within a borough, not being a burgess, 628

ANCIENT LIGHTS,

- declarations in case for obstructing of, 582, 584

ANIMALS,

case for keeping mischievous dogs, &c. 430, 431

ANNUITY,

against an attorney for taking defective security from grantor, 280

ANNUITY BONDS AND DEEDS,

declarations in debt on annuity bond, stating condition and breach, 318
on annuity deed for arrears, 313

APOTHECARY,

declaration in assumpsit by, for attendance, medicine, &c. 62
debt against, for practising without certificate, 305

APPRAISER,

assumpsit by, for his services, 61

APPRAISEMENT,

stated in declaration, 217 to 221

APPRENTICE AND APPRENTICE DEED,

against father of apprentice for neglect of duty of apprentice, 370
covenant by apprentice on indenture, 371
by apprentice against executor of master, 372
case for enticing away or harbouring of apprentice, 485, 486

ARBITRAMENT (see *Award*.)**ARREST (see *Escape*.)**

statement of, under a *capias*, 320
statement of, under a *capias ad satisfaciendum*, 558
case against the sheriff for not arresting, having an opportunity, 554, 570
case for malicious arrest, 434, 438 (see *Malicious Prosecution*.)
trespass for false imprisonment, 653

ARREST AND DETAINMENT (see *Policies of Insurance*.)**ARTICLES OF AGREEMENT (see *Agreement*.)**

covenant on partnership articles, 373

ARTICLES OF PEACE,

case for a maliciously exhibiting them against plaintiff, 444

ASSAULT AND BATTERY (see *Trespass*.)**ASSENT,**

by an executor to a bequest of a chattel real pleaded, 426

ASSETS (see *Devisee*. *Executor*. *Heir*.)**ASSIGNEE (see *Assignments*. *Bankrupt*.)**

commencement of declarations by and against,
of sheriff of bail-bond, 16

Of Bankrupts,

by assignees of, in Q. B., C. P. or Exchequer, 19
conclusion of same, *ib.*

by one partner and the assignees of another, *ib.*

by assignees of two or more bankrupts under several fiats, to recover
a debt due to the joint estate, 20

representative character of, not in issue unless specially denied, 19,
note (p)

assumpsit by,

on promises before bankruptcy, 70

conclusion where declaration contains a count on a bill or note, &c. *ib.*

on promises after bankruptcy, 71

ASSIGNEE—(continued.)

- on promises on causes of action arising after the bankruptcy, 71
- by a surviving assignee, *ib.*
- by one partner and the assignee of another, *ib.*
- by, against maker of note payable to bankrupt, 90
- by assignee of indorsee against indorser, 99
- by assignee of drawer of a bill bankrupt against acceptor, 105
- the like of indorsee against acceptor, 109
- assignee of payee against drawer, 114
- of indorsee, a bankrupt, against drawer, 119
- the like, where bill dishonoured after bankruptcy, *ib.*
- assignee of indorsee, a bankrupt, against indorser, 124
- on a Scotch decree, 179
- on feigned issues to try bankruptcy, &c. 172, 173
- debt by,
 - by assignees of a bankrupt obligee against obligor, 331
- trover by,
 - by, on bankrupt's possession and a conversion after bankruptcy, 641
 - the like, on assignee's possession, *ib.*
- Of Insolvents,*
 - commencement, &c. of declarations by, 20
 - the like by, after removal of first assignee by the Insolvent Court, 20
- assumpsit by,
 - on promises to insolvent, 72
 - conclusion where declaration contains a count on a bill or note, &c. *ib.*
 - counts on causes of action arising to assignee after vesting order, *ib.*
 - on promissory note by, against maker of note payable to insolvent, 91
 - assignee of indorsee against maker, 93
 - the like against payee of a note payable generally, 99
 - on a bill of exchange by assignee of drawer against acceptor, 105
 - the like, by assignee of indorsee, 109
 - assignee of payee against drawer, 115
 - the like of indorser against drawer, 119
 - the like, against indorser, not being drawer, 125
- debt by assignees against insolvent, on 13 Eliz. c. 5, to recover penalties for fraudulent conveyances, 345
- trover by, 642
- of a freighter, declaration against him for damage in detaining ship, &c. 165
- by assignee, &c. of lessor against lessee, 395, 406
- by lessor against assignee of lessee for rent, 395, 397
- by lessor against assignee of lessee for not repairing, &c. 397
- estate by assignment stated, 406, 415
- case by assignee for infringement of patent, 578

ASSIGNMENTS (see also *Pledge.*)

- of bail-bond pleaded, 320
- of replevin-bond, 325
- of lease,
 - to defendant, and his entry, 396, 406
 - to plaintiff, 406, 415
- of interest in a patent, 576

ASSUMPSIT (see *Analytical Table*, and title "*Declaration*," and the respective *heads.*)

- particulars of plaintiff's demand in, 1 to 4
- commencements and conclusions of declarations in, 8 to 28 (see *Declaration.*)

ASSUMPSIT—(*continued.*)

declarations in

- I. Common counts, 1 to 81
 - I. Respecting real property, 37 to 46
 - II. Respecting personal property, 46 to 52
 - III. Respecting personal services, 52 to 64
 - 1. Wages, 52 to 54
 - 2. Fees, &c. 54 to 57
 - 3. Services in general, 57 to 64
 - IV. Respecting monies, 64 to 66
 - V. Relating to character in which plaintiff sues or defendant is sued, 66 to 81
- II. Special counts,
 - I. On promissory notes, 82
 - against maker, 82 to 94
 - against indorser, 94 to 99
 - II. On checks, 99, 100
 - III. On inland bills of exchange, 100
 - drawer and payee against acceptor, 100 to 105
 - indorsee against acceptor, 105 to 109
 - payee against drawer, 109 to 115
 - indorsee against drawer, 115 to 120
 - indorsee against indorser, not being drawer, 120 to 125
 - on non-acceptance of bills, 125 to 127
 - IV. On foreign bills of exchange, 127 to 131
 - V. On sea policies of insurance, 131 to 135
 - VI. On life policies, 153 to 159
 - VII. For general average, 159 to 161
 - VIII. On charter parties, 161 to 167
 - IX. On wagers, 167 to 171
 - X. On feigned issues, 171 to 176
 - XI. On awards, 176
 - XII. On foreign judgments, 177 to 179
 - XIII. For legacies, 179
 - XIV. For contribution to party walls, 180 to 185
 - XV. To pay money for forbearance to defendant, 185
 - XVI. To pay money for forbearance to third persons, 186
 - XVII. The like in consideration of marriage, 188
 - XVIII. The like for services and works, 189 to 192
 - XIX. Relating to sales of goods and personalty, 192 to 200
 - XX. Relating to contracts of exchange, 200
 - XXI. Relating to contracts of loan, 201 to 203
 - XXII. On warranties, 204 to 208
 - XXIII. Relating to sale, &c. of real property, 208 to 231
 - XXIV. On guarantees, 231
 - XXV. On promises to indemnify, 232 to 236
 - XXVI. On promises to marry, 236 to 239
 - XXVII. On promises to serve and employ, 239 to 243
 - XXVIII. To perform works, 243 to 246
 - XXIX. Against bailees in general, 246 to 251
 - XXX. Against agents, factors, &c. 252 to 259
 - XXXI. Against wharfingers, 259 to 262
 - XXXII. Against a farrier for badly shoeing a horse, 262
 - XXXIII. Against carriers by land, 262 to 268
 - XXXIV. Against carriers by water, 269 to 273
 - XXXV. Against attornies, 273 to 283.

ASSURANCE, POLICIES OF (*see Policies of Insurance.*)ATTAINDER (*see Outlawry.*)

ATTORNEY (see *Abatement. Agent. Privilege.*)

declaration by an attorney in Q. B. 15

assumpsit *by*, for fees, &c. for every description of business and journeys, &c. 54

for prosecuting a fiat in bankruptcy, *ib.*

for procuring a bankrupt's certificate, *ib.*

for procuring defendant's discharge as an insolvent, 55

as a clerk in Court, &c. in Exchequer, 15, 55

by an agent against another attorney, 55

against, for negligently conducting cause to trial without evidence, 273

general count, for improperly conducting a defence to an action, whereby plaintiff did not recover in it, 275

for not obtaining judgment so soon as he ought to have done, 276

general count, for improperly conducting a defence to an action, whereby defendant failed in it, 279

for not putting in bail, whereby his client had to pay debt, 276

for not putting in sufficient plea to an action, 277

for not appearing, and for suffering judgment, 278

for not giving note to prisoner, whereby he was discharged, 279

for not examining title to estate his client bought, *ib.*

for taking defective security from grantor of annuity, 280

general count for negligence in investigating security, 283

for not accounting for monies received, defendant being employed to settle a debt, 254, 283

debt *against*, on 2 Geo. 2, c. 23, s. 24, for penalty for practising as an attorney (in the name of another) without being enrolled and admitted as such, 364

case *by*, for a libel on him, 460, 471

case *against*, for not releasing plaintiff out of custody after his paying debt and costs, &c. 439

case *against*, for negligently conducting a cause to trial without proper evidence, 500

general count for improperly conducting an action, *ib.*

case *against*, for not causing a sufficient title to an estate bought by plaintiff to be conveyed to him, *per quod* he could not resell it, 501

general count, for negligence in investigating title, 502

notice of action *by*, to justice, on behalf of client, for false imprisonment, 3

ATTORNEY GENERAL,

information *by*, for running foul of king's ships, 531

AUCTION,

assumpsit for not completing purchase of an estate at, 213

for not taking away goods sold at, 195

the like where there has been a re-sale, 196

AUCTIONEER (see *Agent.*)

assumpsit *by*, for his services, &c. 61

against, for selling on credit, 257, n. (u)

AVERAGE,

average losses stated, 148 to 152 (see *Policies of Insurance.*)

indebitatus assumpsit for, 50

assumpsit, special, for, by owner of ship, where anchor, &c. cut away, 152

the like where ship entangled with shore, &c. 160

AVERAGE—(*continued.*)

where ship damaged by storms was laid on beach and bilged, 160
for contribution by ship-owners for loss by jettison, 161

AWARDS AND ARBITRATION,

statement of making of, after time enlarged, 299
indebitatus assumpsit on, 65
do. on an umpirage, *ib.*
assumpsit on parol submission, 176
debt on, where submission by bond, 295
debt on award under judge's order, 298

BAIL,

pleadings by and against (*see Recognizance.*)
against attorney for not putting in, where sheriff fixed, 276
case against justice for refusing to take, 633
the like against a sheriff, on 23 Hen. 6, c. 9.. 631
the like in debt on that act, 357
at the suit of bail to the sheriff for not indemnifying, 234
against the sheriff for taking insufficient bail in replevin, 568
case against keeper of Queen's Prison for escape, where the defendant
surrendered in discharge of bail, 556

BAIL BONDS (*see Recognizances.*)

declarations on,
debt by assignee of sheriff when first suit was by *capias*, 320
case for not assigning of, 569

BAILEES AND BAILMENT (*see also Account.*)

assumpsit against, 246
bailee, without reward, for not taking care of goods, 247
for not returning casks, or paying for them, 248
bailee having care of goods, &c. lent to him, 251
a pawnbroker for losing a pledge, 248
hirer of a horse for immoderate riding, &c. 249
the hirer of household furniture, 250
watchmaker for loss of watch delivered him to repair, *ib.*
count against bailee for negligence, 251
a wharfinger for loss of goods, &c. 259
a farrier for badly shoeing plaintiff's horse, 262
carriers by land, 262 to 268 (*see Carriers.*)
carriers by water, 269 to 273 (*see Carriers.*)
attornies, 273 to 283 (*see Attorney.*)
agents, auctioneers, factors, &c. 252 to 259 (*see the respective titles.*)
case against,
bailee, for negligence, stating purpose of bailment, 506
general count against bailee for negligence, *ib.*
bailee, without reward, for not taking care of, and re-delivering on
request, *ib.*
bailee of lease, for pawning it, 507
miller, for mixing corn, *ib.*
acceptor of bill for cancelling his acceptance, 510
for selling cow deposited with defendant as security for a debt, 508
coal-meter for not properly measuring coals, whereby plaintiff paid
for more than he had, 509
for putting plaintiff's mare, taken damage feasant, into defendant's
farm yard, where it was gored, 510
against an engraver, for using for his own purpose plates engraved
by him for plaintiff, *ib.*
against banker for not honouring draft of customer, 489, 510
carriers by land, 489 to 495 (*see Carriers.*)

- BAILEES AND BAILMENT**—(*continued.*)
 carriers by water, 495 to 497 (see *Carriers.*)
 innkeepers, 498, 499 (see *Innkeeper.*)
- BAILIFF** (see *Cognizances. Distress. Servant.*)
 assumpsit by, for fees, 56
 case against, for negligence under a distress, £03
 case against sheriff's bailiff for extortion, 635
- BANK NOTE**,
 trover for, 639
 declaration by bearer of country bank note, 89
 assumpsit on warranty of, 208
- BANKERS**,
 assumpsit on check on, 99, 100
 case against, for not paying of, 489, 510
- BANKING COMPANY**,
 assumpsit on promissory note by one of the officers of, under 7 G. 4,
 c. 46..94
 against public officer of, *ib.*
- BANKRUPT AND BANKRUPTCY** (see *Assignees.*)
 declaration by messenger, for his fees, 56
 feigned issue to try, 172, 173
 case for libel charging plaintiff, an attorney, with misconducting a fiat in
 bankruptcy, 460
 case for maliciously issuing fiat in, 452
- BARGAIN AND SALE** (see *Sale.*)
 inrolled, pleaded, 416
- BARON AND FEME** (see *Husband and Wife.*)
- BARRATRY**,
 losses by, stated, 146, 147 (see *Policy of Insurance.*)
 definition of, 146, note (b)
- BATHING-ROOM**,
 case by proprietor of, for slandering him, 477
- BATTERY AND ASSAULT**,
 declarations for (see *Trespass and Analytical Table.*)
- BEGINNINGS**, 13 to 28 (see title *Commencements of Declarations.*)
- BEQUEST**,
 of chattel real, or personal property, how pleaded, 426
- BILLS OF EXCHANGE** (see *Promissory Notes.*)
 commencement of declarations on, 13, &c.
 declarations on, as prescribed by Reg. Gen. of T. T. 1 W. 4, and Hil. T.
 4 W. 4..29
 observations on these rules, *ib.*
 recital of Reg. Gen. T. T. 1 W. 4..30
 schedule of prescribed forms, 31
 drawer against acceptor, being also payee, 32
 the like, not being payee, *ib.*
 indorsee against acceptor, *ib.*
 payee against acceptor, *ib.*
 payee against drawer on default of acceptance, 33
 indorsee against drawer on non-acceptance, *ib.*
 indorsee against indorser on non-acceptance, *ib.*
 indorsee against payee on non-acceptance, *ib.*

BILLS OF EXCHANGE—(continued.)

direction for declarations on bills where action brought after time of payment expired, 33

on bills payable after date, *ib.*
after sight, 34

the like where there is a count on a bill besides the money counts, *ib.*

Assumpsit on Inland Bills of Exchange.

observations on the structure of counts thereon, 100

First. DRAWER OR PAYEE AGAINST ACCEPTOR, *ib.*

drawer against acceptor on a general acceptance, *ib.*

the like on bill with a wrong date, *ib.*

the like on bill payable at a particular place, 101

on bill payable to third person and returned to drawer, *ib.*

on acceptance varying as to time from bill, 102

on acceptance payable on a contingency, *ib.*

payee against acceptor on a general acceptance, *ib.*

by payee on bill drawn by agent, *ib.*

payee against acceptor on bill payable at a particular place, *ib.*

surviving drawer against acceptor, 103

drawer against surviving acceptor, *ib.*

husband and wife on bill drawn by wife before marriage, *ib.*

by husband alone against acceptor where he married before
the bill became due, 104

executor or administrator of drawer against acceptor, *ib.*

drawer against executor or administrator of acceptor, *ib.*

executor or administrator of drawer against executor or ad-
ministrator of acceptor, *ib.*

assignee of drawer, a bankrupt, against acceptor, 105

assignee of drawer, an insolvent, against acceptor, *ib.*

Second. INDORSEE AGAINST ACCEPTOR.

indorsee against acceptor of a bill payable generally, 105

the like payable at a particular place, 106

indorsement by a firm, *ib.*

the like by an agent, *ib.*

surviving indorsee against acceptor, *ib.*

indorsee against surviving acceptor, 107

husband and wife, on a bill indorsed to wife before marriage,
against acceptor, *ib.*

indorsee against husband and wife, on a bill accepted by wife
before marriage, *ib.*

executor or administrator of indorsee against acceptor, 108

indorsee against executor or administrator of acceptor, *ib.*

executor or administrator of indorsee against executor or ad-
ministrator of acceptor, *ib.*

executor or administrator against acceptor on promise to
plaintiff to take case out of Statute of Limitations, 109

assignees of indorsee, a bankrupt, against acceptor, *ib.*

the like by assignee of insolvent debtor, *ib.*

Third. PAYEE AGAINST DRAWER.

payee against drawer, 109

the like payable at a particular place, 110

the like on default of payment where defendant had no effects
in hands of drawee, *ib.*

payee against drawer or indorser when drawee could not be
found to accept or pay, 111

the like where drawee dead and no executor or administrator
appointed at the time the bill became due, *ib.*

payee against drawer, who has dispensed with presentment for
payment, 112

BILLS OF EXCHANGE—(continued.)

payee against drawer, stating protest, 112
 surviving payee against drawer, *ib.*
 payee against surviving drawer, *ib.*
 the like when bill dishonoured after death, 113
 husband and wife, on bill payable to wife before marriage,
 against drawer, *ib.*
 the like when bill became due after marriage, *ib.*
 payee against husband and wife on bill accepted by her when
 sole, *ib.*
 executor or administrator of payee against drawer, 114
 payee against executor or administrator of drawer, *ib.*
 executor or administrator of payee against executor or admi-
 nistrator of drawer, *ib.*
 assignees of payee, a bankrupt, against drawer, *ib.*
 the like by assignee of insolvent debtor, 115.

Fourth. INDORSEE AGAINST DRAWER.

indorsee against drawer on bill payable generally, 115
 the like payable at a particular place, *ib.*
 surviving indorsee against drawer, 116
 indorsee against surviving drawer, *ib.*
 the like where bill became due after the death of the deceased
 partner, 117
 indorsee against drawer where defendant had no effects in hands
 of drawee, *ib.*
 husband and wife, on bill indorsed by wife before marriage,
 against drawer, *ib.*
 the like where bill became due after marriage, *ib.*
 indorsee against husband and wife on bill drawn by wife when
 sole, *ib.*
 executor or administrator of indorsee against drawer, 118
 indorsee against executor or administrator of drawer, *ib.*
 executor or administrator of indorsee against executor or
 administrator of drawer, *ib.*
 assignee of indorsee, a bankrupt, against drawer, 119
 the like where bill dishonoured after bankruptcy, *ib.*
 the like by assignee of insolvent debtor, *ib.*
 by indorsee of bill payable to order of fictitious payee against
 drawer or acceptor privy to the fact, 120

Fifth. INDORSEE AGAINST INDORSER, NOT BEING DRAWER.

indorsee against indorser, not being drawer, on bill payable
 generally, 120
 the like payable at a particular place, 121
 partial indorsement, *ib.*
 surviving indorsee against indorser, *ib.*
 indorsee against surviving indorser, *ib.*
 husband and wife, on bill indorsed to wife before marriage
 against indorser, not being drawer, 122
 indorsee against husband and wife, on bill indorsed by wife
 before marriage, she not being the drawer, *ib.*
 executor or administrator of indorsee against indorser, *ib.*
 the like where bill became due after death, 123
 indorsee against executor or administrator of indorser, *ib.*
 executor or administrator of indorsee against executor or ad-
 ministrator of indorser, 124
 by indorsee of executor or administrator, *ib.*
 assignees of indorser, a bankrupt, against indorser, *ib.*
 the like where the bill became due after the bankruptcy, *ib.*
 the like by assignee of an insolvent debtor, 125

BILLS OF EXCHANGE—(*continued.*)*Sixth.* ON NON-ACCEPTANCE OF BILLS.

- payee against drawer on default of acceptance, 125
- the like against drawer, with averment that defendant had no effects in drawee's hands, 126
- indorsee against drawer of a bill on non-acceptance, *ib.*
- indorsee against indorser of a bill on non-acceptance, *ib.*
- indorser against payee for non-acceptance, 127

On Foreign Bills of Exchange, 127 to 131

- observations, 127
- drawer against acceptor of bill payable in foreign coin at usances, *ib.*
- the like in another form, stating more fully the duration of usance, 128
- drawer against acceptor, where bill paid *supra protest* by third person, *ib.*
- by indorsee against acceptor of bill at usance in two parts, one accepted, the other indorsed, *ib.*
- special indorsement in full of one part of bill stating time and place, 129
- payee or indorsee against drawer, &c. on refusal to accept, *ib.*
- second indorsee against first indorser of bill protested for non-acceptance, *ib.*
- payee or indorsee against drawer or indorser, on refusal of drawee to pay, 130
- payee against drawer, on bill protested both for non-acceptance and non-payment, *ib.*
- by indorsee against acceptor *supra protest*, *ib.*
- the like by indorsee in another form, 131
- by drawee, who accepted *supra protest* for non-acceptance for honour of second indorser, against first indorser, *ib.*

Debt on,

- by drawer of bill against the acceptor, 292
- payee against drawer on default of acceptor, *ib.*

Other Declarations relating to,

- assumpsit for not discounting, 202
 - for not rendering an account of, 258
 - for not indemnifying accommodation acceptor, 232
 - for not delivering of, in payment for goods, 192
 - against agent for not obtaining a good bill, 256
- case against acceptor for cancelling acceptance, 510
- trover for, 639

BILL OF LADING (see *Charter Party.*)

- assumpsit upon, for loss of goods, 269

BLACK ACT (see *Hundred.*)

BOARD AND LODGING,

- assumpsit for, 42
- for lodging and necessaries for defendant, 48
- the like for third person, *ib.*

BOND (see also *Bail Bonds. Deed. Escrow. Replevin Bonds.*)

- debt on bonds,
 1. generally, 315
 - in the Queen's Bench, *ib.*
 - on Jamaica bonds, *ib.*
 - counts on several bonds, 316
 - excuses of profert, *ib.*

BOND—(*continued.*)

2. specially stating conditions and breaches, 317, 318
 - in general, *ib.*
 - observations thereon, *ib.*
 - to what bonds 8 & 9 Will. 3, c. 11, s. 8, does extend, 317
 - to what bonds the statute does not extend, *ib.*
 - form of declaration on a bond stating a condition, 318
 - second breach, *ib.*
 - on bond conditioned for agent's accounting, *ib.*
 - on annuity bond, *ib.*
 - on bond to replace stock, 319
 - on bond to perform covenant in another indenture, 320
 - on bail bonds, *ib.* (see *Bail Bond.*)
 - on replevin bonds, 325 to 329 (see *Replevin Bond.*)
 3. relating to character, &c. in which the party sues or is sued, 329, &c.
 - general observations, 329
 - by baron and feme, 330
 - by surviving obligee, *ib.*
 - by assignees of a bankrupt, 331
 - by executor of obligee, *ib.*
 - by an administrator, *ib.*
 - against baron and feme, 332
 - against executor or administrator, *ib.*
 - against heir of obligor, *ib.*
 - against the devisee of the obligor alone, 334
 - against the heir and devisee of the obligor, 333
 - at the suit of treasurer of a friendly society, established before the 10 Geo. 4, c. 56, and confirmed according to that act, 334
 - at the suit of treasurer of a friendly society, established under the 10 Geo. 4, c. 56. . 335
- trover for, 639

BOOKS (*see Copyright.*)

BOROUGH COURT OF SOUTHWARK,

- commencement of declaration in, 9
- assumpsit on judgment of Borough Court of Liverpool, 307

BOTTOMRY BOND, 139, note (*y*).

BREACHES,

- in assumpsit,
 - of common assumpsit counts in general, 36, 37, 66
 - admitting part payment, and breach of non-payment of residue, 37
 - at the suit of a surviving partner, 67
 - against ditto, *ib.*
 - at the suit of husband and wife, 68
 - against husband and wife, 69
 - at the suit of assignees of a bankrupt, 70
 - at the suit of executors, 73, 74, 75
 - against executors, 75, 76
 - at the suit of administrators, 77, 78
 - against administrators, 79, 80
- in debt,
 - in general, 286
 - special, of bonds, 317, 318
 - double breaches assigned in a declaration, *ib.*

BREACHES—(*continued.*)

- in covenant,
 - non-payment of rent, 395, 397
 - not repairing, &c. 397 to 403
 - in general, 403
- suggestions of breaches (see *Suggestion of Breaches.*)

BRIDGE,

- assumpsit for tolls of, 43
- assumpsit for calls on shares relating to, 44
- by Vauxhall Bridge Company, 45
- debt for calls on, 294

BROKER (see also *Agent.*)

- assumpsit by insurance broker for fees, &c. 60
 - for premium of insurance, *ib.*
- assumpsit by factor or agent, 60
 - by, on policy of insurance, 132
 - against insurance broker for not properly effecting insurance, 245
 - the like for not giving notice of his inability to effect insurance, 246
- case against, for misconducting a distress, 503
- case against, for not giving copy of charges of distress, 545 (and see *Distress.*)

BUILDER AND BUILDINGS,

- assumpsit on a building agreement, for not performing it, 243
 - for not fixing a steam engine properly, 244
 - for contribution to a party-wall, 46, 180 to 185 (see *Party Wall.*)
- trespass for building on plaintiff's wall, 660
- case for undermining plaintiff's buildings, 581

BULL,

- assumpsit for use of, 49
- case for putting plaintiff's mare, taken damage feasant, into defendant's yard, where it was gored, 510

BURGAGE TENURE,

- seisin of, pleaded, 403

BURGESS ROLI,

- debt against overseer on 5 & 6 Will. 4, c. 76, s. 48, for neglecting to make out list, 367
- by burgess, for money due under bye-law, 305

BYE-LAW (see *Friendly Society.*)

- debt on, for payment of money to College of Surgeons, 300
 - by Apothecaries' Company against an apothecary for practising without certificate, 305
 - by chamberlain of City of London for penalties, *ib.*
 - by burgess of Swansea for money due under, *ib.*

CALLS,

- assumpsit for,
 - on shares of a bridge, 44
 - the like at suit of treasurer of bridge company, 45
 - calls under a road act, *ib.*
 - at suit of treasurer of company for canal calls, *ib.*
 - railway calls, *ib.*
- debt for,
 - against subscriber for road calls on statute, for his subscription, 293
 - for road calls on another statute, giving general form of declaring, *ib.*

CALLS—(*continued.*)

- for instalment of subscription towards making canal under private act, 293
- for calls made by Vauxhall Bridge Company, 294
- by commissioners under Navigation Act against proprietor of tolls to recover salary, 295

CANAL,

- for calls, 45, 293 (*see Calls.*)
- case for diverting course of navigable canal, 608
- case for using more water to mill on canal than necessary, 609
- for wrongfully suffering floodgates to remain open, 610

CANCELLING,

- case for cancelling acceptance of a bill, 510
- declaration thereon, *ib.*

CAPIAS AD SATISFACIENDUM (*see Escape.*)

- pleaded, 558

CAPIAS, WRIT OF,

- pleaded in debt on bail bond, 321
- in justification of arrest pleaded, *post*, vol. iii.
- in action for escape and not arresting, 554
- case for malicious arrest on writ of, 434
- the like after judge's order rescinded, 438

CAPTAIN (*see also Agent. Carriers by Water.*)

- assumpsit by,
 - for wages, as against owner, 52
 - the like at suit of ship-steward or mate, 53
 - against, for wages at suit of sailor, 52
 - against, under bill of lading for loss of goods, 269
 - against owner of goods for not unloading, 270
- covenant against for not attending to comfort, &c. of passengers, 382
- case against, for deviating, whereby ship exposed to storm, 495

CAPTURE,

- losses by, stated, 143 to 147 (*see Policy of Insurance.*)

CARDS,

- assumpsit for money won at cribbage, 170

CARRIAGES, &c.

- assumpsit for hire of, 49
 - for standing of, 42
 - for work and labour with, 59
- case for negligence in driving of, 486, 487
- trespass for driving of, against plaintiff's carriage, 656

CARRIAGE OF GOODS (*see Freight.*)

- assumpsit for, 59

CARRIERS (*see Bailee.*)

- assumpsit *by*, for carriage of goods, 59
 - for booking parcels, 64
 - against owner of goods for not unloading, whereby plaintiff lost freight, &c. 270
 - the like for not unloading within a reasonable time, 271
 - the like against owner for bringing on board smuggled goods, 272
- Against Carriers by Land*,
 - for loss of goods, 262
 - for not carrying within a reasonable time, 264
 - for not carrying passenger, *ib.*

CARRIERS—(continued.)

for taking more passengers than legal, whereby plaintiff prevented from proceeding on journey, 265
 second count, for not providing sufficient room, 266
 for negligence, and overturning coach, whereby plaintiff's arm broken, 267
 the like more general, 268

Against Carriers by Water,

against captain on bill of lading for loss of goods, 269

case *against Carriers by Land,*

for loss of a box, 489

for not carrying a box within a reasonable time, 491

against coach proprietors, for loss of a parcel which they engaged to carry with a passenger, 492

second count, stating *termini* of journey with less particularity, *ib.*

third count, merely stating that defendants had plaintiff's parcel to carry to its destination, without describing them as coach owners, or termination of journey, 493

fourth count, for not taking care of parcel generally, *ib.*

for not forwarding parcel, *ib.*

for negligently driving, and breaking plaintiff's gig, &c. 488

Against Carriers by Water.

against captain under bill of lading, for deviating from voyage, &c. 495

against a carrier by water, for loss of goods, and injuring them in unloading, 496

against owner for not obtaining cocquet, whereby goods forfeited, 497

information by attorney-general for running foul of king's ships, 531

CASE (see also *Trover*.)

DECLARATIONS IN,

beginnings and conclusions of a declaration in case in Q. B., C. P. or Exch. 12, &c. (see *Declaration*.)

I. FOR TORTS TO THE PERSON.

For keeping Mischievous Animals, 430, 431

In consequence of public Nuisance, 431 (see *Nuisance*.)

For malicious Prosecutions, 434 (see *Malicious Prosecutions*.)

For Libels, 454 (see *Slander*.)

For slanderous Words, 466 (see *Slander*.)

For Criminal Conversation, 483

For debauching Daughters, &c. 484

For enticing away Apprentices, &c. 485 (see *Apprentices*.)

For careless Driving, 486 (see *Carriages*. *Carrier*.)

Against Surgeon for improper Treatment, 488

Against Inn-keeper, 499 (see *Inn-keeper*.)

II. FOR TORTS TO PERSONAL PROPERTY.

For Breach of implied Contract against Bankers, for not paying a Cheque, 489, 510.

Against Carriers, 489 to 498 (see *Carriers*.)

Against Inn-keepers, 498 (see *Inn-keeper*.)

CASE—II. FOR TORTS TO PERSONAL PROPERTY—(continued.)

- Against Attornies*, 500 (see *Attorney*.)
- Against a Bailiff*, 503 (see *Bailiff*.)
- Against Bailees in general*, 506 (see *Bailee*.)
- For Deceit and Misrepresentation*, &c. 511 (see *Deceit*.)
- For selling Goods manufactured by Defendant as and for Goods of the Plaintiff's*, 520
- For negligent driving Carriages*, 529 (see *Carriages*.)
- For negligently navigating Ships*, 530 (see *Ships*.)
- For illegal distresses*, 533 to 546 (see *Distress*.)
- For excessive Levies*, 546 (see *Excessive Levy*.)
- For Rescue and Pound-breach*, 549 (see *Rescue*. *Pound-breach*.)
- For Escapes*, 552 (see *Escape*.)
- For False Returns*, &c. 562 (see *False Return*.)
- For not taking Replevin Bond*, 565
- For taking insufficient Pledges in Replevin*, 568
- For not assigning Bail Bond*, 569
- For not arresting within a reasonable Time*, 570
- For not obeying Subpœna*, *ib.*
- For infringing Copyrights*, 572 (see *Copyright*.)
- For representing or performing Dramatic Pieces*, &c. 576
- For infringing Patents*, *ib.* (see *Patent*.)
- For Injury to Property in Reversion*, 580

III. FOR TORTS TO REAL PROPERTY CORPOREAL.

- To Houses*, &c. in *Possession*, 582 (see *Nuisance*.)
- To Houses*, &c. in *Reversion*, 589 (see *Reversion*.)
- For not repairing Fences*, 591 (see *Fences*.)
- For not carrying away Tithes*, 593 (see *Tithe*.)
- For Waste*, 595 (see *Waste*.)
- For Injuries to Water-courses*, 599 (see *Water-courses*.)

IV. FOR TORTS TO REAL PROPERTY INCORPOREAL.

- For Disturbance of Rights of Common*, 611 (see *Common*.)
- For Disturbance of Ways*, 617 (see *Way*.)
- For Disturbance of Ferries*, 623.
- For Disturbance of a Pew*, 625
- For Disturbance of a Market*, 626
- For Disturbance of Franchises, Tolls, Offices, Ferries, &c.* 628
- For selling Beer contrary to a custom in a Borough that no one should sell Beer within the Borough, but Freemen licensed by the Mayor and Aldermen*, *Mayor of Leicester v. Burgess*, 2 Nev. & Man. 131, 628.

V. UPON STATUTES.

- By Party grieved.*
 - on 8 Anne, c. 14, against sheriff, for not leaving year's rent, 629
 - on 23 Hen. 6, c. 9, for refusing bail, 631

CASE—V. UPON STATUTES—*By Party grieved—(continued.)*

- on 24 Geo. 3, against justice, for refusing bail, 632
- on 28 Eliz. c. 4, against sheriff, for extortion, 635
- against a sheriff, for refusing to replevy after tender of replevin bond, on distress for poor rate, 633
- against justice, for refusing to take bail on a conviction, where party intended to appeal, *ib.*
- against hundred, on 7 & 8 Geo. 4, c. 31, where building destroyed by rioters, 635
- for destroying goods of plaintiff in the warehouse of another person, 637
- the like where the property was in the care of a servant, 638

CATTLE (see *Fences. Horses. Replevin.*)

- assumpsit for, sold, 46
- for tolls on, 43
- for agistment of, 49
- for keep of, 48
- for hire of, 49
- for work with, 59
- case for injury by, 430
- for keeping mischievous cattle, 430
- trover for, 639
- trespass for chasing of, specially or generally, 654
- for seizing of, 655
- for converting of, *ib.*

CAUSE OF ACTION,

- statement of, in notices of action, 2, 3, in notes.

CELLAR,

- case for keeping it badly covered, *per quod* plaintiff fell in, &c. 432

CERTIFICATE,

- debt against attorney for penalty for practising without, 364
- apothecary for practising without, 305

CHAMBERLAIN,

- debt by, of city of London, for penalties under a bye law, 305
- against stockbroker for acting before admitted, 364

CHANCERY,

- for work and labour as one of six clerks in Chancery, 55

CHARACTER,

- averments of, when unnecessary, 454, 462

CHARTER PARTIES,

Declarations in,

- in whose name to be brought, 161, note.
- how to frame declaration, *ib.*
- assumpsit on, owner against freighter, for not loading, and demurrage, &c. *ib.*
- by owners, against assignee of freighter, for damage in detaining ship beyond days of demurrage, and for freight, &c. *ib.*
- debt on, for penalty incurred by not loading cargo, and for freight, 308
- covenant on, for freight and demurrage, 376
- for not loading in time, and not paying pilotage, 378
- by freighter against owner, with special damage, 379
- against captain of a vessel for not doing acts essential to comfort of passengers, 382

CHASING CATTLE,

- case for chasing with dogs, 431
- trespass for, 654

- CHATTEL INTEREST,
 declaration against purchaser of, 213, note (a)
- CHATTELS,
 indebitatus assumpsit to pay by chattels, 37
 indebitatus assumpsit for, 46
 how to describe them, 639
- CHECKS ON BANKERS,
 assumpsit on, by payee of, against drawer, 99
 by bearer of, against drawer, 100
 case for not paying, 489, 510
- CHIMNEY,
 case by reversioner for stopping up, 590
- CHRISTIAN NAME,
 misnomer in, pleaded (see *Abatement. Index to Vol. III.*)
- CHURCH (see *Pew.*)
- CLERK,
 commencement, &c. of declaration by a clerk or treasurer, &c. of trustees, &c. under a statute, 26 to 28
 assumpsit by, for work and labour as one of six clerks in Chancery, 55
 as clerk in Exchequer, *ib.*
- CLOSE (see *Trespass.*)
 declaration for trespass to, 660, &c.
 name of, or abuttals on, necessity for statement of, 660, note (m), 662,
 note (n).
- COACH (see *Carriage. Carrier.*)
- COAL-METER,
 case against, for not properly measuring coals, 509
- COAL MINE (see *Mine.*)
- CO-DEFENDANT,
 commencement of declaration in second action, after plea in abatement
 for nonjoinder of, 16
- COLLOQUIUM,
 stated in pleading, 466
- COMMENCEMENTS (see *Declaration.*)
 of declarations in general, 8 to 28
- COMMISSION,
 assumpsit for, 60
 of bankruptcy, case for maliciously suing out, 452
- COMMISSIONER,
 debt against, for acting in matter in which he was personally interested,
 367
- COMMITTITUR,
 of a prisoner to custody of keeper of Queen's Prison, stated, 560, 562
- COMMODATUM, 246, 249
- COMMON COUNTS,
 in assumpsit, 36 to 66 (see *Declaration.*)
 in debt, 291, 292 (see *Debt.*)
- COMMON INFORMER (see *Statutes.*)

- COMMON, RIGHTS OF,**
 declarations respecting,
 case for disturbance of common of pasture by putting on cattle, 611
 for not suffering fields to lie fallow in rotation, 613
 by building, &c. 615
 by inclosing, &c. *ib.*
 by digging turves, *ib.*
 by rabbits, *ib.*
 by taking dung off, 616
 by putting heaps of dung on, *ib.*
 by trespassing with horses, *ib.*
 of common of turbary, *ib.*
 of estovers, 617
 ejectment for common of pasture, 671
- COMMON, TENANCY IN** (see *Tenants in Common.*)
 pleaded, 412
- COMPANY** (see *Partners.*)
 declaration by a clerk, &c. to, empowered to sue under a statute, 26 to 28
- COMPOSITION** (see *Accord and Satisfaction.*)
 by a vicar on a, for tithes, 41, 48
- CONCISENESS** (see *Models of, and Declaration.*)
 in pleading, prescribed by Reg. Gen. T. T. 1 W. 4, and H. T. 4 W. 4,
 29 to 35
- CONCLUSIONS,**
 of declarations in general, 8 to 28 (see *Declarations.*)
- CONDITIONS PRECEDENT,**
 averment of performance of, 398
- CONSIDERATIONS, STATEMENT OF** (see vol. i. Index, *Consideration.*)
 past or executed,
 in *indebitatus* assumpsit, 36
 in common counts in debt, 291, 292
 in special assumpsit, 131 to 283
 continuing, 223
 concurrent, 194
 future or executory, 185, 190
 mutual promises, 166, 237
- CONSIGNEE,**
 by consignee against captain, on bill of lading, for loss of goods, 269
- CONSTABLE,**
 demand of copy of warrant from, 4
 assumpsit by, for a reward, 191
- CONTINGENCY,**
 declarations on a bill payable on, 102
- CONTINUATION,**
 of nuisance, case for, 584
 of title shown, when, *ib.*
- CONTRACT** (see *Agreement. Assumpsit. Covenant. Promise.*)
- CONTRIBUTION** (see *Party-wall.*)
 to party-walls, declarations for, 180 to 185
- CONUSEE,**
 of Irish judgment, debt by, 342

- CONVERSION,**
counts on, in trover, 639 to 645 (see *Trover*.)
- CONVEYANCE** (see *Pleader*.)
not executing one on sale of estate, 209
- CONVOY,**
averment in action on policy, that ship sailed with, 140
- COPARCENARY,**
estate in, pleaded, 412
- COPYHOLD ESTATE,**
assumpsit for price of, 37
fines on admission to, assumpsit for, 42
fees to steward on admission to, 57
estate in fee of copyhold by grant, 409, 423, 424, 425
devise of copyhold since 1 Vict. c. 26. . 424
remainder in fee in a copyhold, 411
surrender to use of will, death, presentment thereof, and admittance, 423
surrender to use of purchaser, and admittance, 425
enfranchisement of copyhold by lease and release, *ib*.
- COPYHOLDER,**
avowry by, or his tenant, for distress damage feasant, *post*, vol. iii.
seisin in fee of, stated, 408, *post*, vol. iii.
- COPYRIGHT** (see *Patent*. *Print*.)
case on 5 & 6 Vict. c. 45, for infringing copyright of a book, 572
first count for printing for sale or exportation, *ib*.
second count for importing, &c. book unlawfully printed, 573
the like for selling, &c. without consent of proprietor, 575
on 5 & 6 Vict. c. 45, for infringing copyright of a print, *ib*.
for infringing copyright of musical production, *ib*.
- CORN,**
case for not grinding of, at plaintiff's ancient mill, 629
- CORPORATIONS,**
declarations against, 15
seisin in fee of, 405
- COSTS** (see also *Damage*.)
liability of executor or administrator to, 74, note (u)
on agreement to pay, if plaintiff would cease further proceedings, 185
by acceptor of accommodation bill, for not indemnifying him from, 232
the like by maker of a promissory note, 234
for not indemnifying bail to sheriff from, *ib*.
by broker against party employing him to distrain, for not indemnifying him against costs, &c. *ib*.
for breach of covenant of good title, whereby ejectment brought, and plaintiff put to, 388
for defending ejectment in plaintiff's name, whereby he was put to, 521
- COUNTY COURT** (see *Inferior Court*.)
declarations in, 9
ditto in replevin, 647
to statement of proceedings in replevin there, 325 (see *Debt on Replevin Bond*.)
- COUNTY PALATINE** (see *Chester*. *Inferior Court*. *Palatine*.)
- COURT** (see *Inferior Court*.)

COVENANT,

statement of (*see the respective titles.*)

DECLARATIONS IN (*see Declarations.*)

commencements of, 8 to 28

conclusion of, *ib.* 371

On Apprentice Deeds, 370 (*see Apprentice Deed.*)

On Articles of Agreement between co-partners in trade, 373

On Deeds of separate Maintenance against Husband, 375

On Indemnity Deed, 376

On Charter-parties, ib. (*see Charter-party.*)

On Policies, 382 (*see Policy*)

On Deeds of Sale of Real Property,

by heir of purchaser against executor of husband, on covenant for

further assurance, and for not levying a fine, 387

against vendor for breach of good title, plaintiff ejected, 388

On Mortgage Deeds, 391

On Leases ib. (*see Lease*)

Title pleaded, 403 (*see Title pleaded.*)

Estate and Quantity of Interest, 404 (*see Title pleaded.*)

Estate and Time of Enjoyment, 410 (*see Title pleaded.*)

Estate and Number of Owners, 411 (*see Title pleaded.*)

Mode of acquiring the Title, 413 (*see Title pleaded.*)

COVERING MARES,

assumpsit for use of stallion, 49

COWS,

assumpsit for use of bull, 49

case for selling a cow deposited in defendant's custody for a debt, 508

CREDIT,

form of particulars of demand giving of, 6, 7

assumpsit against agent for selling goods on, 255

against factor for selling on credit to person who became insolvent,
257

against shopman for selling on credit against orders, *ib.*

CRIBBAGE,

assumpsit for money won at, 170

CRIMINAL CONVERSATION,

case for, 483

trespass for, 652

CRIMPAGE,

assumpsit for, 54

CROPS,

assumpsit for price of, 47, 218

for bad cultivation of, 223 to 230, 597 (*see also Landlord and Tenant.*)

case for selling, under a distress, before ripe, &c. 543

CROSS CLAIMS,

feigned issue to try, under Interpleader Act, 175

plea thereto, 176

CURATE,

assumpsit by, for performance of divine service, 64

- CURTESY,**
tenancy by, pleaded, 406
- CUSTOMARY FREEHOLD,**
pleaded, 410
- CUSTOMS, OFFICER OF,**
notice of action to, 4
- CUSTOMS, PETTY,**
assumpsit for, 44
- CUSTOMS PLEADED** (*see Prescription.*)
against tenant for not using premises according to custom of country, 226
ship-owner, for average loss, by jettison, 161
- DAMAGE** (*see also Costs.*)
conclusions of, in declarations in general, 8 to 28
special statements of,
in assumpsit,
an action brought, and plaintiff obliged to pay costs, 232
loss of employment, 239
consequence of attorney's neglect a nonsuit, 273
loss of profits from non-delivery of corn, 199
consequence of breach of warranty, 204
loss of use of chattel bailed, 247 to 250
against carriers by water, for loss, 259, 269
by land, for loss, 272
against vendor, loss of bargain, expenses of conveyance, &c.
209
stipulated damages, non-payment of, stated, 217
defending ejectment in plaintiff's name, whereby he was im-
prisoned for costs, 521
loss of place by a servant, 458, 464
loss of customers, 475
loss of acquaintances, &c. 457, 480
loss of lodgers, 589
in trespass, for an assault, 649
- DAMAGE FEASANT,**
case for rescuing cattle taken, 550
for a pound-breach of cattle taken, 551
for misusing distress taken, 510
- DATE,**
bill payable after, 34
- DAUGHTERS,**
assumpsit for education and maintenance of, 48, 62
case for debauching of, 484
trespass for debauching of, 653
for battery, &c. of, *ib.*
- DEATH,**
declaration where one of plaintiffs died after issuing writ, 17
where one of defendants died after issuing writ, 18
on promise to pay debt after, of a particular person, 307
on life policies (*see Policy of Insurance.*)
of party seised in fee, 426
of party seised of a copyhold, 423
possessed of a term, 426
- DEBAUCHING DAUGHTERS,** 484, 653 (*see Daughters.*)

DEBAUCHING WIFE (see *Criminal Conversation.*)

DE BONIS ASPORTATIS,
count for, of cattle or goods, &c. 655

DE BONIS NON, 23, 78, 79 (see *Administrator.*)

DEBT AND DETINUE,
occasional commencement of declaration in, 16, 429

DEBT,

I. BEGINNINGS OF DECLARATION IN, 13 to 28, 284 to 286

common commencement in debt, 284

by a surviving partner, *ib.*

against a surviving partner, 285

by husband and wife, *ib.*

against husband and wife, *ib.*

by an executor or administrator, *ib.*

against an executor or administrator, *ib.*

by assignees of a bankrupt, 286

by assignees of an insolvent debtor, *ib.*

in debt and detinue, 16

in debt *qui tam*, 17

II. CONCLUSIONS IN GENERAL, 286 to 291

general conclusion in debt, 286

by surviving partner or joint contractor, *ib.*

against surviving partner or joint contractor, 287

by husband and wife, *ib.*

against husband and wife, *ib.*

by an executor, *ib.*

by an administrator, *ib.*

against executor or administrator, 288

by an executor against an executor or administrator, *ib.*

by administrator against an executor or administrator, 289

by a surviving executor, *ib.*

by a surviving administrator, *ib.*

against a surviving executor or administrator, *ib.*

by husband and wife, the wife being executrix, 290

the like, wife being administratrix, *ib.*

against husband and wife, the wife being executrix or administratrix, *ib.*

by an administrator *de bonis non*, *ib.*

against an administrator *de bonis non*, 291

by assignees of a bankrupt or insolvent, *ib.*

III. COMMON COUNTS IN DEBT, 37 to 66, 291

goods sold, 291

work and materials, *ib.*

money lent, *ib.*

money paid, *ib.*

money received, *ib.*

interest, *ib.*

account stated, *ib.*

IV. COUNTS IN DEBT ON SIMPLE CONTRACT, 292 to 295

for use and occupation, 229

On Promissory Notes.

payee against maker, 292

On Bills of Exchange.

debt by drawer of a bill against acceptor, 292

against drawer on default of acceptor, *ib.*

For Road and Canal Calls, 293 (see *Calls.*)

DEBT—*(continued.)*

V. ON LEGAL LIABILITIES, 295 to 307

- On Awards, 295 (see Award.)*
- On Bye-laws, 300 (see Bye-law.)*
- On Foreign Judgments, 305 (see Judgment.)*
- On Decrees, 306 (see Decree.)*

VI. ON SPECIALTIES, 307 to 335

- On Deeds Poll.*
 - on deed, where testator appointed money to be paid to plaintiff when testator died, 307
- On Charter-parties, 308 (see Charter-party.)*
- On Sea Policy against London Assurance Company, 310*
- On Leases, &c. 310 (see Lease.)*
- On Annuity Deeds for Arrears of Annuity, 313*
- On Mortgage Deeds for Principal and Interest, 313*
- On Bonds generally, 315 (see Bond.)*
- On Bond stating Condition.*
 - observations in general as to, 317
- On Annuity Bonds, 318*
- On Bonds to replace Stock, 319*
- On Bond to perform Covenant in another Indenture, 320*
- On Bail-bonds, ib. (see Bail-bond.)*
- On Replevin Bond, 325 (see Replevin Bond.)*
- On Bonds relating to Party's character of suing and being sued, 330 to 335 (see Bond.)*

VII. ON RECORDS, 335 to 342

- On Recognizances of Bail, 335 (see Recognizance.)*
- On Judgments, 337 (see Judgment.)*

VIII. ON STATUTES, 342 to 367

- By Party grieved, 342 to 357 (see Statute.)*
- By Common Informer, 357 to 367 (see Statute.)*

DEBIT REPARARE, &c.

- when a sufficient mode of stating liability, 592

DECEIT (see also Sale. Warranty.)

Case,

- for false warranty of a horse, 511
- for deceit on exchange of horses, 512
- for falsely warranting a cable sound, 513
- for deceitfully selling a smaller quantity of coals than pretended, 514
- for deceitfully selling land for greater quantity than it was, *ib.*
- for misrepresenting value and quantity of business, &c. done at a public-house, which plaintiff was about to purchase, and which he afterwards purchased of defendant, *ib.*
- for misrepresenting value of business, 515
- for misrepresenting that defendant had authority to accept bills for a third party, 517
- for pretending defendant had given more for lease than he had, 516

DECEIT—Case—(continued.)

- for misrepresenting that defendant was authorized to receive goods directed to plaintiff's wharf, whereby plaintiff lost wharfage, &c. 517
- for representing plaintiff's waggon set out from defendant's inn, 518
- by one fishmonger against another for personating him to a customer, 519
- by proprietor of patent snuff, for selling snuff as if plaintiff's, 520
- another form, 1 Nev. & Man. 353; 4 B. & Adol. 410, S. C.
- for defending ejectment in plaintiff's name, whereby plaintiff imprisoned for costs, 521
- for representing third person fit to be trusted, 522
- for misrepresenting the character of a person whom plaintiff, in consequence, employed as his agent, 524
- against a secretary of an insurance company for misrepresentation, 526

DECLARATIONS,**COMMENCEMENTS AND CONCLUSIONS.****ON REMOVALS FROM INFERIOR COURTS.**

- of declaration in Q. B. in an action removed from an inferior court, 10
- conclusion of same, *ib.*
- do. in C. P., 11
- conclusion of same, *ib.*
- do. in replevin, *ib.*
- conclusion of same, *ib.*
- do. in Exchequer, in action removed from inferior court, *ib.*
- conclusion of same, *ib.*
- do. at suit of an executor or administrator, *ib.*
- conclusion of same, *ib.*

OBSERVATIONS ON COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS AS NOW REGULATED.**IN THE SUPERIOR COURTS.**

- 1. how affected by form of writ, 12
- 2. how affected by the character in which plaintiff sues or defendant is sued, 13
- conclusions of declarations, *ib.*
- omission of pledges, *ib.*
- title of, *ib.* note (h)
- statement of time, *ib.*
- venue, 14, note (i)

I. IN GENERAL.

- 1. common commencement of a declaration, 13
- conclusion thereof, *ib.*
- 2. do. at suit of an infant, 14
- 3. do. against a *peer* who has been served with a common writ of summons, *ib.*
- 4. the like against a member of parliament, *ib.*
- 5. do. against a corporation aggregate, 15
- 6. do. against guardians of the poor, *ib.*
- 7. do. against hundredors, *ib.*
- 8. do. by an attorney suing in that character, *ib.*
- 9. do. at the suit of a side clerk of the Exchequer, *ib.*
- 10. do. in a second action after a plea in abatement of the nonjoinder of a defendant, 16
- 11. do. of occasional commencement in debt, *ib.*
- 12. do. in debt and detainue, *ib.*
- 13. do. by the assignee of a sheriff on bail bond. *ib.*
- 14. do. in debt *qui tam*, 17
- 15. do. by a plaintiff who has been sued by a wrong name, *ib.*
- 16. do. by a defendant sued by a wrong name, *ib.*

DECLARATIONS—I. IN GENERAL—(*continued.*)

- 17. commencement by a surviving plaintiff where his co-plaintiff died between writ and declaration, 17
- 18. do. against a surviving defendant, where the deceased died between writ and declaration, 18
- 19. do. where one of the defendants has been outlawed, *ib.*

II. RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED.

1st. SURVIVING PARTNERS.

- 20. commencement by a surviving partner, 18
- 21. do. against a surviving partner, 19

2nd. HUSBAND AND WIFE.

- 22. commencement by husband and wife, 19
- 23. do. against husband and wife, *ib.*

3rd. BY ASSIGNEES OF A BANKRUPT.

- 24. commencement by assignees of a bankrupt, 19
conclusion of same, *ib.*
- 25. do. by one partner and the assignees of another, *ib.*
- 26. do. by assignees of two or more bankrupts under several fiats, to recover a debt due to the joint estate, 20

4th. BY ASSIGNEES OF AN INSOLVENT DEBTOR.

- 27. commencement by the assignee of an insolvent debtor, 20
- 28. do. by the assignee of an insolvent after the removal of the first assignee by the Insolvent Court, *ib.*

5th BY AND AGAINST EXECUTORS.

- 29. commencement by an executor, 20
- 30. do. against an executor, *ib.*
- 31. do. by an executor against an executor, 21
- 32. do. by the executor of an executor, *ib.*
- 33. do. by a surviving executor, *ib.*
- 34. do. against a surviving executor, *ib.*
- 35. do. by husband and wife, the wife being executrix, *ib.*
- 36. do. against husband and wife, the wife being executrix, *ib.*
- 37. conclusion and profert by an executor, 22
- 38. the like by an executor of an executor, *ib.*
- 39. profert by a surviving executor, *ib.*

6th. BY AND AGAINST ADMINISTRATORS.

- 40. commencement of declaration by an administrator, 22
- 41. do. against an administrator, *ib.*
- 42. do. by an administrator against an administrator, *ib.*
- 43. do. by a surviving administrator, 23
- 44. do. against a surviving administrator, *ib.*
- 45. do. by husband and wife, the wife being administratrix, *ib.*
- 46. do. against husband and wife, the wife being administratrix, *ib.*
- 47. do. by an administrator *de bonis non*, with the will annexed, *ib.*
- 48. do. against an administrator *de bonis non*, with the will annexed, *ib.*
- 49. do. by an administrator *durante minoritate*, 24
- 50. do. by an administrator limited until the original will or a copy thereof be brought into the Archbishop's Court, *ib.*
- 51. conclusion and profert by an administrator, 25
- 52. the like in another form, *ib.*
- 53. statement of grant by vicar general of the bishop of Chester, *ib.*
- 54. profert by a surviving administrator, *ib.*
- 55. profert by an administrator *de bonis non* of an administrator, 26
- 56. profert by an administrator *de bonis non*, with the will annexed, *ib.*
- 57. profert by an administrator with the will annexed, *ib.*

DECLARATIONS—(*continued.*)II. RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED—(*continued.*)

7th BY AND AGAINST CLERKS, TREASURERS, TRUSTEES, AND PUBLIC OFFICERS APPOINTED TO SUE AND BE SUED BY STATUTE.

58. commencement of declaration by a clerk or treasurer to trustees, &c. empowered to sue by statute, 26

59. do. by clerk or treasurer to a company empowered to sue by statute, 27

60. do. against such clerk or treasurer, *ib.*61. do. by the trustees of a friendly society, *ib.*62. do. by one of the public officers of a banking company, under 7 Geo. 4, c. 46, *ib.*

63. do. against one of the public officers of a banking company, 28

MODELS OF CONCISENESS IN DECLARATIONS IN ASSUMPSIT AND DEBT AS PRESCRIBED BY REG. GEN. T. T. 1 W. 4, AND REG. GEN. HIL. T. 4 W. 4.

observations on these rules in general, 29

Reg. Gen. T. T. 1 W. 4. .30

recital of object of the rule, *ib.*

forms prescribed under that rule, 31

1. count on a promissory note against the maker by payee or indorsee, as the case may be, *ib.*2. count on a promissory note against payee by an indorsee, *ib.* several indorsements, 323. count on a promissory note against indorser by indorsee, *ib.*4. count on an inland bill of exchange, against the acceptor, by the drawer, being also the payee, *ib.*5. do. against the acceptor by the drawer, not being the payee, *ib.*6. do. against the acceptor by indorsee, *ib.*7. do. against the acceptor by the payee, *ib.*

8. do. against the drawer by payee on non-acceptance, 33

9. do. against the drawer by indorsee on non-acceptance, *ib.*10. do. against indorser by indorsee on non-acceptance, *ib.*11. do. against payee by indorsee on non-acceptance, *ib.*12. directions for declarations on bills where action brought *after time of payment expired*, *ib.*1. on bills payable after date, *ib.*

2. on bills payable after sight, 34

directions for declarations on bills or notes payable at sight, *ib.*directions for declarations on foreign bills, *ib.*

COMMON COUNTS.

1. goods sold, 34

2. work and materials, *ib.*3. money lent, *ib.*4. money paid, *ib.*5. money received, *ib.*6. account stated, *ib.*7. general promise applicable to all the counts, *ib.*8. general breach, *ib.*directions how to frame declarations when there is a count on a bill or note besides the common counts, *ib.*

DECREE,

assumpsit on Scotch decree by assignees of a bankrupt, 179

debt on Scotch decree, 306

DEED (see *Bond. Covenant. Debt.*)

on a deed-poll, 307

trover for, 639

- DEFECT OF FENCES (see *Damage Feasant. Fences.*)
- DEFENDANT,
commencement of declaration where one outlawed, 18
- DEL CREDERE COMMISSION,
assumpsit on promise to be responsible in, 257
- DELIVERY (see *Lease. Sale.*)
for not delivering goods bought, 197 to 199
of writ to sheriff, and of warrant to bailiff pleaded, 322
- DEMAND (see also *Request.*)
of copy of warrant from a constable, 4
declaration on note payable on, averring demand, 83
particulars of, 5 to 7 (see *Particulars of Demand.*)
- DEMISE (see *Landlord and Tenant. Lease. Notice. Title pleaded.*)
statement of,
in ejectment, 669 to 675 (see *Ejectment.*)
by lease, 391
- DEMURRAGE,
assumpsit for, 51
for detaining ship beyond days of demurrage, &c. 161, 165
debt for, 308
covenant for, 376
- DEPOSIT MONEY,
action to recover, 168, note (b)
how to frame declaration, *ib.*
- DEPOSITUM,
what, 246
- DESCENT (see *Rien per Descent.*)
title by, stated, 413
- DESCRIPTION,
in notices of action, 1 to 4 in notes
- DETINUE,
commencement of declaration in, 428
Declarations in,
first count on a bailment to re-deliver on request, 428
second count on a supposed finding, *ib.*
debt and detinue in the same declaration, 429
- DEVASTAVIT,
law as to, suggesting, &c. 340, note
suggested, in action against administratrix, on judgment, *ib.*
- DEVISAVIT VEL NON,
feigned issue, to try, 174
- DEVISE AND DEVISEE (see *Bond. Will.*)
devise in fee-simple pleaded, 424, 426
title by, since 1 Vic. c. 26. .427
declaration against devisee and heir, 333 (see *Bond.*)
- DILAPIDATIONS (see *Covenant. Landlord and Tenant. Rector. Waste.*)
- DISCOUNT,
for not procuring discount of a bill, 202, 258
for usury on, 359 to 362

DISTRESSES,

- assumpsit on promise to pay the rent on plaintiff's withdrawing a distress, 187
- by broker for not indemnifying him from loss by reason of the distress, 234
- case for illegal distresses,
 - as to number of counts in actions relating to, 533
 - for double value of goods, no rent being in arrear, 534
 - for distraining beasts of the plough, 535
 - for distraining tools of trade, *ib.*
 - for distraining for more rent than was due, 536
 - for an excessive distress, 537
 - for distraining a second time on same goods for same rent, 538
 - for driving distress out of hundred, 539
 - for impounding distress off premises, and not giving notice, *ib.*
 - for refusing to re-deliver goods on tender, 540
 - for selling goods within the five days, 541
 - for not removing goods after the five days, 542
 - for selling under a distress without having goods appraised by appraisers, *ib.*
 - for distraining by other persons than by bailiffs sworn in, 543
 - for selling a growing crop before gathered and appraised, *ib.*
 - for not selling for best price, *ib.*
 - for selling more goods than necessary, 544
 - for not giving a copy of charges, under 57 Geo. 3, c. 93. . 545
 - for several injuries, in one count, *ib.*
 - for not leaving overplus in the hands of the sheriff, &c. 544
 - for rescue of cattle, &c. distrained for rent, 550
 - for pound-breach of cattle distrained for rent, 551
 - for rescue of cattle, &c. distrained damage feasant, *ib.*
 - for pound-breach of cattle distrained damage feasant, 551
 - for misusing a distress, 510
 - against a bailiff for misconducting a distress, 503
 - against landlord for not indemnifying plaintiff from a distress by ground-landlord, 546, 230
 - against sheriff for refusing to replevy on tender of replevin bond, on a distress for poor rates, 633
- trespass for taking a distress, 658

DISTURBANCE,

- of rights of common, 611 to 617 (*see Common.*)
- of rights of way, 617 to 622 (*see Way.*)
- of ferries, 623
- of pews, 625
- of markets, 626
- of franchises, &c. 628

DOGS,

- case for keeping dogs used to bite, &c. 430, 431
- trespass for killing of, 655

DOUBLE RENT (*see Rent.*)

- assumpsit for, 40
- debt for, 344

DOUBLE VALUE (*see Rent.*)

- debt for holding over, 342

DOWER,

- pleaded, 406

DRAFT (*see Check.*)

DRAMATIC COMPOSITION,
case for representing of, &c., 576

DRAWER AND DRAWEE,
assumpsit by and against, 32, 99, 100 to 131 (see *Bills of Exchange*.)

DRIVING,
carelessly, case for damage by, 486 to 488

DURANTE MINORE ÆTATE, 24, 78, 79 (see *Administrator*.)

DWELLING-HOUSE (see *Houses*.)

EATAGE OF GRASS, &c.
assumpsit for, 41
depasturing, &c. 49

EDUCATION,
assumpsit for educating defendant's child, &c. 62

EJECTMENT,
declarations in,
observations on, in general, 668
by original in Q. B.
on a single demise, 669
premises in general how to be described, 671, 672
the demise, 670
plaintiff's entry, 671
the ouster, *ib.*
the notice to appear, 672
notice to appear under 1 Geo. 4, c. 87. . 673
the like in another form, *ib.*
on 1 Will. 4, c. 70, s. 36, *ib.*
on two demises with one ouster, *ib.*
on two demises with two ousters, 674
on demises by tenants in common, &c. 675
by a joint-tenant or parcener, *ib.*
by a lessor or superior landlord against lessee, 676
on a demise by deed, for tithes, *ib.*
by a bill in Q. B. 677
in the Exchequer, *ib.*
on a vacant possession, 678
notice to appear thereto, *ib.*

ENGRAVER,
case against, for using for his own purpose plates engraved by him for
plaintiff, 510

ENGRAVING,
case for pirating, 575

ENROLMENT,
of specification pleaded, 576

ENTRANCE MONEY,
assumpsit for, 62

ENTRY (see *Ways*.)
under a lease stated, 391, 392
by an assignee, 395

EQUITABLE INTEREST,
assumpsit by vendor of, 213, note (a)

ESCAPES,

Case for,

- against sheriff for escape on mesne process, 552
- the like for not arresting on opportunity, 554
- the like for false return of *non est inventus*, 555
- the like for escape on final process, 557
- against keeper of Queen's Prison for escape on mesne process, prisoner removed by *habeas corpus*, 555
- a general count against keeper of Q. P. where defendant in custody on a surrender in discharge of bail, 556
- against keeper of Q. P. where prisoner committed to his custody in execution, 559
- the like more general, without stating *how* original defendant was in his custody, 561
- against keeper of Q. P. where prisoner charged in execution on judgment in C. P. removed into Q. B. on error, &c. 561

ESTATES,

- title in, pleaded (see *Title pleaded and the respective titles.*)
- sold, assumpsit for, 37, 38
- assumpsit for not making title or abstract, or conveyance, on sale of, 209
- for not completing purchase of, 213
- covenant for breach of good title, 388

ESTOVERS (see *Common.*)

- declarations for disturbance of common of, 617

EXCESSIVE DISTRESSES (see *Distresses.*)

EXCESSIVE LEVY,

- for levying on a judgment entered up under warrant of attorney, when part had been paid, rest not due, 546
- second count for issuing *feri facias* where nothing due, 548
- for procuring a *feri facias* for more than the judgment, *ib.*
- against sheriff for, and converting overplus to his own use, *ib.*

EXCHANGE, BILL or (see *Bill of Exchange.*)

EXCHANGE OF HORSES, &c.

- assumpsit to pay money upon, 200
- upon a warranty on, 206

EXCHEQUER, COURT or,

- forms of declaration in, 12 to 28
- declaration at the suit of one of side clerks, 15
- debt on judgment of, 337

EXCISE OFFICERS,

- notice of action to, 3

EXECUTED CONDITION,

- assumpsit on, 254

EXECUTION,

- case, for escape, where prisoner in custody in, 557, 559, 561

EXECUTORS (see *Administrators.*)

- Commencements and Conclusions of Declarations by and against,*
- beginning of a declaration by an executor in Q. B., C. P. or Exchequer, 20
- do. against an executor, *ib.*
- do. by an executor against an executor, 21
- do. by executor of an executor, *ib.*
- do. by a surviving executor, *ib.*
- do. by husband, and wife executrix, *ib.*
- do. against husband and wife, wife being executrix, *ib.*

EXECUTORS—*(continued.)*

- conclusion and profert by an executor, 22
- profert by an executor in Q. B. *ib.*
- profert by executor of an executor, *ib.*
- profert by a surviving executor, *ib.*
- assumpsit by, in general*, on promises to testator, 73
 - on promises to plaintiff as executor, 74
 - on an account stated with him as such, *ib.*
 - conclusion where declaration contains a count on a bill, note, &c. 73
 - surviving executor, 74
 - husband, and wife executrix, before marriage, 75
 - the like where the wife became executrix after marriage, *ib.*
 - to recover expenses of a party wall, 184
 - profert of a will, 21 to 23
 - liability of, to costs, 74, note (u)
- assumpsit against*, on promises by testator, 75
 - conclusion where declaration contains a count on a bill or note, &c. *ib.*
 - on promises by defendant as executor, *ib.*
 - on an account stated by defendant as executor, *ib.*
 - on causes of action arising against defendant as executor, 76
 - as surviving executor, *ib.*
 - husband, and wife executrix, before marriage, *ib.*
 - the like where she became executrix after marriage, *ib.*
 - on promise to pay a legacy in case of forbearance, 179
- assumpsit on Promissory Notes* (see *Promissory Notes.*)
- assumpsit on Bills of Exchange* (see *Bills of Exchange.*)
- debt by executor of obligee against obligor*, 331
 - against executor of obligor*, 332
- covenant by and against*,
 - by executor of lessor against lessee, 395
 - by executor of lessor being a termor, for a breach after testator's death, 407
 - against executor of lessee for a breach after testator's death, 408
 - title stated, 407, 408, 426
 - by executors of insurer on policy of insurance, 382
 - on mariner's indenture against executor of master, 372
 - by heir of purchaser against executor of husband on covenant for further assurance, and for not levying a fine, 387
- trover by*, 643
 - proof of will by, pleaded, 426
 - assent to a bequest pleaded, *ib.*
- trespass by*, for injury to real estate of testator, 663

EXPULSION (see *Eviction. Trespass.*)

EXTORTION,

- debt by party grieved, on 32 Geo. 2, c. 28, against bailiff for, 355
- the like for treble damages, on 23 Hen. 6, c. 9. .357
- debt on 28 Eliz. c. 4, and 43 Geo. 3, c. 46, s. 5. .352
- debt by common informer, on 23 Hen. 6, c. 9, for refusing bail, and for extortion, 357
- the like, on 29 Eliz. c. 4, for £40 penalty, 358
- case against sheriff, on 29 Eliz. c. 4. .635

FACTOR (see *Agent.*)

- assumpsit by*, for commission, &c. 60
- against*, for selling on credit to an insolvent, &c. 255, 257
- for not rendering account, 252, 254

FALSE CHARACTER (see *Deceit. Slander.*)

case for giving of, 463

case for misrepresenting third person fit to be trusted, 524

FALSE IMPRISONMENT (see *Malicious Prosecution.*)

notices of action for, 1 to 4

limitation of notice for, 1, note (a)

the like of action after notice, 1, note (b)

declarations for, specially, 653

generally, 654

FALSELY AND MALICIOUSLY,

allegation of, how far material, 434, 435, 442, 455 in notes

FALSE RETURNS (see *Sheriff.*)case for, to *mesne process, non est inventus*, 555to final process, *nulla bond*, 562

not levying, and for a false return, 565

FARM (see *Ejectment. Landlord and Tenant.*)**FARRIER,**

assumpsit against, for badly shoeing horses, 262

FEEES (see *Work and Labour.*)

assumpsit for,

by an attorney and solicitor, for various descriptions of business,
and for journeies, &c. 54, 55

as a clerk in Court in Exchequer, 55

by one of the six clerks in the Court of Chancery, *ib.*by a proctor, *ib.*by an agent against another attorney, *ib.*

as a messenger under a fiat in bankruptcy, 56

by a sheriff's officer or bailiff, &c. *ib.*

do. in another form, 26

by a steward of a Court baron, 57

by a witness, *ib.*

by a physician, when, 62, note (x)

FEE-SIMPLE (see *Copyhold. Covenant. Title pleaded.*)

seisin in fee in possession pleaded of different property, 404

of husband and wife, *ib.*

of the king, or a corporation, 405

in reversion, 410

in remainder in a copyhold, 411

in severalty, *ib.*in joint-tenancy, *ib.*

coparcenary, 412

tenancy in common, *ib.*

descent in fee, 413

FEIGNED ISSUES,

nature of, 171, note (j)

venue in, *ib.*construction of declaration, *ib.*leave of Court to try, *ib.*costs of, *ib.*

forms of,

to try existence of modus in lieu of tithe, 171

feigned issue, with two counts, at the suit of surviving partners;

first count to try petitioning creditor's debt; second, to try
bankruptcy, 172, 173

the like to try trading of a supposed bankrupt, 173

the like issue in one count, to try several rights of common, *ib.*

FEIGNED ISSUES—(*continued.*)

pleas, 174

feigned issue *devisavit vel non*, *ib.*

the like, to try issue whether party heir at law or not, 175

under Interpleader Act, to try property in goods seized by sheriff, *ib.*

plea thereto, 176

FELONY,

on promise to pay money if plaintiff would arrest a felon, 191

the like for reward at suit of a constable, *ib.*

case for malicious prosecution of plaintiff before a justice for, 441

for libel, charging plaintiff with, 458

for words slandering plaintiff, by charging him with, 466, 469

FEME COVERT (*see Husband and Wife.*)

FENCES,

declarations for not repairing of, 591

trespass for breaking down, 660

FEOFFMENT (*see Title pleaded.*)

pleaded, 414

FERRY,

case for disturbing, 623

FIAT IN BANKRUPTCY,

case for maliciously issuing of, 452

FICTITIOUS PERSON,

on bill payable to order of, 120

FIERI FACIAS,

stated in pleading, 562

declarations for false returns, &c. to, 562 to 565

FINDING (*see Detinuc. Trover.*)

FINES,

on admission to a copyhold, assumpsit for, 57

fines levied with and without proclamations, pleaded, 418, 419

covenant on deed of sale for not levying a fine, 387

FIRM (*see Partners.*)

indorsement by, 106

FISH AND FISHERY,

assumpsit for rent of, 39

debt on 5 Geo. 3, for penalty on fishing in private fishery, 351

trespass for fishing in close, &c. 666

second count, for fishing in plaintiff's several fishery, *ib.*third count, for fishing in plaintiff's free fishery, *ib.*

fourth count, for catching plaintiff's fish generally, 667

FIXTURES (*see Landlord and Tenant.*)

assumpsit for, 38, 49, 217, 222

assumpsit, special, for, by outgoing tenant, where a valuation made, 217

the like, for stipulated damages for not taking, 218

covenant by lessor against lessee for removing of, 397

trover for, 639

FLOODGATES,

case for suffering them to remain open to injury of navigation of a canal,

610

FORBEARANCE,

- assumpsit to pay costs for staying proceedings against defendant, 186
- to pay debt of third person in consideration of, 186, 232
- on promise that if plaintiff would withdraw a distress, defendant would pay the rent, 187
- against executor, on promise to pay legacy in consideration of, 179

FORCIBLE ENTRY,

- declarations for, 659, 660

FORCIBLE ESCAPE (*see Escape.*)**FOREIGN BILLS** (*see Bills of Exchange.*)**FOREIGN COIN,**

- declaration on note payable in, 85
- on bill payable in, 127
- averment of value of, usual, 128, note (g).

FOREIGN JUDGMENT,

- assumpsit on a Jamaica judgment, 177
- assumpsit on a Scotch decree, at the suit of assignees of a bankrupt, 179
- debt on a decree in Court of Sessions of Scotland, 306
- on a Jamaica judgment, 305

FOREIGN LANGUAGE,

- note made in, may be set out in English, 83, note (a).

FORMS OF COURT,

- in declarations, in general, 8 to 28 (*see Declarations.*)

FORNICATION (*see Adultery.*)

- case for libel accusing governess of, 473

FRANCHISES, &c.

- case for disturbance of, 628

FRAUD (*see Deceit and Misrepresentation.*)**FRAUDULENT CONVEYANCES,**

- debt by assignee of insolvent on 13 Eliz. c. 5, to recover penalties for, 345

FRAUDULENT REMOVAL,

- debt on 11 Geo. 2, c. 19, against party assisting in, 345

FREEHOLD ESTATE (*see Fee Simple. Freeholder. Title pleaded.*)

- sold, assumpsit for price of, 37

FREE-WARREN,

- trespass on, 665, note (u).

FREIGHT,

- assumpsit for freight, primage, average, &c. 49
- on policy of insurance on, 136
- debt for, 308
- covenant for, 376, 379

FRIENDLY SOCIETY,

- assumpsit by trustees of, on promissory note, 93
- for money lent by society, 94
- debt on bond, at the suit of treasurer of a friendly society, established before the 10 Geo. 4, c. 56, and not conformed according to that act, 334
- at the suit of treasurer of a friendly society, established under the 10 Geo. 4, c. 56. . 335

- FUNERAL,**
 assumpsit by undertaker for funeral bill, 63
- FURNITURE,**
 assumpsit for use and hire of, 42, 49
 for improperly using the same, 250
 case for improperly using it, 506
 trover for, 639
- FURTHER ASSURANCE,**
 covenant on breach of, 387
- GALAGE RENT,**
 covenant against lessee for not paying, 400
- GAME,**
 trespass
 for breaking close and killing game, at common law, 665
 for carrying away game, *ib.*
 for entering with hounds and killing deer, *ib.*
 for fishing, &c. 666
- GAMING,**
 debt on the 9th Ann. c. 14, s. 2, by the loser, for money lost at play,
 at one sitting, to recover it back from the winner, 351
- GAVELKIND,**
 pleaded, 404, note (*s*).
- GENERAL ACCEPTANCE,**
 what deemed such, 101, note (*d*).
- GENERAL AVERAGE** (see *Average*.)
- GOODS, &c.** (see *Agent. Assumpsit. Factor. Fictures. Sale.*)
 assumpsit on contracts relating to,
 for goods sold and delivered to defendant, 46
 for goods sold to defendant and delivered to a third person, 47
 for goods bargained and sold to defendant, *ib.*
 for a crop of grass or turnips sold, *ib.*
 for tithes, 48
 the like in another form, *ib.*
 for small tithes, *ib.*
 for use and hire of goods, &c. 49
 for carriage of, 59
 for not paying money on exchange of horses, &c. 200
 for not delivering a bill of exchange in payment for goods sold, 192
 on a contract to pay for goods sold to a third person, 231
 for not returning goods, or paying for them, 193
 for not accepting goods sold, 194
 for not accepting goods made for defendant, 195
 for not taking away goods sold at auction, *ib.*
 the like where there has been a re-sale, 196
 for not delivering goods, &c. bought, 197
 for not delivering goods at a particular place, 198
 special damage by reason of non-delivery of, 199
 on a warranty of a horse, &c. 204
 the like on an exchange of horses, &c. 206
 for not furnishing good hams, 207
 against bailees for loss of, &c. (see *Bailees*.)
 for not accounting for produce of, 252 (see *Agent. Factor*.)
 trover for, 639 (see *Trover*.)
 case for injuring goods in reversion, 580

GOODS—(*continued.*)

- trespass for seizing, 658 (see *Trespass.*)
- in a dwelling-house, 658
- de bonis asportatis*, 655

GOOD TITLE,

- declaration for breach of covenant for, 389
- construction of covenants for, 389, note.

GOODWILL,

- assumpsit,
 - for lease and business, 38
 - for a business alone, *ib.*
- case for a misrepresentation on the sale of, 514, 515

GOVERNESS (see *Education.*)

- case by, for slander of, 473

GRANT (see *Title pleaded. Way.*)**GRASS,**

- assumpsit for price of crop of, 47

GROUND RENT (see *Landlord and Tenant.*)

- assumpsit against landlord for not indemnifying tenant from, 230
- case against landlord for not indemnifying against, 546

GUARANTEE (see *Indemnity.*)

- to pay money in consideration of forbearance to a third person, 186
 - in consideration of sale of goods to a third person, 231
- to pay rent if plaintiff would withdraw a distress, 187
- on guarantee to pay debt of third person, in consideration of forbearance, 232
- for not indemnifying plaintiff who had guaranteed defendant's debt, 234
- debt on bond against surety of agent, for not accounting, 318

HABEAS CORPUS (see *Escape.*)

- case against keeper of Queen's Prison for escape where prisoner removed by, 555
- the like for escape on mesne process, where prisoner removed by, *ib.*

HABENDUM,

- statement of, in covenant, 392

HABERE FACIAS POSSESSIONEM,

- case against sheriff for not executing writ of, 565

HAD AND RECEIVED (see *Money Counts.*)**HARES,**

- trespass for carrying away, 665

HAY,

- assumpsit for crop of, 47

HEDGES (see *Fences.*)**HEIR** (see *Descent. Title pleaded.*)

- declaration against, in general, 332, 333
 - on bond against, 332
 - the like with devisee, 333
 - covenant at suit of, 413

HIGHWAY AND HIGHWAY ACT (see *Way*.)

assumpsit for calls relating to, 45

case for nuisances in obstructing, &c. 431 to 433

HIRE OF GOODS, &c.

assumpsit for, 49, 59

HIRING (see *Master and Servant*.)**HORSES,**

assumpsit for hire of, 49

for covering mares, *ib.*

for work and labour with, 59

for agistment of, 49

on promise to pay money on exchange of, 200

for immoderate use of, 249

for badly shoeing of, 262

for false warranty of, 204 to 206

case on warranty of, 511

for deceit on exchange of, 512

HORSE-MEAT AND STABLING,

assumpsit for, 46

HORSE RACE,

assumpsit for a wager upon, 167, 169

for a bet on, 169

debt for running horse for plate of less value than £50. . 357

HOUSES (see *Ancient Windows. Landlord and Tenant*.)assumpsit relating to, 208 to 231 (see *Assumpsit*.)case for nuisances to, 582 to 589 (see *Case*.)trespass relating to, 658 to 660 (see *Trespass*.)**HUNDRED AND HUNDREDORS.**

commencement of declaration against, 15

case on 7 & 8 Geo. 4, c. 31, where buildings, &c. destroyed by rioters,
635**HUNTING** (see *Game*.)trespass for, 665 (see *Trespass*.)**HUSBAND AND WIFE** (see *Feme Covert*.)*Commencement of declarations by and against.*

by and against, in mayor's court, 8.

by husband and wife in Q. B., C. P., or Ex., 19

against husband and wife, *ib.*

by, wife being executrix, 21

against wife executrix, *ib.*

by wife being administratrix, 23

against wife being administratrix, *ib.*

assumpsit by or against,

by, for work, &c. by wife before marriage, 68

conclusion where declaration contains account on a bill or note, &c. 69

against, for work, &c. done for wife before marriage, *ib.*conclusion where declaration contains a count on a bill or note, &c. *ib.*

by, wife executrix, before or after marriage, 75

against wife, executrix before marriage, 76

the like after marriage, *ib.*

by wife, administratrix before marriage, 78

the like after marriage, *ib.*

against wife, administratrix before marriage, 80

the like after marriage, *ib.*

HUSBAND AND WIFE—(continued.)

on promissory notes,

- by, on note payable to wife while sole, 90
- by an executor, on a note payable to wife of testator before marriage, she not having indorsed it, *ib.*
- by husband alone, on a note made to wife during coverture, *ib.*
- against husband and wife, on her note before marriage, *ib.*
- by, on note indorsed to wife before marriage, against maker, *ib.*
- indorsee against husband and wife, on note by wife *dum sola*, 92
- by, on note indorsed to wife before marriage, against indorsee, 97
- against, on note payable to wife before marriage, and indorsed by her, *ib.*

on bills of exchange,

- by husband and wife on bill drawn by wife before marriage, 103
- by husband alone against acceptor where he married before the bill became due, 104
- husband and wife on bill indorsed to wife before marriage against acceptor, 107
- indorsee against, on bill accepted by wife before marriage, *ib.*
- husband and wife on bill payable to wife before marriage, against drawer, 113
- the like, when bill became due after marriage, *ib.*
- payee against, on bill accepted by her when sole, *ib.*
- husband and wife on bill indorsed to wife before marriage against drawer, 117
- the like where bill became due after marriage, *ib.*
- indorsee against husband and wife, on bill, drawn by wife when sole, *ib.*
- husband and wife, on bill indorsed to wife before marriage, against indorsee, not being drawer, 122
- by indorsee, against husband and wife, on the like, *ib.*

for not marrying, 237

debt,

- by baron and feme on bond to feme before coverture, 330
- against them on like bond, 332
- by baron and feme against baron and feme administratrix, on judgment against intestate, revived by *scire facias* suggesting *devastavit*, 340

covenant relating to,

- on deed of separate maintenance by trustee against husband, 375
- by heir of purchaser against executor of husband, on covenant for further assurance, and for not levying a fine, 381

title pleaded,

- estate in fee in right of wife, 404
- in a term in right of, 406, note (i)
- in fee in severalty in wife by survivorship, 411
- title by marriage pleaded, 414
- fine levied by, pleaded, 418

case for criminal conversation, 483

- for negligently overturning coach, whereby wife injured, 529
- against administratrix of rector for waste, 597

trespass,

- by husband and wife against husband and wife for battery, 651
- by husband alone for battery of wife, 652
- for criminal conversation, *ib.*

IMPRISONMENT (see *False Imprisonment. Trespass.*)

INDEBITATUS ASSUMPSIT,

- form of the count in general, 36
- statement of different debts, 36 to 80 (and see the *Analytical Table.*)

INDEBITATUS IN DEBT,

- form of the count in general, 292
- statement of different debts, 291, 292, (same as in *Assumpsit*, 36 to 80, see the *Analytical Table*.)

INDEMNITY (see *Guarantee*.)

- assumpsit* on contracts of,
 - by tenant against landlord for not indemnifying against ground-rent, 230
 - by an accommodation acceptor against drawer, 232
 - by maker of promissory note made for accommodation of defendant for not indemnifying, 234
 - for not indemnifying bail to sheriff, *ib.*
- on promise to indemnify plaintiff for refusing to deliver goods to a third person and law, 232
- by broker, for not indemnifying from loss by reason of the distress, 234
- covenant on indemnity deed, by administrator for not indemnifying intestate from payment of an annuity, 376
- case by tenant against landlord for not indemnifying against ground-rent, 546

INDENTURE (see *Covenant. Debt.*)

- statement of, in covenant, 370, 391

INDICTMENT,

- for malicious prosecution of indictment for perjury, 448
- the like of indictment for assault, 450

INDORSEMENT,

- on notice of action, 3, note (A)
- on writ of *ca. sa.* 558
- on writ for bail, 322
- of promissory notes and bills,
 - how many should be stated, 32, 86
 - short indorsement, *ib.*
 - partial, stated, *ib.*
 - in full, stated, *ib.*
 - by a firm, 106
 - by an agent, *ib.*
 - of one part of foreign bill, stated, 129

INDORSER AND INDORSEE,

- assumpsit* by and against, of a note, 31, 82 to 99
- of a bill, 32, 100 to 131

INDUCEMENTS,

- in *assumpsit*,
 - of an expected race, 167
 - of differences being depending, 176
 - of an action being depending, 186
 - of a debt subsisting, *ib.*
 - of defendant's being a pawnbroker, wharfinger, carrier, &c., 248, 259, 262, 265
 - of possession of a lease, 215
 - that defendant was tenant to plaintiff, 227
- in covenant,
 - of different seisins, possessions, titles, &c. (see *Covenant*.)
- in case,
 - of good character, 454, 465
 - of trade, &c. 471
 - for injuries to real property, 582, 595, 611

INFANCY,

- notice of action by *prochein amy*, 3, note (k)
- declaration by an infant in Q. B. and C. P. 14
- declaration by an administrator *durante minore ætate*, 24

INFERIOR COURT,

- commencement and conclusion of declarations in,
 - in the Mayor's Court, in London, in assumpsit, 8
 - the like in debt, *ib.*
 - the like by baron and feme, feme being sole trader, &c. *ib.*
 - the like against baron and feme, feme being sole trader, &c. *ib.*
 - in the Palace Court, 9
 - in the Court of Record of Kingston-upon-Hull, *ib.*
 - in the Borough Court of Southwark, *ib.*
 - in the County Court, *ib.*
 - præcipe* for writ of justices in assumpsit, *ib.*
 - writ of justices thereon, 10
 - declaration thereon, *ib.*
- of removals from inferior Courts,
 - of declaration in Q. B. in an action removed from an inferior Court, *ib.*
 - conclusion of same, *ib.*
 - of declaration in C. P. 11
 - conclusion of same, *ib.*
 - of declaration in replevin, *ib.*
 - conclusion of same, *ib.*
 - of declaration in Exchequer, *ib.*
 - conclusion of same. *ib.*
 - of declaration at suit of an executor or administrator, *ib.*
 - conclusion of same, *ib.*
- declarations, &c. relating to,
 - assumpsit on Jamaica judgment, 177, 305
 - a Scotch decree, 179
 - a judgment in the Borough Court at Liverpool, 307
 - debt on a Scotch decree, 306
 - the like at suit of assignee of sheriff of county palatine of Chester, 325
 - on replevin bond, when forfeited by suit not being prosecuted in County Court, 329
 - on Irish judgment, 341
 - replevin in County Court, 647

INFORMATION,

- by attorney-general, for running down one of the queen's ships, 531

INFORMER,

- debt by, 357 to 367, (*see Statutes.*)

INFRINGEMENT,

- of copyright, &c. declarations for, 572 to 576, (*see Copyright.*)
- of patents, declarations for, 576 to 580, (*see Patents.*)
- for representing, &c. dramatic or musical compositions, 576

IN FUTURO,

- interest pleaded, 411

INLAND BILLS (*see Bills of Exchange.*)**INN,**

- assumpsit for the good-will of, 38
 - for use and profits of, 40
 - for not taking, on sale of, &c. 215, 217
- case for misrepresenting value of, on sale to plaintiff, 514

INNKEEPER,

- assumpsit by, for warehouse-room of goods, 41
 - for standing of carriages, *ib.*
 - for necessities, 46
 - for horse-meat and stabling, *ib.*

INNKEEPER—*(continued.)*

- assumpsit by, for hire of horses, &c. 49
 - for work with chaises, &c. 59
- against, on sale of lease, for not having title, 211
- case against, for loss of a box, 498
 - for refusing to lodge plaintiff, 499

INNUENDO,

- pleaded, and notes, 456, note (o)

INQUIRY, WRIT OF,

- case for verbal charge of perjury, on execution of writ of, 468

INSOLVENT AND INSOLVENCY, (see *Assignees.*)

- commencement, &c. of declaration by the assignee of an insolvent debtor, 20
- the like by the assignee after the removal of the first assignee, *ib.*
- declaration by the assignee on promises to the insolvent, 72
- the like, on promises to the assignee, *ib.*
- assumpsit against agent for selling on credit to, 257
- debt by assignee of, on 13 Eliz. c. 5, to recover penalties for fraudulent conveyances, 345
- case for representing insolvent fit to be trusted, 522
- case for words of, 476
- trover by assignees of, 642

INSTALMENTS,

- declaration on note payable by, where whole became due at one default, 84
- when sufficient to declare generally on note, *ib.* note
- declaration for one instalment of note, 84
- the like for several, *ib.*
- debt will not lie on note payable by, till the last day of payment is past, 84, note (n), 292, note (k)
- for instalment of subscription towards a canal, 293
- assumpsit for, on shares, &c. 44 to 46

INSURANCE COMPANY (see *Policy of Insurance.*)

- case against secretary of, for misrepresentation, 526

INSURANCE POLICIES OF (see *Policies of Insurance.*)

- assumpsit for premiums of, 60
 - as broker for effecting policies, *ib.*
- against broker for not properly effecting, 245
- the like, for not giving notice to his employer of inability to effect insurance, 246
- on policies of, (see *Policy of Insurance.*)

INTERESSE TERMINI,

- pleaded, 411

INTEREST (see *Policy of Insurance. Title Pledged.*)

- assumpsit for, 65
- in goods insured, stated in action on policy, 136 to 140
- provisions of 28 Geo. 3, c. 56, as to statement of interest of party insuring, 132, note (h)

INTERPLEADER ACT,

- feigned issue to try claim under, 175
- plea thereto, 176

IRELAND,

- debt on Irish judgment, 341
- by conusee of Irish judgment, 342

IRONY,

case for words spoken ironically, 480

JAMAICA,

assumpsit on a Jamaica judgment, 177

debt on a Jamaica judgment, 305

debt on a Jamaica bond, 315

JETTISON,

average loss for contribution by ship owner, according to a particular custom, 161

JOINT TENANCY (*see Partners.*)

pleaded, and death of one and sole seisin, 411

ejectment by joint tenants, 675

JOURNEYMAN (*see Master and Servant.*)

JOURNEYS,

assumpsit for, 59, (*see Work and Labour.*)

JUDGE (*see Justice of Peace.*)

how far may refuse to try a wager, 167, note

order of, debt on award under, 298

case for malicious arrest on order of, after same had been rescinded, 438

JUDGMENTS (*see Judgment Recovered.*)

form of remedy on, 177, note (e)

requisites of declaration on, *ib.*

pleas on, 178, note

assumpsit on Jamaica judgment, 177

debt on, in debt in Q. B., C. B., or Exchequer,

for the plaintiff in assumpsit, 337

for the plaintiff in debt, 338

on a judgment of *non pros*, for not declaring, 339

for the defendant, *ib.*

on Jamaica judgment, 305

on Irish judgment, 341

by conusee of Irish judgment, 342

on a judgment recovered by bill in Q. B. when defendant was sued by a wrong name, 340

by baron and feme, against baron and feme administratrix, on judgment against intestate, revived by *scire facias* suggesting *devastavit*, 340

on Scotch decree, 306

statement of recovery of, in Q. B., C. P., or Exchequer, 557, 558

JUSTICE OF THE PEACE,

notice of actions to, 1 to 4

limitation of notice, now regulated by 5 & 6 Vict. c. 97, s. 4. . 1, note (a)

the like as to action after notice, *ib.* note (b)

case by, for slander of, 470

against, for refusing to take bail on a conviction, where plaintiff intended to appeal, 633

KEEPER OF QUEEN'S PRISON,

case for escape, where party taken on mesne process and removed by habeas corpus, 555

the like, where defendant in custody on a surrender in discharge of bail, 556

the like, when committed in execution, 559

KEEPER OF QUEEN'S PRISON—(*continued.*)

the like, more general, 561

the like, where prisoner charged in execution on a judgment in C. P., removed into Q. B. in error, *ib.***KING,**

seisin of, pleaded, 405

title by lease from, pleaded, 418

KING'S SHIP,

information by attorney-general for running foul of, 531

KINGSTON UPON HULL,

declaration in Court of Record of, 9

LAND (see *Case. Landlord and Tenant. Lease. Party Wall. Trespass.*)**LANDLORD AND TENANT** (see *Rent. Use and Occupation.*)

assumpsit by landlord,

for use and occupation of a house, or of a house and land, 38

for use and occupation of a fishery, 39

for use of a way, *ib.*

for use and occupation of a pew in a church, 40

for use of seat in house to view a public procession, *ib.*for use of a tennis court, balls, and racket, *ib.*for use, occupation, and profits of an inn, *ib.*for double rent, on 11 Geo. 2, c. 19, s. 18, *ib.*

for use of pasture land, and eatage of the grass, 41

for use of premises and prædial tithes, *ib.*for use of land, with right to take tithes, *ib.*

for use and occupation of furnished lodgings, 42,

for use and occupation of unfurnished lodgings, 41

for the use of standings in market-places and tolls, *ib.*

for board and lodging, 42

for hire of furniture, 49

for not taking fixtures, 217

for fixtures, 38, 221, 222

against third person on promise to pay rent in consideration of plaintiff's withdrawing a distress, 187

against tenant, for breach of express agreement to consume straw on premises, 223

against tenant who held premises after end of lease on terms of lease for not repairing, &c. 224

against tenant for not using premises in husbandlike manner, and according to custom of country, 226

breach for ploughing up grass land and cropping land without manuring same, 227

for taking successive crops without manuring land, 228

for keeping and leaving premises out of repair, *ib.*

for not taking care of furniture, 250

against tenant for using premises in untenantlike manner, 229

against landlord,

for not indemnifying tenant from ground-rent, 230, 546

by outgoing tenant against landlord on implied promise not to interfere with sale by tenant, 230

by the like for allowance for tillage and sowing, *ib.*

debt,

on leases on a demise, 310

against assignee for rent and account of land-tax redeemed by lessor, 311

on land-tax redemption act, 312

LANDLORD AND TENANT—(*continued.*)

- debt by landlord against tenant, on 4 Geo. 2, c. 28, s. 1, for double value for not quitting in pursuance of landlord's notice, 342
- the like on 11 Geo. 2, c. 19, s. 18, for not quitting in pursuance of *tenant's* notice, 344
- the like on 11 Geo. 2, c. 19, s. 3, for assisting in fraudulent removal of goods, 345
- the like on 11 Geo. 2, c. 19, s. 12, for not giving notice of declaration in ejectment, *ib.*
- covenant in leases,
 - by lessor against lessee for rent, 391
 - by lessor against lessee for not repairing, 393
 - by assignee, executor, or heir, &c. of lessor against lessee, 395
 - by lessor against assignee of lessee for rent, &c. 395, 397
 - by lessor against lessee for removing fixtures and improvements, 397
 - by lessor against assignee of lessee for not repairing, &c. with averment of performance of condition precedent, *ib.*
 - breach, non-payment of galage rent of coal-mines, 400
 - breach for ploughing up, &c. whereby £5 per acre forfeited, 401
 - breach for not insuring, *ib.*
 - by lessee for not paying quit-rent, 402
 - by lessee against lessor for breach of quiet enjoyment, *ib.*
 - breaches in general, 403
 - title pleaded (see *Title pleaded.*)
- case,
 - against broker for not properly conducting a distress, 503
 - for not taking care of furniture, 506
 - for illegal distresses, 533 (see *Distress.*)
 - for indemnifying against ground-rent, 230, 546
 - for injury to goods in possession of tenant, 580
 - by reversioner, for injury to house in tenant's possession, 589
 - by reversioner against tenant for voluntary waste, 595
 - the like in another form by a reversioner against tenant who had quit-tenanted premises, for having cut down timber and committed waste, 596
 - second count for not cutting down timber as defendant ought to have done, *ib.*
 - against tenant for not cultivating according to good husbandry, and not repairing, 597
 - against administratrix of rector for dilapidations, *ib.*
 - on 8 Ann. c. 14, against sheriff, for not leaving a year's rent, 629
- ejectment, declarations in (see *Ejectment.*)

LAND-TAX,

- debt for, 312

LEASE (see *Landlord and Tenant.*)

- against tenant, for breach of repairs after holding over, 224
- statement of lessor's title (see *Title pleaded.*)
- debt on, 310 to 312 (see *Landlord and Tenant.*)
- covenant on, 391 to 403 (see same title.)
- title by, 391, 406, 414
- assignment of, to plaintiff, stated, 415
- surrender of, stated, *ib.*
- by the queen, pleaded, 418

LEASE AND RELEASE,

- how pleaded, 417
- debt on mortgage by, for principal and interest, 313

LEASEHOLD ESTATE (see *Lease.*)

- sold, assumpsit for price of, 38

- LEGACY,**
 against executor, on promise to pay, in consideration of forbearance, 179
 when remedy for, in equity, 179, note
- LEGAL LIABILITIES** (see *Assumpsit. Debt.*)
- LETTER,**
 case for a libel in, 465
- LETTERS OF ADMINISTRATION** (see *Administration.*)
- LETTERS PATENT,**
 of the queen, pleaded, 418
 case for infringement of patent, 576
- LEVIES, EXCESSIVE** (see *Excessive Levies.*)
- LIBEL** (see *Slander.*)
- LIFE** (see *Death.*)
 estate for, pleaded, 405
 assumpsit on life policy, 153, 155
 covenant on life policy, 382, 385
- LIGHTERAGE, &c.** (see *Carriers. Wharfingers.*)
 assumpsit for, 51, 59
- LIGHTS ANCIENT** (see *Ancient Lights.*)
- LIMITATION OF ACTION,**
 against magistrates, &c. now limited by 5 & 6 Vict. c. 97, s. 4. .1,
 note (b)
- LIMITATIONS, STATUTE OF**
 executor or administrator against acceptor of bill on promise to take
 case out of, 109
- LIQUIDATED DAMAGES,**
 assumpsit for, 217
- LIVERPOOL,**
 assumpsit on judgment of Borough Court of, 307
- LIVERY-STABLE KEEPER** (see *Innkeeper.*)
- LOAN,**
 assumpsit for money lent, 64
 debt for money lent, 291
 assumpsit for not replacing stock, 201
 for not discounting a bill, 202
 debt for penalty of usury on a loan, 359 to 362
- LOCATIO OPERIS FACIENDI, 246, 250**
- LOCATIO OPERIS MERCIUM VEHENDARUM, 246**
- LOCATIO REI, 246, 249**
- LOCATUM, 246**
- LODGINGS,**
 assumpsit for use of unfurnished lodgings, 41
 for use of furnished lodgings, 42
 for board and lodging, *ib.*
 for necessities found and provided, 46
 for hire of furniture, 49
 for not taking care of furniture, 250
 case for not taking care of furniture, 506
 special damage, of loss of lodgers, 589.

LOSSES (*see Policies of Insurance.*)

LOSS ON RESALE,
statement of, in pleading, 215

MAGISTRATE (*see Justices of Peace.*)

MAKER OF NOTE (*see Promissory Note.*)
assumpsit against, 31, 82 to 94

MALA PRAXIS,
case against surgeon for, 488

MALICIOUS PROSECUTION AND ARREST,
of civil actions,
where first suit ended by payment of money into Court, 434
where the first suit was discontinued, 437
where the first suit was non-prossed, 438
where there was a verdict for present plaintiff, *ib.*
for causing plaintiff to be arrested by virtue of a *capias* issued under a judge's order which has been rescinded, *ib.*
of criminal proceeding,
case by plaintiff against defendant and his attorney, for not releasing plaintiff out of prison after satisfaction of debt and costs, &c. 439
of a charge of felony, before a justice, 441
for maliciously exhibiting articles of peace at Quarter Sessions against plaintiff, in consequence of which he was arrested on a warrant of the justices and obliged to find sureties, and enter into recognizance to appear at a future time, that he did appear, but was not proceeded against, and discharged, 444
for maliciously procuring search warrant, and causing plaintiff's house to be searched for stolen goods, 446
of an indictment for perjury, 448
of indictment for assault, 450
the like in another form, 451
for maliciously issuing a fiat in bankruptcy against plaintiff, 452

MANDATUM, 246

MAN-MIDWIFE,
assumpsit by, for attendance, 63

MANOR,
ejectment for 668, (*see Ejectment.*)
assumpsit for copyhold fines, 57
for price of, 37
estate in fee of copyhold by grant, 409, 424, 425
remainder in fee in a copyhold, 411
surrender to use of will, death, presentment thereof, and admittance, 423
to use of purchaser and admittance, 424
enfranchisement of copyhold by lease and release, 425

MANUFACTURE (*see Work and Labour.*)
assumpsit for preventing plaintiff completing a work, 241
for not performing building agreement, 243
for not fixing steam engine properly, 244

MARINER (*see Sailor.*)

MARKET,
assumpsit for use of standings, 41
for tolls on goods brought to market and weighed in plaintiff's beam, 43
for tolls on cattle sold in a market, *ib.*
case for disturbance of, 626

- MARRIAGE** (see *Husband and Wife*.)
 assumpsit on promise to pay money in consideration of, 188
 for not marrying, 236 to 239
- MARSHAL** (see *Keeper of Queen's Prison*.)
- MARSHALSEA COURT**,
 declaration in, 9
- MASTER AND SERVANT** (see *Agent. Apprentice. Bailiff. Sailor*.)
 assumpsit against master,
 for wages, 52
 special, for board wages, 189
 for not receiving plaintiff into defendant's service, 239
 for turning plaintiff away without notice, 240
 covenant on apprentice deeds, 370 to 373
 case by servant against master for a libel in giving a false character, 463
 by master for debauching, &c. servant, 484
 for enticing away, 485
 for harbouring, 486,
 for misrepresenting the character of, 524
 against master for careless driving of servant, 486, 529
 trespass by master, for debauching, &c. servant, 653
 for battery of servant, *ib.*
 for impressing mate, whereby ship prevented sailing, 657
- MASTER OF SHIP** (see *Captain*.)
 trespass by master for impressing mate, whereby ship prevented sailing, 657
- MASTS**,
 assumpsit for general average where it was necessary to cut away masts, &c. 148
- MATE OF SHIP** (see *Sailor*.)
- MATERIALS FOUND**,
 assumpsit for, 57
- MAYOR'S COURT**,
 declarations in, 8
- MEETING HOUSE**,
 trespass for turning plaintiff out of, 651
- MEMBERS OF PARLIAMENT**,
 declaration against, after being served with a common writ of summons, 14
- MESNE PROFITS**,
 declaration in trespass for, and costs in ejectment, 664
- MESSENGER**,
 assumpsit by, for his fees, &c. 56
- MILL**,
 case for diverting water-course from, 599
 for using more water to mill on canal than necessary, 609
 for disturbance of, 628
- MILLER**,
 case against, for mixing corn, 508

MINE,

- covenant for non-payment of galage rent for mines, 440
- trespass for digging in, and carrying away coals, 663
- for digging mines, raising ore, and taking and converting it to his own use, *ib.*

MISCHIEVOUS ANIMALS,

- case for keeping of, 430, 431

MISCONDUCT,

- dismissal for, wages not recoverable, 241

MISNOMER (see *Abatement.*)

- declaration where plaintiff sued by a wrong name, 17
- declaration on, where defendant was sued by a wrong name, *ib.*
- declaration on a judgment where defendant sued in a wrong name, 340

MISREPRESENTATION (see *Deceit.*)**MODELS OF CONCISENESS IN DECLARATIONS IN ASSUMPSIT OR DEBT (see *Declaration.*)**

- as prescribed by Reg. Gen. T. T. 1 W. 4, and Reg. Gen. Hil. T. 4 W. 4, 29
- observations on these in general, *ib.*
- Reg. Gen. of T. T. 1 W. 4 . . . 30
- forms prescribed under that rule, 31 to 35 (see *Declaration.*)

MODUS (see *Tithe.*)

- declarations for, 48
- feigned issue to try, 171

MOIETY (see *Party-walls. Tenants in Common.*)**MONEY (see *Assumpsit.*)**

- trover for, 639
- assumpsit on note payable in foreign coin, 85
- on bill payable in foreign coin, 127

MONEY CLAIMS,

- form stating one promise to pay several, 65

MONEY COUNTS,

- in assumpsit,
 - for money lent, 64
 - paid, *ib.*
 - had and received, *ib.*
 - interest, *ib.*
 - work, goods sold, and the money counts in one count, *ib.*
 - on an award made by arbitrator, *ib.*
 - on an umpirage, *ib.*
 - for stock sold and transferred, 66
 - on an account stated, *ib.*
 - form of stating one promise to pay several money claims, *ib.*
 - breach admitting part payment, and non-payment of the residue, 37
- in debt,
 - for money lent, 291
 - paid, *ib.*
 - received, *ib.*
 - interest, *ib.*
 - on an account stated, *ib.*
 - general conclusion, 392
 - common breach, 286

MOORAGE OF SHIPS, &c. assumpsit for, 42

MORTGAGE,

- debt on mortgage deed for principal and interest, 313
- the like in a shorter form, 314
- lease and release pleaded, 391 (see *Covenant*.)
- covenant on mortgage deeds, *ib.*

MUSIC,

- case for infringing copyright in, 575

MUTUAL PROMISES,

- statement of, in pleading in general, 166, with a note
- on a policy of insurance, 133
- to perform award, 176
- to marry, 237
- to purchase, 214

NAME (see *Misnomer*.)

- averment where name of ship mis-stated in policy, 139

NAVIGATION (see *Water-courses*.)

- assumpsit for calls under a navigation act, 45
- debt by commissioners under, for salary, 295

NECESSARIES (see *Board and Lodging. Rent. Use and Occupation*.)

- assumpsit for, found and provided for defendant, 46
- for third persons, *ib.*
- by a schoolmaster, 62

NEGLIGENCE, ACTION FOR (see *Assumpsit. Case*.)

- assumpsit against owners of stage coach, &c. 267
- negligence, when inferred, 267, in note
- in driving carriage by servant, 486 to 488
- in navigating ships, 530
- against an attorney for negligence, 273 to 283 (see *Attorney*.)

NEWSPAPERS,

- assumpsit for composing advertisements, &c. 64
- case for libel in, 465

NO EFFECTS,

- averment of, 95, 110, 117, 126

NOISY NUISANCE,

- case for, 589

NON-ACCEPTANCE,

- of a bill, declarations for, 125 to 127

NON EST INVENTUS,

- case for false return of, 555

NONJOINDER,

- commencement of declaration in second action after plea in abatement for, 16

NON PROS,

- stated in action on replevin bond, 329
- pleaded, 438

NONSUIT (see *Non Pros*.)

- against attorney for negligence, whereby plaintiff nonsuited, 273
- against witness for not attending, whereby plaintiff nonsuited, 570

NOTICE (see *Scienter*.)

- averment of, 83
- statement of, in a policy of insurance and of loss, 135, 136
- to appear in ejectment, 672

NOTICE OF ACTION,

- requisites of, 1, note (a)
- uniformity of law, as to giving of, how settled, 1, note (b)
- limitation of action after notice, *ib.*
- indorsements on, 3, 4, in notes
- by a party to a justice of peace, and cases thereon, 1
- by an attorney for his client, 3
- to an excise or custom-house officer, 4

NOTICE TO QUIT,

- stated, 343

NUISANCES,

- case for,
 - keeping mischievous, &c. dogs, 430, 431
 - consequences of, against occupiers of house for laying rubbish in street, 431
 - keeping a hole (which led to defendant's cellar) so badly covered, that plaintiff fell down and broke his leg, 432
 - obstructing a public highway, 433
- case for, to houses, &c. *in possession*,
 - obstructing ancient windows, 582
 - second count for continuing nuisance, 584
 - third count for obstructing, without stating the mode, *ib.*
 - for not repairing privy adjoining plaintiff's house, 585
 - second count for not emptying cesspool, *ib.*
 - manufacturing candles near a dwelling-house, 586
 - keeping a slaughter-house near plaintiff's school, 587
 - cutting down trees in an avenue, 588
 - erecting a building near to plaintiff's, so that rain-water ran therefrom, &c. and plaintiff lost lodgers, 589
 - for a noisy nuisance in manufacturing iron, 589
- case for, to houses, &c. *in reversion*,
 - by reversioner, for damage done to house, &c. in tenant's possession, 589
 - for stopping up chimneys in house, &c. 590
- for not repairing fences,
 - for not repairing, whereby plaintiff's cattle escaped and were hurt, 591
 - for not repairing sea walls, 593
- for not carrying away tithes,
 - for not carrying away great tithe, 593
- to water-courses,
 - for diverting water in river from plaintiff's mill, 599
 - second count for a diversion, without stating the means, 602
 - for not keeping banks of river in repair, 603
 - for widening cuts from stream, 604
 - for suffering a ditch to be choked up, 605
 - for removing a hatch placed to prevent water from running to plaintiff's mill, *per quod* he could not repair it, 606
 - against owner of wharf, for placing tree in Thames, whereby plaintiff's barge struck, 607
 - for interrupting plaintiff in his reversionary right to irrigate a meadow, 606
 - for injury to navigable canal, whereby plaintiff's barge could not proceed, 608
 - for using more water to mill on canal than necessary, 609
- to commons, ways, &c. 611, 617, (see *Commons. Ways.*)

NULLA BONA,

- case for false return of, 562

- NURSE,
assumpsit by, for attendance, 63
- OFFENCE (see *Felony*.)
- OFFENDER,
assumpsit for reward offered for apprehending, &c. 189 to 191
- OFFICE,
case for disturbance of, as bellman, &c. 629
- OFFICER (see *Bailiff. Constable. Customs. Excise. Sheriff*.)
case for words slandering plaintiff in his office as a justice, 470
- ORDER,
of a judge, debt on award under, 298
case for malicious arrest on, after same had been rescinded, 438
- ORIGINAL WRITS,
by justices in County Court,
 præcipe for justices in assumpsit, 9
 writ of justices thereon, 10
 declaration thereon, *ib.*
- OUSTER,
stated in ejectment, 669 to 672
- OUT-GOING TENANT,
assumpsit by, against incoming tenant, for crops, manure, &c. 47
the like where valuation made, &c. 218 to 221
assumpsit by, for fixtures, &c. 221, 222
indebitatus count, 38, 47
- OUTLAWRY (see *Original Writ*.)
declaration where one of several defendants has been outlawed, 18
- OVERSEER,
debt on 55 Geo. 3, c. 137, s. 6, for penalties for selling goods to the
 workhouse, 364
debt against, on 5 & 6 Will. 4, c. 76, s. 48, for neglecting to make out
 and sign list of persons entitled to be enrolled on burgess roll, 367
- OWNER OF SHIPS (see *Captain. Charter-party. Master*.)
- PALACE COURT,
declaration in, 9
- PARCENERS,
ejectment by, 675
- PARENT AND CHILD (see *Master and Servant. Seduction*.)
- PARISHIONER (see *Hundred. Inhabitant. Poor Rate*.)
- PARLIAMENT (see *Members of Parliament. Statute*.)
- PARTICULAR PLACE,
assumpsit on note payable at, 82, 86, 95
on bill payable at, 101, 102, 110, 115, 121
- PARTICULARS OF DEMAND,
Reg. Gen. of T. T. 1 Will. 4, reg. 6, prescribing delivery of, 5
in what actions to be delivered, 5, note (a).
form of requisites, *ib.*

PARTICULARS OF DEMAND—*(continued.)*

- giving credit for payments on account, *ib.*
- effect of giving credit for payments, or cross demands, *ib.*
- forms of, 1 to 7
 1. full particulars not giving credit, 5
 2. the like giving credit, 6
 3. short particulars not giving credit, *ib.*
 4. the like giving credit, 7

PARTNERS (see *Surviving Partners.*)

- commencement of declaration where co-plaintiff died between writ and declaration, 17
- assumpsit *by*,
 - indorsement by firm stated, 106
 - survivor, on promises to both partners, 66, 106
 - on promises to survivor to pay debts due before the death, 67, 97
 - promise after death, 67
 - breach, *ib.*
 - conclusion where declaration contains a count on a bill or note, &c. 66
- against*,
 - survivor, on promises by both partners, 97
 - on promises by survivor to pay debts due before death, 68
 - conclusion where declaration contains a count on a bill or note, &c. *ib.*
- covenant on partnership articles, 373

PART PAYMENT,

- admittance of, in assumpsit, and breach, nonpayment of residue, 37
- giving credit for, on particulars of demand, 5 to 7

PARTY-WALLS,

- assumpsit, *indebitatus* count, 46
- the like for moiety of expense for pulling down an old party-wall, and building party-wall where two buildings were of same rate or class, 180
- the like where there was no old party-wall before the new party-wall was erected, 182
- the like by lessee for years, where defendant cut into the wall, 183
- the like by executor to recover expenses, 184

PASSAGE,

- assumpsit for passage-money, 51

PASSENGER,

- covenant against captain for not attending to comfort, &c. of, 382

PASTURE (see *Common.*)**PATENTS,**

- assumpsit for use of, 46
- grant of, from the queen, pleaded, 418
- case for infringement of, 576 to 579
- by patentee and assignee of a part, 576
- case for selling goods as plaintiff's, when they were not, 520
- profert of letters patent, 576

PAWN AND PAWNBROKER (see *Bailee.*)

- assumpsit against pawnbroker for losing a pledge, 248

- PAWN AND PAWNBROKER**—(*continued.*)
case against pawnee for selling a cow deposited with him as a security, 508
case against bailees in general, 506 to 510
- PAYEE** (*see Bills of Exchange. Promissory Notes.*)
- PAYMENT**,
breach, admitting part payment, 37
- PAYMENTS ON ACCOUNT**,
giving credit for, in particulars of demand, 5, note (a).
particulars admitting of, 6, 7
breach admitting of, 37
- PAYMENT OF MONEY INTO COURT**,
rule for, pleaded, 436
- PEACE** (*see Justices.*)
case for maliciously exhibiting articles of the peace against plaintiff, 444
- PEER**,
declaration against, when served with a common writ of summons, 14
- PENAL STATUTES** (*see Statutes.*)
- PENALTY** (*see Damages. Debt.*)
- PERFORMANCE** (*see Breaches.*)
averment of plaintiff's readiness to perform contract, 195, 198, 238
of plaintiff's performance of conditions of contract, 195, 201
statement in declarations in covenant of plaintiff's general performance, 393, 394, 398
of plaintiff's performance of condition precedent, 398
of defendant's general non-performance, 394, 399
- PERILS OF SEA**,
losses by, stated in action on policy, 140 to 142 (*see Policy of Insurance.*)
- PERJURY** (*see Slander.*)
case for malicious prosecution for, 448 (*see Malicious Prosecution.*)
for libel charging plaintiff with, 454, 468, 469
for verbal slander charging plaintiff with, 469
- PERUSAL OF WARRANT**,
demand of, and copy, 4, and note (l).
- PETITIONING CREDITOR'S DEBT**,
feigned issue to try, 172, 173
- PETTY CUSTOMS**,
assumpsit for, 44
- PEW**,
declaration in assumpsit for use of, 40
case for disturbance of, 625
- PHEASANT** (*see Game.*)
- PHYSICIAN**,
cannot in general sue for fees, 62, note (x).
- PIGNORI ACCEPTUM**, 246, 248 (*see Bailees.*)
- PILOTAGE**,
assumpsit for, 53
covenant on charter-party for not paying, 378

PIRATES,

losses by, stated, 146

PLATES,

pirating copyright of, 575

case against engraver for using for his own purpose plates engraved for plaintiff, 510

PLEDGE (see *Pawn*.)PLEDGES (see *Bail*.)

omission of, in declaration, prescribed by Reg. Gen. 3 Will. 4, reg. 1 . . 13
taking insufficient, in replevin, case for, 568

POLICIES OF INSURANCE,

DECLARATIONS ON SEA POLICIES.

instructions to frame same concisely, 131, &c. and notes.

assumpsit on policy on goods lost by capture at suit of broker, 132

debt on, against London Assurance Company, 310

*Statements relative thereto.**Property Insured and Interest.*

on insurance on freight stated, 136

on insurance on expected profits, *ib.*

insurance on moiety of ship—interest in several persons, 137

plaintiff interested in two-thirds, and others in residue, *ib.*

another form, where plaintiff interested in two-thirds of ship, *ib.*

the like, where some persons interested in ship, and others in goods, *ib.*

averment that no British subject was interested, 138

on an insurance of money lent on *respondentia*, *ib.*

averment where name of ship mis-stated in policy, 139

on policy varied after effected, but not as to subject-matter, *ib.*

statement of alteration of terms after commencement of risks, *ib.*

averment that ship sailed with convoy, &c. 140

Losses by Perils of Sea.

loss of ship and goods by stormy weather, 140

more general statement of loss by perils of sea, *ib.*

loss by shipwreck, *ib.*

the like in another form, 141

loss by sinking of ship, *ib.*

ship leaky, lost while putting into port, *ib.*

loss by sinking among rocks, *ib.*

loss by ship foundering at sea, *ib.*

loss by ship being cast on rock, and tempest, *ib.*

ship lost by storms and ice, and foundered, 142

loss of ship and freight by stranding, *ib.*

goods damaged by leak sprung in storm, *ib.*

Loss by Worms.

ship eaten by worms, lost in a storm, 142

Loss by Ships running foul.

loss by another ship's running down ship insured, 143

Loss by Fire.

ship and goods burnt at sea, 143

the like in another form, *ib.*

Loss by Capture.

loss by capture of ship and goods, 143

for total loss of ship and freight by capture, for expenses incurred in endeavouring to regain it, 144

total loss of goods by capture and recapture, *ib.*

POLICIES OF INSURANCE—(*continued.*)DECLARATIONS ON SEA POLICIES—(*continued.*)

loss by being fired upon and sunk by enemy, 144
 total loss of goods, ship compelled to go into Cadiz, confiscated by
 the King of Spain, 145

Loss by Arrest or Detainment.

ship detained on coast of America, 145
 loss by ship being seized by savages, 146

Loss by Pirates.

ship taken by Americans, then considered as rebels, 146
 second count as if taken by pirates, *ib.*

Loss by Thieves.

ship damaged on voyage by unknown persons, and robbed, 146

Loss by Barratry.

by barratry of master and mariners, 146
 the like in a more general form, 147
 loss by putting in smuggled goods, *ib.*
 ship confiscated by master's taking her into hostile port, 148

Average Losses.

for average loss of goods damaged by sea water, 148
 another count for general average where it was necessary to cut
 away masts, &c. in a storm, *ib.*
 ship stranded and disabled, and obliged to be unloaded and piloted,
 149
 for rateable part of expense in endeavouring to recover ship, 150
 the ship damaged by bad weather; her cables, masts, &c. cut
 away; plaintiff obliged to pay salvage, &c. *ib.*
 where ship sprung a leak, and forced to put into Lisbon, &c. 151
 average loss on sugars wetted by sea, &c. 151
 for average loss, anchor, &c. cut away, 152
 for average loss, by tackle, &c. burnt, *ib.*
 for average loss, goods stolen while ship detained by embargo, *ib.*

Statement of Abandonment,

where plaintiff abandoned his claim to ship, 153

Statement of Adjustment,

statement of adjustment of loss in an action on policy, 153

ON LIFE POLICIES, 153 to 159

assumpsit on policy against insurer underwriting by agent, 153
 on policy on life of third person, against Atlas Company,
 155
 covenant on lives against Royal Exchange Company, 385

AGAINST FIRE,

covenant on policy against fire, by executor of insurer, against
 fire-office, on loss after death, 382
 form of a policy against fire, *ib.*

DECLARATIONS RELATING TO POLICIES IN GENERAL.

assumpsit for effecting, 60
 assumpsit for premiums of insurance, *ib.*
 case against secretary of company for misrepresentation, 526

POOR,

debt on 55 Geo. 3, c. 137, s. 6, for penalties against an overseer for
 selling goods to the workhouse, 364

POOR RATES,

case against sheriff for refusing to replevy on distress for arrear of, 633
 debt on 11 Geo. 4, c. 10, for recovery of, 351

PORT DUTIES,
assumpsit for, 44

POSSESSION,
statement in assumpsit against vendor, for not having title to assign his lease, of defendant's possession of leasehold estates, 211
statement in action against vendee of estate, of vendor's possession of lease, 215, 217
the like in action against incoming tenant, of outgoing tenant's possession, 218
ditto in action against tenant by landlord of tenant's possession, 223, 229, 344
ditto of possession of bailment (see *Bailce.*)
ditto in covenant of possession of leasehold interest, 406
statement in trover, 639
declaration in trespass on plaintiff's possession as tenant, 660, note (*k*)

POUND BREACH (see *Escape. Rescue.*)
of cattle distrained for rent, case for, 549, 550
the like, damage feasant, 550, 551

PRÆCIPE (see *Original Writs.*)

PRECEDENT CONDITION (see *Condition Precedent. Performance.*)

PREDIAL TITHES,
assumpsit for, 41

PREMISES (see *Abutments.*)
how to be stated in covenant, &c. 391
in trespass, 660, note (*m*), and 662, note (*n*)
in ejectment, 670, 671

PREMIUMS OF INSURANCE,
assumpsit for, 60

PRESCRIPTIONS (see *Customs.*)
declarations for not cultivating according to custom of country, 226
for disturbance of common, 611
of way, 617
of ferries, 623
of a pew, 625
of a market, 626
of franchises, tolls, &c. 628

PRESENTMENT,
of promissory note or bill when dispensed with, stated, 96, 112
of promissory note, stated, 83, 89
of bill of exchange to acceptor, 101, 113, 115
of bill payable at a particular place, 101, 106, 110, 115, 121, and notes.

PRIMAGE,
assumpsit for, 49

PRINTS,
case for infringing copyright in, 575
case against engraver for using for his own purpose plates engraved for plaintiff, 510

PRISONER,
actions for escape of (see *Escape.*)

PRIVILEGE (see *Attorney. Member of Parliament. Peer, &c.*)
assumpsit for fees, &c. 54 to 57

- PRIVY,**
 case for not emptying the same, &c. 585
- PRIZE MONEY,**
 assumpsit for, 53
- PROBATE** (see *Profert.*)
 profert of will, 22
 proof of will pleaded, 426
- PROCESS** (see *Writs.*)
- PROCESSION,**
 indebitatus assumpsit for use of seats to view, 40
- PROCHEIN AMY,**
 notice of action by, 3, note (*k*)
 commencement of declaration by, 14
- PROCLAMATION,**
 statement of proclamation made to avoid a fine, 419
- PROCTOR,**
 assumpsit by, for his fees, 55
- PROFERTS,**
 of will, 22
 by an executor, *ib.*
 by a surviving executor, *ib.*
 by an executor of an executor, *ib.*
 of letters of administration, 25
 by a surviving administrator, *ib.*
 by an administrator *de bonis non* of an administrator, 26
 the like with the will annexed, *ib.*
 by an administrator with the will annexed, *ib.*
 of bonds, or deeds, in Q. B. or C. P. or Exchequer, 314 to 317
 excuses for not stating, 316
 of indentures in covenant, 307
 of a lease, 391
 of exemplification of letters patent, 418, 576
- PROFITS,**
 declaration on policy on expected profits, 136
- PROMISE, OR CONTRACT** (see *Assumpsit.*)
 how stated, in common assumpsits, 36
 in debt, 292
- PROMISSORY NOTES** (see *Bills of Exchange.*)
 commencement of declarations on, 13, &c.
 declarations on, as prescribed by Reg. Gen. of Trin. T. 1 W. 4, and
 Reg. Gen. of Hil. T. 4 W. 4..29
 observations on these rules, 29
 recital of Reg. Trin. T. 1 W. 4..30
 schedule of prescribed forms, 31
 by payee or indorsee against maker, *ib.*
 indorsee against payee, *ib.*
 several indorsements, 32
 indorsee against indorser, *ib.*
 directions for declarations on promissory notes payable at sight, 34
 the like where there is a count on a note with the money counts, *ib.*
- ASSUMPSIT ON PROMISSORY NOTES,**
 instructions to prepare declarations, 81 to 83, and notes.
 if in foreign language may be set out in English, 82, note (*a*)

PROMISSORY NOTES—ASSUMPSIT ON PROMISSORY NOTES—(continued.)

date of, 82, note (b).

venue in, *ib.*

delivery of, need not be stated, *ib.*, note (c)

payment of, in what money, *ib.*, note (d).

Against Maker,

payee against maker on a note payable generally, 82

on a note wrongly dated, 83

payee against maker on a note payable at a particular place, *ib.*

on a note payable on demand, *ib.*

on a note payable by instalments, where whole due on one default, 84

the like on one instalment, *ib.*

the like for several instalments due, *ib.*

on a note for less than £5. . 85

on a note made abroad for the payment of guilders, *ib.*

by payee against maker of note, payable six months after the death of another, *ib.*

first indorsee against maker, payable generally, *ib.*

the like when payable at a particular place, 86

second or remote indorsee against maker, *ib.*

short indorsement, *ib.*

on a note indorsed for residue, after part payment, *ib.*

by executor or administrator of payee against maker, 87

the like on promise since the death, *ib.*

the like in another form, stating the probate, *ib.*

payee against the executor or administrator of maker, 88

by indorsee of executor against maker, *ib.*

by indorsee of an administrator after the death of the payee against the maker, *ib.*

by the bearer of a note payable to E. F. or bearer, against the maker, 89

the like in another form, *ib.*

on a country banker's note, payable in town or country, *ib.*

by a surviving payee against maker, *ib.*

payee against a surviving maker, *ib.*

by husband and wife on a note payable to her whilst sole, 90

by an executor on a note payable to the wife of testator before marriage, she not having indorsed it, *ib.*

by husband alone on a note made to wife during coverture, *ib.*

against husband and wife on her note before marriage, *ib.*

by assignees of a bankrupt against maker of a note payable to bankrupt, *ib.*

by assignee of payee, an insolvent debtor, against maker of a note payable to the insolvent, 91

surviving indorsee against maker of a note payable generally, *ib.*

indorsee against surviving maker of a note payable generally, *ib.*

by husband and wife on note indorsed to wife before marriage against maker, *ib.*

indorsee against husband and wife on note made to wife before marriage, 92

executor or administrator of indorsee against maker of note payable generally, *ib.*

indorsee against executor or administrator of maker of a note payable generally, *ib.*

executor or administrator of indorsee against executor or administrator of maker, *ib.*

assignee of indorsee, a bankrupt, against maker, 93

assignee of indorsee, an insolvent debtor, against maker, *ib.*

by trustees of friendly society against maker, *ib.*

PROMISSORY NOTES,

ASSUMPSIT ON PROMISSORY NOTES—*Against Maker*—(continued.)

- second count for money lent by the society, 94
- by officer of banking company under 7 G. 4, c. 46, against maker, 94
- against public officer of banking company, 94

Against Indorser,

- indorsee against indorser of note payable generally, *ib.*
- the like payable at a particular place, 95
- by indorsee against indorser, payable to *bearer* thirty days after sight, delivered over by payee to defendant, who indorsed it to plaintiff, *ib.*
- first indorsee against first indorser, with averment of want of effects, to excuse notice of non-payment, *ib.*
- against indorser, where maker cannot be found, 96
- against indorser, where maker dead at time note became due, and no executor or administrator, *ib.*
- against indorser who dispensed with presentment for payment, *ib.*
- surviving indorsee against indorser, 97
- indorsee against surviving indorser, *ib.*
- husband and wife on note indorsed to wife before marriage against indorser, *ib.*
- indorsee against husband and wife on note payable to the wife before marriage and indorsed by her, *ib.*
- executor or administrator of indorsee against indorser, 98
- indorsee against executor or administrator of indorser, *ib.*
- executor or administrator of indorsee against executor or administrator of indorser, *ib.*
- assignees of indorsee, a bankrupt, against indorser, 99
- assignee of indorsee, an insolvent debtor, against payee of a note payable generally, *ib.*
- debt on payee against maker, 292
- trover for, 639

PROPERTY (see *Possession.*)PROPERTY TAX (see *Land Tax.*)

PROTEST,

- for non-acceptance, stated, 112, 129, 130
- drawer against acceptor, where bill paid *supra protest* by a third person, 128, 129
- for non-payment, stated, 112, 130

PROUT PATET PER RECORDUM,

- reference to a judgment, 337, 558, 561
- to a record of commitment, 560, 562
- to a recognizance, 336
- to a private statute, 418
- to letters patent, *ib.*
- to a writ and return, 558, 559

PUBLIC COMPANIES,

- assumpsit by, at suit of treasurer, secretary, &c. 26 to 28, 44 to 46, 94

PUBLIC HOUSE (see *Innkeeper.*)

- assumpsit for good-will of, and business, 38
- against publican for not making title to lease, &c. 212
- the like against vendee of lease, &c. for not completing purchase, &c. 215
- case for misrepresenting the value, &c. of, 514

- PUBLIC OFFICER,**
commencement of declaration by or against, under 7 Geo. 4, c. 46. .27,
28, 94
- PURCHASE** (*see Sale.*)
- QUAKERS' MEETING,**
trespass for turning plaintiff out of, 661
- QUANTUM MERUIT COUNT,**
virtually abolished, 31, note (b)
- QUEEN,**
seisin of, pleaded, 405
title by lease from, pleaded, 418
information by attorney-general for running foul of ship of, 531
- QUEEN'S PRISON,**
case against keeper of, for escapes, 455 to 561 (*see Escape.*)
- QUIET ENJOYMENT,**
assumpsit against publican for not having title to assign his lease, 212
covenant against vendor for breach of good title, whereby plaintiff
ejected, 388
covenant against lessor for not paying quit rent, 402
- QUI TAM,**
commencements of declarations in, 17
conclusions of declarations in, *ib.*
declarations in debt, *qui tam*, and observations, 357 to 370 (*see Debt.
Statute.*)
- QUIT RENT,**
covenant by lessor against lessee for not paying, 402
- RABBITS,**
case for injury to common with, 615
- RACE** (*see Gaming.*)
- RAILWAY,**
assumpsit for calls, 45
for not accepting and paying for shares in, 195
- RATES** (*see Poor Rate. Tolls.*)
- REAL PROPERTY** (*see Covenant. Case. Trespass.*)
assumpsit relating to, 37 to 46, 208 to 231
- REASONABLE CAUSE,** 1, note (b)
- REASONABLE TIME,**
averment of elapse of, 188, 193, 199, 238
- RECOGNIZANCE** (*see Judgment.*)
of bail, debt on,
on a recognizance by capias in Q. B., C. P., or Exchequer, 335
- RECORD,**
debt on, 337 to 342 (*see Judgment. Recognizance.*)
- RECORDARI FACIAS LOQUELAM,**
statement of, 325
- RECOVERY SUFFERED,**
pleaded, with deed to lead uses of, 419
the like more fully pleaded, 420

- RECTOR,**
 seisin of, for life, pleaded, 405, 597
 title by succession pleaded, 413
 case by, against executors of deceased, for dilapidations, 597
- RECTORY,**
 ejectment for, 668
- REDDENDUM** (see *Rent*.)
 statement of, in covenant, 392
- REFERENCE** (see *Profert*.)
 to policy of insurance, and memoranda, 132, 133
 to conditions of sale, 213
 to award, 295
 to record, 560, 562, &c. (see *Prout Patet per Recordum. Record*.)
 to indentures in covenant, 307
 to lease, 392
 to private statute, 418
 to letters patent, 418, 576
- RELEASE** (see *Accord and Satisfaction. Lease and Release*.)
 lease and release pleaded, 417
 under 4 Vic. c. 21 .418
- REMAINDER** (see *Reversion*.)
 seisin in fee in reversion, pleaded, 410
 in fee in a copyhold, pleaded, 411
- REMOVAL**, 10 (see *Inferior Court*.)
- RENT** (see also *Landlord and Tenant*.)
 assumpsit for,
 of a house and land, 38
 of a fishery, 39
 of a way, *ib*.
 of a pew, 40
 of seat to view a procession, *ib*.
 of a tennis court, &c. *ib*.
 of an inn, *ib*.
 for double rent, *ib*.
 of pasture land and eatage of grass, 41
 of premises and prædial tithes, *ib*.
 of lands, with right to take tithes, *ib*.
 for unfurnished lodgings, *ib*.
 of furnished lodgings, 42
 the use of standings in a market-place and tolls, 41
 for board and lodging, 42
 for warehouse-room of goods, *ib*.
 for the standing of a chaise or carriage, *ib*.
 for the moorage of ships, *ib*.
 for agistment of cattle, 49
 for lodging and necessities, 48
 the like for third persons, *ib*.
 passage on board ship, 51
 on promise to pay rent if plaintiff would withdraw a distress, 187
 against landlord, for not indemnifying tenant from ground rent,
 230, 546
- debt for,
 on a lease, 310
 use and occupation, *ib*.
 on a lease against assignee, 311
 double value for holding over, 342

RENT—debt for—*(continued.)*

- for double rent, for holding over, 344
- covenant for, against lessee, 391
- for not paying galage rent, 400
- by lessee, for not paying quit rent, 402
- case for illegal distresses for, 553 (see *Distress.*)
- against sheriff, on 8 Ann, c. 14, for not leaving year's rent, 629
- against landlord, for not indemnifying tenant against distress by ground landlord, 546, 230

REPAIRS (see *Covenant. Landlord and Tenant.*)**REPLEVIN,**

- declarations in Q. B. or C. P. 646
- in the County Court, 647

REPLEVIN BONDS,

- debt on,
 - by assignee of sheriff where proceedings removed by *re. fa. lo.* 325
 - the like where judgment was obtained in County Court, 329
 - the like where party was *non prossed* for not declaring, *ib.*
- case for neglecting to take, 565
- taking insufficient sureties, 568
- against sheriff for refusing to replevy after tender of replevin bond, 633

REPLEVYING,

- for refusing to grant replevin, 633

REQUEST,

- statement of, in pleading, 237

RESALE,

- and loss stated, 215

RESCINDED ORDER,

- case for malicious arrest on, 438

RESCUE (see *Pound-breach.*)

- of cattle distrained for rent, case for, 549
- of cattle distrained damage feasant, case for, 550
- of a person arrested on mesne process, case for, 551

RESPONDENTIA,

- assumpsit on insurance on money lent on *respondentia*, 138

RETURNS (see *Sale. Writ.*)

- case for false return to *capias*, 555
- to *feri facias*, 562, 565

REVERSION,

- estate in fee, or in a term, or in a copyhold pleaded, 410
- case for injury to reversionary interest in goods, 580
 - by reversioner against stranger, for damage to house in possession of tenant, 589
 - by reversioner for stopping up a chimney, 590
- against tenant for waste, bad husbandry, 595, 597
- for interrupting plaintiff in his reversionary right to irrigate his meadow, 606
- by reversioner for stopping up a way, 620

REWARD,

- assumpsit for a reward offered for taking a prisoner who had escaped, 189

REWARD—*(continued.)*

- the like for a reward advertised for discovering an offender, 190
- the like, on promise if plaintiff would arrest a felon, 191
- the like for reward at the suit of a constable, *ib.*

RIOT,

- case against hundred, on 7 & 8 Geo. 4, c. 31, where house, &c. demolished, 635

ROADS AND ROAD CALLS *(see Way.)*

- assumpsit for calls, 45 *(see Canal Calls.)*
- debt for calls, special, 293

ROLL *(see Record.)*

RULE OF COURT,

- rule to pay money into Court pleaded, 436

SAILOR *(see Captain. Ship.)*

- assumpsit by, for his wages, against captain or owner, 52
- for short allowance money, 53
- for not suffering mariner to go as boatswain in defendant's ship, 240
- covenant on indenture of apprenticeship to a mariner, by apprentice, for not boarding, &c. 371, 372

SALARY,

- assumpsit for, 52, 53
- debt for, by commissioners under Navigation Act, 295

SALES,

INDEBITATUS ASSUMPSIT, RELATING TO,

Respecting Real Property, for

- a freehold estate sold and conveyed, 37
- a copyhold estate surrendered, *ib.*
- a leasehold estate sold and assigned, 38
- a good-will of business, *ib.*
- a good-will of a public-house and plaintiff's business therein, *ib.*
- fixtures by outgoing against incoming tenant, *ib.*
- pasture land and eatage of the grass, 41
- the use of premises and prædial tithes, *ib.*
- use of lands with right to take tithes, *ib.*

Respecting Personal Property, for

- goods sold and delivered to the defendant, 46
- goods sold to defendant, and delivered to a third person, 47
- goods bargained and sold to defendant, generally, *ib.*
- a crop of grass or turnips, &c. bargained and sold, *ib.*
- tithes bargained and sold, 48
- the like in another form, *ib.*
- small tithes, *ib.*
- necessaries found and provided for defendant, 46
- necessaries found and provided for third persons, *ib.*
- horsemeat and stabling, *ib.*
- agistment of cattle, 49

ASSUMPSIT, SPECIAL, RELATING TO

Sales of Goods,

- for not delivering bill of exchange for goods sold, 192
- on contract of sale and return for not returning or paying, 193
- for not accepting goods sold, 194
- for not accepting goods made for defendant, 195
- for not taking away goods sold at auction, *ib.*

SALES—ASSUMPSIT SPECIAL, RELATING TO SALES OF GOODS—(continued.)

- the like where there has been a re-sale, 196
- for not delivering goods within specified time, 197
- for not delivering goods at a particular place, 198
- the like in another form, *ib.*
- special damage, by reason of non-delivery of goods, 199
- for not providing another horse or returning money where horse unsound, 200
- on promise to pay money on exchange of horses, *ib.*
- on warranty of a horse to be sound and free from vice, 204
- on warranty on exchange of horses, 206
- for not furnishing, &c. good hams, 207
- on false warranty of bank-note, 208
- against agents, &c. for negligence on sales (*see Agent.*)
- for not returning casks, or paying for them, 248
- on a guarantee for goods sold to a third person, 231

Sale, Use, &c. of Real Property.

- against tenant for not using premises in a husbandlike manner, and according to custom of country, 226
- breach for ploughing up grass land and cropping land without manuring same, 227
- for taking successive crops without manuring land, 228
- against tenant, for keeping and leaving premises out of repair, *ib.*
- against landlord, for not indemnifying tenant from ground-rent, 230
- against vendor of estate, for not making title, 209
- general count, for not making a good title to premises for residue of term within reasonable time, 211
- against publican, for not having title to assign his lease, 212
- by vendor, for not completing purchase, and paying loss on resale, 213
- against vendee on public-house agreement, 215
- against vendee for not taking fixtures and stock in trade, 217
- by outgoing against incoming tenant, for price of crops, &c. valued, 218
- the like in another form, 220
- the like for fixtures, 221
- landlord against tenant, for breach of express agreement to consume straw on the premises, 223
- against tenant who held premises in question after end of lease, on terms of such lease, for not repairing, &c. 224

COVENANT RELATING TO,

- on deed of sale by heir or purchaser against executor of husband, on covenant for further assurance, and for not levying a fine, 387
- against vendor for breach of good title, 388
- title by assignment pleaded, 415
 - by surrender of leasehold interest, *ib.*
 - by bargain and sale enrolled, 416
 - by lease and release, 417
 - by release under 4 Vict. c. 21. .418
 - by surrender to use of purchaser, 424

CASE,

- for deceit relating to, 511 (*see Deceit.*)
- for infringing copyrights, &c. by sale, 572, &c. (*see Copyright.*)

SALVAGE,

- assumpsit for, 54

SAMPLE,

- note as to sale by, 207, note (*t*)

SCHOOLMASTER AND SCHOOLMISTRESS,

- assumpsit by, for tuition, &c. 62

- SCHOOLMASTER AND SCHOOLMISTRESS**—(*continued.*)
assumpsit by, for entrance money, 62
for taking away child without notice, 191
case for keeping a slaughter-house near plaintiff's school, 587
for accusing governess of fornication, 473
- SCIENTER** (*see Deceit.*)
stated in pleading, 430, 431, and notes.
- SCOTCH DECREE**,
assumpsit on, by assignees of a bankrupt, 179
debt on, 306
- SEAMAN** (*see Sailor.*)
- SEA WALLS**,
case for not repairing pursuant to charter, 593
- SEARCH WARRANT**,
case against defendant for maliciously procuring and causing plaintiff's house to be searched, 441
- SECOND ACTION**,
commencement of, after plea in abatement for nonjoinder, 16
- SECURITY** (*see Guarantee.*)
against attorney for not taking a sufficient security on purchase of annuity, 280, 283
- SEDUCTION**,
case for, 483
trespass for, 652
- SEISIN** (*see Title pleaded.*)
- SEPARATE MAINTENANCE** (*see Husband and Wife.*)
covenant on deed of, by trustee against husband, 375
- SERVANT** (*see Bailiff. Master and Servant.*)
- SERVICES AND WORKS** (*see Work and labour.*)
- SEVERALTY**,
seisin of estate in, pleaded, 411
- SHARES**,
assumpsit for calls on, 44, 45
for not accepting and paying for, 195
- SHERIFF** (*see Sheriff's Officer.*)
declaration by assignee of, on bail bond, 16
assumpsit against attorney for not putting in bail, whereby sheriff fixed, 276
debt,
by assignee of, on bail bonds, 320 (*see Bail Bond.*)
by assignee of replevin bond, 325
on 32 Geo. 2, c. 28, s. 1 and 12, by party grieved, against sheriff for extortion, &c. 355
on 28 Eliz. c. 4, and 43 Geo. 3, c. 46, s. 5. .352
on 28 Eliz. c. 4, for £40 penalty for extortion, 358
on 23 Hen. 6, c. 9, *qui tam* for extortion, and for refusing to take bail, 357
case against,
for illegal distresses, 533 to 546 (*see Distress.*)
for excessive levies, 546 to 549 (*see Levy.*)

SHERIFF—(continued.)

- for escapes, 552 to 562 (*see Escape.*)
- for false returns, 555, 562, 564 (*see False Return.*)
- for not taking replevin bond, 565, 633
- for not executing writ of *habere facias possessionem*, 565
- for taking insufficient pledges in replevin, 568
- for not assigning bail bond, 569
- for taking insufficient bail, 570
- for not arresting within a reasonable time, and on the first opportunity, 554, 570
- on 8 Ann. c. 14, for not leaving year's rent, 629
- on 23 Hen. 6, c. 9, for refusing bail, 631
- on 28 Eliz. c. 4, for extortion, 635
- for refusing to replevy after tender of replevin bond on distress for poor rate, 565, 633

SHERIFF'S OFFICER (*see Sheriff.*)

- assumpsit by, for fees, 56

SHIPS OF WAR,

- private, insurance on, 134, note (c)

SHIPS (*see Captain. Charter-party. Freight. Policy of Insurance. Sailor.*)

- assumpsit
 - for demurrage, 51 (*see Demurrage.*)
 - for moorage of, 42
 - for hire of, 49, 50
 - for passage on board, 51
 - for wages, &c. on board of, 52 to 54
 - for work and labour with, 59
 - on sea policies of insurance, 131 to 153 (*see Policies of Insurance.*)
- case for negligence in managing of, 530
- information by Attorney General for running foul of king's ship, 531
- for slander respecting sea worthiness of, 482
- trover for, 659 (*see Trover.*)
- trespass for seizing of, 657
 - by master for impressing mate of ship, whereby ship prevented from sailing, 657
 - for seizing plaintiff's vessel and putting it adrift, *ib.*
 - for navigating a vessel against plaintiff's vessel, 658
 - for battery, &c. on board of, 651

SHIPWRECK,

- loss by, stated, 140

SHOOTING,

- trespass for shooting a dog, &c. 655
- for wounding plaintiff with a pistol, 650

SHORT-ALLOWANCE MONEY,

- assumpsit for, 53

SIDE CLERK IN EXCHEQUER,

- commencement of declaration at suit of, 15, 55

SIGHT,

- assumpsit on note payable after, 34, 95

SIX CLERKS,

- declaration by one for business done, 55

SLANDER,

declarations,

For Libels,

for libel indirectly accusing plaintiff of perjury or other specific offence, 454

second count, 457

third count, *ib.*

for a libel directly accusing plaintiff of a theft or other specific offence, 458

for a libel imputing no specific offence, or imputing want of moral conduct, 459

for a libel of plaintiff in his *profession* as an attorney, for a libel upon himself and another in his mode of conducting a fiat of bankruptcy, 460

for a libel imputing insolvency to plaintiff in the way of his trade, 462

for a libel upon plaintiff in his *employment* as a servant against his master, in a letter to a person, who in consequence refused to take him into his service, 463

for a libel in a newspaper, 465

for a libel in a letter, *ib.*

for a libel containing distinct passages of libellous matter, *ib.*

For verbal Slander,

for slanderous words indirectly accusing plaintiff of a *specific offence*, 466

second count, 467

for charging plaintiff with perjury in the execution of a writ of inquiry, with a *special* inducement to explain the words, 468

for slanderous words directly accusing the plaintiff of perjury or other *specific offence*, 469

second count, *ib.*

for words slandering plaintiff in his *office*, as for accusing a justice of the peace with having pocketed fines forfeited by persons convicted by him, 470

for words slandering plaintiff in his *profession*, as for slandering an attorney, 471

for accusing a governess of fornication, 473

by baron and feme for words spoken of the latter in the way of her trade, 474

for words slandering plaintiff in his *trade*, as by calling him a rogue, &c. *ib.*

second count, 475

for words imputing insolvency to plaintiff in the way of his trade, 476

by keeper of bathing-rooms for words imputing a propensity to commit an unnatural crime, spoken in answer to a question put to defendant by a third person, 477

second count, 478

for slander actionable only by reason of *special damage*, *ib.*

special damage that plaintiff lost acquaintances, &c. 480

for *slander of title*, in procuring a third person to attend at a public auction room, and slander plaintiff's title to the estate he was about to sell there, 481

second count, 482

for saying to a person who was about to hire plaintiff's ship, that she was broken and unfit to proceed to sea, whereby he refused to hire ship, 482

for slander where the words are spoken *ironically*, 480

for slander where it is to be collected from *question* and *answer*, *ib.*

SOLICITOR (see *Attorney*.)

SOUTHWARK COURT (*see Inferior Courts.*)

declaration in, 8

SPECIAL ACCEPTANCE,

what, and effect of, 101, note (*d*)SPECIAL ORIGINAL (*see Original Writs.*)SPECIALTIES (*see Bond. Covenant. Debt. Deeds.*)

STALLION,

assumpsit for use of, 49

STANDING OF CARRIAGES,

assumpsit for, 42

STANDINGS IN A MARKET,

assumpsit for tolls for, 41

STATUTE OF LIMITATIONS,

assumpsit by executor or administrator against acceptor of a bill, on promise to plaintiff to take case out of, 109

STATUTES (*see Uses.*)

title by private statute pleaded, 418

commencement, &c. of declarations by or against clerks, &c. empowered to sue under, 26 to 28

assumpsit for double rent, on 11 Geo. 2, c. 19, s. 18. .40

for calls, under a road act, 45

the like under a bridge act, 44

do. canal act, 45

do. railway act, *ib.*

on 14 Geo. 3, c. 78, for contribution to party-walls, 46, 180 to 185

debt against subscriber, on statute, for road call, 293the like for road calls, on another statute, giving a general form of declaring, *ib.*for canal call, under a private act, *ib.*

for calls by Vauxhall Bridge Company, 294

by commissioners under Navigation Act, 295

on land tax redemption act, 312

by treasurer of friendly society, &c. 334, 335

by party grieved,

on land tax redemption act, 312

on 4 Geo. 2, c. 28, by landlord against tenant for double value for not quitting, 342

on 11 Geo. 2, c. 16, s. 18. .344

for bribery at election, under 2 Geo. 2, c. 24. .366

by landlord against tenant, on 11 Geo. 2, c. 19, s. 12, for not giving notice of declaration in ejectment, 345

by assignee against insolvent, on 13 Eliz. c. 5, to recover penalties for fraudulent conveyances, *ib.*on 11 G. 2, c. 19, s. 3, *ib.*

on 2 & 3 Edw. 6, c. 13, s. 1, for treble value of tithes not set out, 347

on 2 & 3 Edw. 6, c. 13, for treble value of *sylva cæduæ* not set out, 349

on 11 Geo. 4, c. 10, for recovery of poor rate under local act, 351

on 9 Ann. c. 14, s. 2, *ib.*on 5 Geo. 3, c. 14, s. 3, by owner of fishery, for £5 penalty in fishing there, *ib.*

on 23 Hen. 6, c. 9. .357

STATUTES—(continued.)

- on 32 Geo. 2, c. 28, s. 1 and 12, against bailiff for extortion, 355
- on 29 Eliz. c. 4, and 43 Geo. 3, c. 46, s. 5. .352
- another form, 355
- on 13 Eliz. c. 5, by assignee of insolvent debtor, 356, 345
- on 28 Hen. 8, c. 11, s. 3. .356

by common Informer;

- on 13 Geo. 2, c. 19, s. 2, for running a horse for plate less than £50 value, 357
- on 23 Hen. 6, c. 9, against sheriff, for refusing to take bail, and for extortion, *ib.*
- on 28 Eliz. c. 4. .358
- on 12 Ann. s. 2, c. 16, for usury, 359 to 362
- on 7 Geo. 2, c. 8. .362
- on 2 Geo. 2, c. 23, s. 24. .364
- on 6 Ann. c. 16, against stock-broker for acting before admitted, *ib.*
- on 55 Geo. 3, c. 137, s. 6, *ib.*
- against a commissioner for acting in a matter in which he was personally interested, 367
- on 2 Geo. 2, c. 24, for bribery, 366
- on 5 & 6 W. 4, c. 76, s. 48, against overseer for not making out burgess roll, 367

Covenant,

- title by private act of parliament pleaded, 417
- statute of uses pleaded, 415

Case on Statutes,

- on 2 W. & M. sess. 1, c. 5, s. 5, for illegal distress, 534 to 546 (see *Distress.*)
- for distraining tools of trade, when sufficient other goods on premises to be answerable, 535
- on 52 Hen. 3, c. 11, for illegal distress, 537
- for distraining a second time on same goods, 538
- for selling under a distress without having goods appraised by two sworn appraisers, 542
- for distraining by other persons than by bailiffs sworn in, 543
- for selling a growing crop under a distress, before the same had been gathered and appraised, contrary to the 11 Geo. 2, c. 19, s. 8, *ib.*
- against a broker, on 17 Geo. 3, c. 93, for not giving a copy of the charges of a distress, 545
- for rescue and pound breach, 549
- against keeper of Queen's Prison for an escape, 555 to 562 (see *Escape.*)
- for not taking a replevin bond on a distress for rent under 11 Geo. 2, c. 19. .565
- against sheriff on 4 Ann. c. 16, s. 20, for not assigning a bail bond, 569
- against plaintiff's landlord, for not indemnifying him against a distress made on his goods by the ground landlord, 546, 230
- for infringing copyright, &c. 572 to 576 (see *Copyright.*)
- for not carrying away great tithe, 593
- on 8 Ann. c. 14, against sheriff, for not leaving year's rent, 629
- on 23 Hen. 6, c. 9, for refusing bail, 631
- on 24 Geo. 3, against justice for refusing bail, 632
- on 28 Eliz. c. 4, against sheriff for extortion, at the suit of plaintiff in action, 635

STATUTES—*Case on Statutes—(continued.)*

- against sheriff for refusing to replevy after tender of replevin bond, 633
- against a justice for refusing to take bail on a conviction where plaintiff intended to appeal, *ib.*
- against hundred, on 7 & 8 Geo. 4, c. 31, where a building, machinery, and goods were destroyed by rioters, 635 to 638

Trespass,

- on 8 Hen. 6, c. 9, for forcible entry and detainer, 659
- for hunting, &c. 665
- for fishing, 666

STEAM ENGINE,

- assumpsit for not fixing according to agreement, 244

STEWARD OF A MANOR,

- assumpsit by, for fees, 57

STIPULATED DAMAGES (see *Damages.*)

- when proper to declare for them, and form of declaration, 216, 217

STOCK,

- assumpsit for not replacing, 201, and note as to,
- debt on bond to replace, &c. 319
- case for not transferring, 202, note.

STOCK BROKER,

- debt on 6 Ann. c. 16, for acting as, before admitted, 364

STOCK JOBBING,

- debt on 7 Geo. 2, c. 8, for penalties for stock-jobbing on a *sale* of stock, 362
- second count for stock-jobbing on a *purchase* of stock, *ib.* 363

SUBPŒNA,

- case against witness for not obeying a *sub. duces tecum*, 570

SUBSCRIBER (see *Calls.*)

SUCCESSION,

- title by, as to rectory, pleaded, 413

SUMMONS, WRIT OF,

- commencement of declaration, 13 to 18
- do. at suit of an infant, 14
- do. against a peer, *ib.*
- do. against an M. P. *ib.*

SUMMONS,

- against members of parliament, 14

SUPRA PROTEST,

- payment *supra protest* stated, 128, 129
- acceptance *supra protest* stated, 100, 102

SURETY (see *Guarantee.*)

- debt against, of agent on bond, for agent's due accounting for goods, 318

SURGEON,

- assumpsit by, for attendance, &c. 62
- case against, for improper treatment, 488

SURRENDER,

- of lease pleaded, 415

SURRENDER—(*continued.*)

- of copyhold to use of will, death of testator, and admittance, &c. 423, 424
- of copyhold to use of purchaser, and admittance, 424
- in discharge of bail, stated, 556

SURVEYOR,

- assumpsit by, for his bill, 61

SURVIVING ADMINISTRATOR (*see Administrator.*)

SURVIVING DEFENDANT,

- declaration against, where deceased defendant died between writ and declaration, 18, 66
- against, in general, in assumpsit, 66

SURVIVING EXECUTOR (*see Executor.*)

SURVIVING PARTNER (*see Assignees. Executors. Partners.*)

- declaration in assumpsit by, where co-plaintiffs died between writ and declaration, 17
 - a surviving partner, 18
 - by surviving partner on a promise to both partners, 66
 - on promises to surviving partner to pay debt due to both before the death, 67
 - promise after death, and breach stated, *ib.*
 - on promises for work, &c. by the plaintiff alone, *ib.*
 - on bills or notes (*see Bills of Exchange. Promissory Notes.*)
- declaration against, where deceased died between writ and declaration, 18
 - against a surviving partner, 19
 - the like for work done, &c. 67
 - conclusion where declaration contains a count on a bill or note, 68
 - on promises by defendant after the death of his partner, *ib.*

In debt,

- by a surviving partner, 284
- against a surviving partner, 285

TAIL, SEISIN IN FEE (*see Title pleaded.*)

- pleaded, 405
- recovery as to, pleaded, 419

TAXES,

- debt against assignee for rent, and account of land-tax redeemed by lessor, 312
- debt on land-tax redemption act, *ib.*

TENANCY (*see Title pleaded.*)

- by lease pleaded, 391

TENANCY IN COMMON,

- pleaded, 412

TENANTABLE REPAIR,

- duty of tenant to keep premises in, implied, 228, note.

TENANTS IN COMMON,

- estate in, pleaded, 412
- demise by, in ejectment, stated, 675

TENDER,

when need not be averred in action for not delivering goods, &c. 198, 199, in note.

TENURE IN FREE BURGAGE,

pleaded, 404

TERM (see *Declaration. Title of Term.*)**TERM FOR YEARS** (see *Title pleaded.*)

pleaded, in possession, 406

in futuro, 411

THEFT (see *Felony.*)**TIMBER** (see *Trees.*)**TIME** (see *Title of Declaration.*)

statement of, in declaration, 13, note (h).

how to be stated in trespass, and as to "on divers days, &c." 648, note (c), and 649, note (k).

TITHES,

assumpsit for use of premises and predial tithes, 41

for use of lands with right to take tithes, *ib.*

composition, 48

small tithes, *ib.*

debt for treble value of, 347, 349

case for not removing of, 593

obstructing way to carry off, 621

ejectment for, 669

TITLE OF DECLARATION, 13, note (h).**TITLE,**

declaration for not making one, against vendor, 209, 211

general count for not making a good title to premises for residue of term in a reasonable time, 211

against a publican for not having title to assign, 212

covenant against vendor for breach of good title, whereby plaintiff ejected, 388

construction of covenants for, 389, note.

case for slander of, 481, 482

TITLE PLEADED,*Nature of Tenure.*

tenure of free burgage, 403

Estate and Quantity of Interest.

inducement that lessor was seised in fee simple, 404, 413

seisin in fee, &c. in husband and wife in right of wife, *ib.*

seisin in the king or a corporation, 405

seisin in tail, *ib.*

seisin for life, *ib.*

the like by a rector, in right of his rectory, 406

tenancy by curtesy or by dower, *ib.*

by assignee of lessor being a termor, against lessee, *ib.*

by executor of lessor being a termor against lessee, for a breach of covenant after testator's death, 407

against executor of lessee for a breach of covenant after his death, 408

by executor of lessor in another case, *ib.*

inducement that premises were copyhold, and lessor seised thereof, 409

the like in a more concise form, *ib.*

customary freehold, 410

TITLE PLEADED—*(continued.)**Estate and Time of Enjoyment.*

- tenancy for years, 392
- seisin in fee in reversion, 410
- interest in a term to commence *in futuro*, *ib.*
- remainder in fee in a copyhold, *ib.*

Estate and Number of Owners.

- estate in severalty, 411
- estate in joint tenancy, and death of one and sole seisin of survivor, *ib.*
- estate in coparcenary, 412
- tenancy in common, *ib.*

Mode of acquiring the Title.

- by descent in fee, 413
- by succession of a rector on death, *ib.*
- by marriage, 414
- by feoffment, *ib.*
- by lease, *ib.*
- by assignment of a term to the plaintiff, 415
- by surrender of a leasehold interest, *ib.*
- by covenant to stand seised to uses, *ib.*
- by bargain and sale enrolled, 416
- by lease and release, 417
- by release under 4 Vict. c. 21 . . 418
- by private act of parliament, *ib.*
- by lease, &c. from the king, *ib.*
- by fine levied by husband and wife, of inheritance of wife, *ib.*
- the like with proclamations, 419
- deed to lead the uses of recovery, and recovery accordingly, *ib.*
- the like more fully pleaded, 420
- surrender to the use of will, and death and presentment thereof, and admission of devisee, 423
- devise of copyhold premises since 1 Vict. c. 26 . . 424
- surrender to the use of a purchaser, 424
- presentment of surrender at a subsequent Court to surrender, 425
- enfranchisement of copyhold by lease and release, *ib.*
- title by devise, in fee simple, before 1 Jan. 1838 . . 426
- title to a chattel real by will, before 1 Jan. 1838 . . *ib.*
- title by devise since 1 Jan. 1838 . . 427

TOLLS,

- assumpsit*
 - for standings in a market, 41
 - for passing over a bridge, 43
 - for goods brought to a market and weighed, *ib.*
 - for live cattle sold in a market, *ib.*
 - for passing with carriages through a turnpike gate, 44
 - for petty customs, *ib.*
 - for tonnage of goods, 51

TONNAGE,

- assumpsit* for, 51

TOOLS OF TRADE,

- case for distraining of, 535

TORTS (see *Case. Trespass, and the particular heads.*)**TRADE,**

- case by baron and feme for words spoken of the latter in the way of her trade, 474

TRADE—(*continued.*)

- for slandering plaintiff in, by calling him a rogue, 474
- for charging him as being insolvent, 476
- for distraining tools of, 535

TRANSFERRING STOCK,

- case for not transferring, 202, note.

TREASURER,

- commencement of declarations by or against, empowered to sue or be sued by statute, 26 to 28
- assumpsit at suit of, of bridge company, for calls, 45
- the like at suit of, of canal company, *ib.*
- the like in debt, 293, 294
- debt on bond at suit of, of friendly society, established before 10 Geo. 4, c. 56 . . 334
- the like where society established after 10 Geo. 4, c. 56 . . 335

TREBLE DAMAGES,

- debt for, on extortion, 355

TREBLE VALUE,

- debt for, on 4 Geo. 2, c. 28 . . 342
- on 2 & 3 Edw. 6, c. 13, s. 1 . . 347, 349

TREES (*see Landlord and Tenant. Waste.*)

- case for cutting of, &c. 588, 596
- trespass for cutting of, 662

TRESPASS (*see the Analytical Table.*)

- notice of action in, against magistrates for false imprisonment, 1 to 4 and notes.

DECLARATIONS IN,

- general form of, in the Queen's Bench, Common Pleas, or Exchequer, 13 to 26, 648
- mode of framing of, in general, *ib.*

To Persons,

- for an assault, spitting in face, beating, &c. with damage, 649
- second count, for a common assault, 650
- for firing a loaded pistol at plaintiff, and wounding him thereby, *ib.*
- the like for a battery, &c. on board a ship, &c. 651
- for forcibly excluding plaintiff from vestry-room, *ib.*
- for preventing plaintiff entering Quakers' meeting-house, *ib.*
- husband and wife against husband and wife, for a battery, *ib.*
- by husband alone, for the battery of his wife, *per quod*, &c. 652
- for criminal conversation, *ib.*
- for debauching a daughter and servant, in trespass, 653
- by a master, for the battery of his servant *per quod*, &c. *ib.*
- for false imprisonment, and compelling plaintiff to go to a police-office, *ib.*
- common count, for false imprisonment generally, 654

To Personal Property.

- for chasing sheep, &c. with special damage, 654
- second count, for chasing sheep or other cattle, *ib.*
- for seizing cattle, or other property, as a distress, 655
- common count *de bonis asportatis*, *ib.*
- for shooting a dog, &c. *ib.*
- for running defendant's cart against plaintiff's horse, and killing it, 656
- for running a carriage against plaintiff's, with special damage, &c. *ib.*
- for seizing plaintiff's cart and horse, &c. *ib.*
- for seizing and detaining plaintiff's barge, 657

TRESPASS—*Declarations in, to Personal Property—(continued.)*

by master, for impressing mate of ship, whereby ship prevented sailing, 657

for seizing plaintiff's boat, and putting it adrift, *ib.*

for navigating a vessel against plaintiff's vessel, 658

To Real Property.

for trespass in a dwelling-house, breaking doors, and seizing goods, 658
count for a common expulsion, 659

on stat. 8 Hen. 6, c. 9, for a forcible entry and detainer, *ib.*

second count, on possession generally, 660

for building on plaintiff's wall, and thereby obstructing light, *ib.*

name or abutments, or other description, necessity for statement of, 660,
note (m), 662, note (n).

breaking close, gates and locks, with carts, &c. and special damage, 660

the like, setting out the name of the close, or its abutments, 662

for cutting down and carrying away trees, *ib.*

for laying wood in close, 663

for digging in coal-mine, *ib.*

for digging mines, raising ore, and taking and converting it to his own use, *ib.*

by an executor for an injury done to the real estate of his testator, *ib.*

for mesne profits, after recovery in ejectment, 664

for breaking close and killing game, at common law, 665

for carrying away game, *ib.*

for entering with hounds, and killing deer, *ib.*

for fishing, 666

for fishing in plaintiff's several fishery, *ib.*

in plaintiff's free fishery, *ib.*

for catching fish generally, 667

TROVER,

for cattle, deeds, bonds, bills, notes, bank-notes, money, or goods, 639

by assignees of a bankrupt, on bankrupt's possession, and a conversion after the bankruptcy, 641

second count on assignees' possession, *ib.*

by assignees of insolvent debtor, on a possession and conversion before insolvent's petition, 642

second count on insolvent's possession, with a conversion after plaintiff was assignee, *ib.*

third count on the actual possession, and a conversion afterwards, *ib.*

by an executor, for conversion in the life-time of testator, 643

second count, for conversion after his death, *ib.*

third count, for trover and conversion after testator's death, *ib.*

by an administrator on intestate's possession, 644

second count, on trover before the death, and conversion after, *ib.*

third count, on a trover after death, and before administration, 645

fourth count, on possession of administrator, *ib.*

against an administrator or executor for a conversion by intestate or testator within six months of his death, *ib.*

TRUSTEES (see *Treasurer.*)

commencement, &c. of declaration by or against clerk, &c. of, under statute, 26 to 28

assumpsit by trustees of friendly society, on note, 93

debt by trustee against husband, on deed of separate maintenance, 375

TURBARY (see *Common.*)**TURNIPS,**

assumpsit for crop of, 47

UMPIRAGE (see *Award.*)
assumpsit upon, 65

UNDERTAKER,
assumpsit by, for funeral bill, 63

UNSOUNDNESS,
in a warranty, what, 204, 205, in notes

USANCE,
assumpsit on bill payable at, 127
averment of duration of, 128

USE AND OCCUPATION (see *Landlord and Tenant. Rent.*)
assumpsit for,
 of a house or land, 38
 of a fishery, 39
 of a way, *ib.*
 of a pew, 40
 of a seat to view a procession, *ib.*
 of a tennis court, &c. *ib.*
 of an inn and profits, *ib.*
 for double rent, *ib.*
 of pasture land and eatage of the grass, 41
 premises and tithes, *ib.*
 for agistment of cattle, 49
 of unfurnished lodgings, *ib.*
 of furnished lodgings, 42
 for board and lodging, *ib.*
 lodging and necessities, 46
 warehouse-room of goods, 42
 the standing of a carriage, *ib.*
 the moorage of ships, *ib.*
debt for, 310
covenant for rent, 391
trespass for, after recovery in ejectment, 664

USES, STATUTE OF,
how described in pleading, 419

USURY,
debt on 12 Anne for, stating forbearance to have been on a loan, 359
common count stating the forbearance to have been of a debt, 361
the like where sum forborne was paid at different times, 361

VACANT POSSESSION,
declaration in ejectment on, 678

VALUATION (see *Appraisement.*)

VARIANCES (see *Index. Vol. I.*)

VAUXHALL BRIDGE COMPANY,
assumpsit by, for calls, 45
debt by, for calls, 294

VENDOR AND PURCHASER (see *Sale.*)
suggestions to frame declarations by and against, 208, 209, and notes

VENUE,
statement of, 9, note (a), 14, note (i)

VESSEL (*see Ship.*)

- .assumpsit for use of, 49
- case for negligence in navigating of, 530
- information by attorney-general for running foul of Queen's ship, 531
- trespass for navigating against plaintiff's vessel, 658
- for impressing mate, whereby ship prevented sailing, 657

VESTRY,

- trespass for excluding parishioner from, 651

VI ET ARMIS,

- omission of, when aided, 648, note (d)

WAGER (*see Feigned Issue.*)

- how far a judge may refuse to try, 167, note (b)
- what wagers legal or not, *ib.*
- action to recover deposit money, 168, note
- requisites of declaration, *ib.*
- pleas, *ib.*
- assumpsit for, on a horse-race, 167, 169
- on wager as to weight of hogs, 170
- for money won at cribbage, *ib.*

WAGES, &c. (*see Work and Labour.*)

- dismissal for misconduct, wages not recoverable, 241, note

WALLS (*see Party Wall.*)

- trespass for building on and obstructing light, 660

WAREHOUSE-ROOM (*see Use and Occupation.*)

- assumpsit for, of goods, 42
- for standing of carriages, *ib.*
- for lighterage, wharfage, and warehouse-room, 51

WARRANT,

- case for maliciously procuring search warrant and searching plaintiff's house, &c. 446

WARRANT OF ATTORNEY,

- case for maliciously suing out execution upon a judgment entered up by a, 546

WARRANTIES (*see Deceit.*)

- assumpsit on a general warranty of a horse, &c. 204
- on an exchange of horses, &c. 206
- for not furnishing good hams, &c. 207
- of right to sell, 211
- of warranty of bank note, 208
- case on, of a horse, 511, 512
- of a ship's cable, 513

WASTE (*see Landlord and Tenant.*)

- assumpsit against tenant for not using premises in husband-like manner, &c. 226
- for leaving premises out of repair, 228
- case by reversioner against tenant for voluntary waste, 595
- the like in another form, by a reversioner against tenant who had quitted premises, for having cut down timber and committed waste, 596
- second count, for not cutting down timber, and as defendant ought to have done, *ib.*
- against tenant for cutting trees, and bad husbandry, 597
- against administratrix of rector, for waste, *ib.*
- covenant for not repairing, &c. 393, 397, 401

WORKS AND WORKMAN (see *Work and Labour*.)

- assumpsit against, for not performing a building contract, 243
- for performing work inartificially, 244
- for not employing a servant, &c. 239
- for preventing plaintiff completing a work, 241

WRECK,

- statement of loss by, 140

WRIT (see *Original Writs*.)

- declaration, how affected by form of, 12

WRIT OF INQUIRY,

- case for verbal charge of perjury, on execution of writ of, 468

WRITS, PLEADED,

- capias ad satisfaciendum*, 558
- delivery of, to sheriff, 322, 559
- of *capias*, 321
- of a *fiery facias*, 563

WRITING OBLIGATORY (see *Bonds*.)**WRONG DATE,**

- assumpsit on bill with, 100
- on a note, 83

WRONG NAME,

- commencement of declaration where defendant sued by, 17
- where plaintiff has sued by, *ib.*

END OF THE SECOND VOLUME.

LONDON:

C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

